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ABSTRACT

A STUDY OF THE IMPLICATIONS OF THE NONRETENTION OF TENURED AND NONTENURED FACULTY FOR PUBLIC FOUR- YEAR INSTITUTIONS OF HIGHER EDUCATION IN THE UNITED STATES

By

Bethany Jeanne Fisher

The Problem

Statement of the Problem

The three-fold purpose of this study was to (1) ascertain the evolving procedural and substantive due process requirements concerning the nonretention of faculty in public four-year institutions of higher education in the United States; (2) determine the extent of the differences in such requirements as they relate to proceedings involving tenured and nontenured faculty; and (3) make recommendations to administrators in public four-year institutions of higher education regarding due process requirements and procedures. Particular emphasis was given to the emerging due process procedures from 1972 to 1974 as found in federal case law.

Methodology

The historical-legal method of research was employed in this study. Cases of record in the federal

court system, scholarly journal articles, and significant decisions of and policy statements by the AAUP were scrutinized for the purpose of determining substantive and procedural due process procedures required by case law. The related constitutional issues of freedom of speech and expression, freedom of political activity and association were also studied. Procedural due process requirements were also analyzed at institutions dismissing faculty due to financial exigency.

Summary of Findings

Some of the major findings were:

1. A public institution of higher education, consistent with the First Amendment, may fail to renew the contract of a nontenured faculty member because of pedagogical differences.
2. The constitutionally protected right of a teacher to criticize the administration of an institution is a limited right, which must be balanced against the need for orderly administration.
3. A tenured faculty member has a property interest in continued employment, and, therefore, can only be dismissed after having been accorded full due process of law.
4. The absence of a written contract with explicit tenure provisions does not foreclose the

possibility that a nontenured faculty member has a property interest in re-employment.

5. Longevity alone is not sufficient to create a property interest demanding satisfaction by constitutional due process.

6. A substantial institutional claim of financial exigency supersedes the claims of tenured and nontenured faculty of expectancy of re-employment.

Conclusions

Some of the major conclusions of the study were:

1. Academic due process continues to be defined.
2. Academic due process is not strictly a body of law.

3. There is little difference between the rights of tenured and nontenured faculty when constitutional issues of personal freedoms are involved.

4. The courts have supported administrators who have said that the clearest reason for dismissing faculty is professional incompetence.

5. There is a trend of extending the procedural rights of dismissed nontenured faculty.

6. Failure to incorporate either a tenure policy or an employment policy into a written plan may be detrimental to the academic freedom of faculty.

Recommendations

The major recommendations of the study were:

1. Institutional policies and procedures (and faculty handbooks) should be studied by a lawyer for the university and the administration appraised of the implications of such policy.
2. Collective bargaining agreements between governing bodies and faculty units should embody fair dismissal procedures.
3. If a faculty member is suspended pending an administrative hearing, that person's salary and fringe benefits during the period of suspension should continue.
4. Every attempt should be made to inform faculty before they are hired, and again during their employment, of all procedures and policy relating to hiring, promotion, nonrenewal and dismissal.
5. Substantive causes for dismissal should be well defined in writing.
6. Evaluations should be made of probationary faculty and tenured faculty on a regular basis. During the probationary period, if promotion requires the accomplishment of certain factors, these should be clearly defined in writing.
7. There appears to be no clear consensus within the academic profession as to what should constitute

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adequate cause for dismissal. Academe should strive to define this principle instead of allowing, by default, the courts to sketch a definition by means of a case-by-case evolution.

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YEAR INSTITUTIONS OF HIGHER EDUCATION IN
THE UNITED STATES

By

Bethany Jeanne Fisher

A DISSERTATION

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DEDICATION

In memory of my maternal grandmother, Lenora (Mimi) Dulmage, for her spirit and courage, and of my paternal grandfather, Heber J. Fisher, who had a keen respect and appreciation of law . . . and a twinkle in his eye . . .

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Finally I would like to thank my parents for life and for loving encouragement and support.

VITA

Ms. Bethany Jeanne Fisher was born in Detroit, Michigan on June 27, 1945. She received her baccalaureate degree from Michigan State University in 1967, with a major in English literature and a minor in economics.

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<u>Toney v. Reagan</u> 326 F.Supp. 1093 (1971), 407 F.2d 933 (1972); Rehearing denied October 5, 1972, cert. den. Jan. 15, 1973, 93 S.Ct. 951 (1973) .	.107, 114, 140, 156
<u>Torcaso v. Watkins</u> 367 U.S. 488 (1961)	57, 65
<u>United Public Workers v. Mitchell</u> 330 U.S. 75 (1947).	74, 78
<u>Viemeister v. Prospect Park Board of Education</u> 5 N.J.Super. 215 (App. Div. 1949)	127
<u>Wahba v. New York University</u> 492 F.2d 96 (1974)	189
<u>Walker v. California State Board of Trustees</u> 351 F.Supp. 997 (W.D.Pa. 1972)	112, 157, 192
<u>Walker v. Wildwood Board of Education</u> 120 N.J. 408 (Sup.Ct. 1938)	127
<u>Wall v. Stanley County Board of Edu- cation</u> 378 F.2d 275 (4th Cir. 1967). .	127
<u>Ward v. Kansas State Agricultural Col- lege Board of Regents</u> 138 F.372, 70 CCA 512 (1905).	165
<u>Watts v. Board of Curators, University of Missouri</u> 363 F.Supp. 883 (1973) .	.107, 158, 184, 190 215
<u>Whitehill v. Elkins</u> 287 F.Supp. 61 (1968) on rem'd from S.Ct. 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967)	63, 66, 70
<u>Whitney v. Board of Regents of Uni- versity of Wisconsin</u> 355 F.Supp. 321 (1973)	153, 191
<u>Wieman v. Updegraff</u> 344 U.S. 183 (1952)	55, 57, 59, 60 65, 70, 83, 90 96, 148

Cases	Pages
<u>Wisconsin v. Constantineau</u> 400 U.S. 433, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971) . .	148, 211
<u>Worzella v. Board of Regents of Education</u> 77 S.D. 447, 93 N.W.2d 411 (1958) . .	167
<u>Zimmerer v. Spencer</u> 485 F.2d 176 (5th Cir. 1973)	113, 158, 190
<u>Zumwalt v. Trustees of the California State Colleges</u> 107 Cal. Rptr. 573 (1973)	177, 184, 190 215

CHAPTER I

THE PROBLEM

Introduction

Law is an independent instrument of social control which impacts virtually all aspects of life. That body of law concerning higher education represents one small segment of American Jurisprudence. "Education law constitutes the legal structure within which teachers, administrators, and other education personnel discharge their responsibilities."¹ Educational administrators need an appreciation of the impact that law has on higher education. Such an appreciation can develop through a sufficient understanding of the legal principles underlying education law.

Committee A of the American Association of University Professors in its annual report to the Association for 1963-1964 suggested that "one of the weaknesses of the whole concept of academic freedom and tenure arises from the fact that it has not yet been integrated into the

¹George M. Johnson, Education Law (East Lansing, Mich.: Michigan State University Press, 1969), p. xix.

mainstream of American law."² Since that time there has been an increasing volume of litigation concerning faculty freedoms of speech and association and faculty dismissals.

As the body of education law increases, judges are gaining a deeper understanding of the basic concepts of academic freedom and tenure. Likewise these concepts which are so basic to American higher education are being impacted by judicial decisions. The increasing volume and cost of litigation necessitates that educational administrators understand the evolving concepts of due process.

Statement of Purposes

The purpose of this investigation is threefold:

- (1) to ascertain the evolving procedural and substantive due process requirements concerning the non-retention of faculty in public four-year institutions of higher education in the United States;
- (2) to determine the extent of the differences in such requirements as they relate to proceedings involving tenured and nontenured faculty; and
- (3) to make recommendations to administrators in public four-year institutions of higher education regarding due process requirements and procedures.

²"Report of Committee A, 1963-1964," AAUP Bulletin 50 (June 1964): 125.

Particular emphasis will be given to the emerging due process concepts from 1972 to 1974.

Both the Fifth and the Fourteenth Amendments guarantee that no person can be deprived of life, liberty or property without due process of law. Procedural due process can be traced to the Magna Carta where the king promised that "no free man (nullus liber homo) shall be taken or imprisoned or deprived of his freehold liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land (per legem terrae)."³ Until 1923 the courts in the United States viewed due process as having only a procedural component which guaranteed an individual certain rights in the jury process. In Adkins v. Children's Hospital,⁴ the Supreme Court first applied the "substantive" content of the law. Both procedural and substantive due process are evolving concepts which require the study of related judicial precedents.

Significance of the Study

The stabilization of student enrollments, the increasing availability of large numbers of qualified

³Kern Alexander and Erwin S. Solomon, College and University Law (Charlottesville, Virginia: The Michie Company, 1972), p. 430.

⁴261 U.S. 525 (1923); Also Ibid., p. 431.

young faculty members, the declining growth in the economic resources for higher education and the increasing amount of litigation concerning faculty dismissals point to the need to study and understand the evolving due process requirements as they relate to such procedures. In order to help protect themselves against costly litigation, institutions must understand and comply with Constitutionally protected due process requirements.

Stephen P. Dresch, director of research in the economics of higher education at Yale University, has developed a mathematical model to estimate future college enrollments. According to the model, between 1980 and 1990 undergraduate enrollment in colleges and universities will shrink by 46 percent. This model "takes into account changes in demand for college-educated people in the labor force as well as changes in the supply of young people in the population and in the proportion of young people going to college."⁵ An increasing proportion of college-age persons are declining to enter academic institutions. "Although female enrollments as a percentage of the college-age population have remained essentially steady (citation omitted) approximately 37.6 percent of the nation's 18 to 19 year old men were enrolled in colleges

⁵The Chronicle of Higher Education, 10 February 1975, p. 7.

and universities in the fall of 1972, compared with 44 percent in the fall of 1969."⁶

Leslie and Miller report that the slowed or no-growth trend in higher education is reflected in institutional income patterns. Annually, M. M. Chambers has studied and reported the income trends for public institutions of higher education.

In 1971-72, state appropriations to higher education for operating expenses reached the lowest year-to-year increase (7 to 10 percent) since 1962. State appropriations to 98 state universities for 1972-73 decreased in 11 instances, while 46 institutions received increases of less than 10 percent, the amount calculated by the Office of Institutional Research and Information. . . .⁷

Inflationary pressures remain high, thus causing a decrease in real dollars flowing to institutions of higher education. "State appropriations for higher education have increased 29 percent in the past two years, but an estimated two-thirds of that increase already has been gobbled up by inflation."⁸

Institutional income corrected for inflation and the facts re institutional enrollments point to the

⁶Larry L. Leslie and Howard F. Miller, Jr., Higher Education and the Steady State (ERIC/Higher Education Research Report No. 4, Washington, D.C.: AAHE, 1974), p. 6.

⁷Ibid., pp. 11-12.

⁸The Chronicle of Higher Education, 21 October 1974, p. 1.

steady-state of higher education. Enrollments have leveled off producing a no-growth situation, institutional endowments and investments have been greatly affected by the recent sharp declines in the market values of stocks, and the greatest portion of an educational budget is fixed in labor costs.

Declining enrollments, soaring inflation and budgetary cuts have forced many colleges and universities to dismiss large numbers of faculty members, both tenured and nontenured. Southern Illinois University was the focus of national attention when it dismissed 104 faculty and staff members, 28 of whom were tenured. "Southern Illinois has suffered a 20-per-cent enrollment decline in the last two years and had its basic budget cut by the state board of education."⁹

In May of 1973 the University of Wisconsin sent lay-off notices to 88 tenured faculty members on nine of its campuses and even a greater number of nontenured faculty members did not have their appointments renewed.¹⁰ Indiana State University and the University of California at Riverside are among the many institutions that have announced termination of faculty members due to budget reductions.¹¹

⁹The Chronicle of Higher Education, 28 January 1974, p. 3.

¹⁰Ibid., p. 1.

¹¹Ibid., p. 3.

Higher education today resembles a classical conflict of any tight employment situation. Faced with declining production and declining budgets the employer is forced to reduce the number of employees. And the employees, with little prospect for employment elsewhere, become increasingly ready to fight to hold onto a job. "Generally speaking, where there is societal conflict there are lawsuits, and the numbers of cases involving the non-renewal of nontenured teachers has risen dramatically in recent years."¹² The increasing costs of litigation add yet another burden to the already shrinking educational budget.

The tenure system is designed to meet the threat of authoritarian censorship, to protect a faculty member's right to free inquiry and free interchange of ideas by providing protection, job security, to faculty in pursuit of academic freedom. But the tenure system is under attack from many quarters. Indeed, many are asking the question of whether or not it should be saved. An obituary for the principle of tenure in American higher education was given in the April 16, 1971 Wall Street Journal. "Tenure is suddenly under attack from many quarters. . . . It is increasingly doubtful that tenure

¹² Laurence H. Kallen, "The Roth Decision: Does the Nontenured Teacher Have a Constitutional Right to a Hearing Before Nonrenewal?" Illinois Bar Journal (May 1973): 464.

can survive much longer in its present form. . . . The practice is already on the wane."¹³

There are a number of pressing issues related to the tenure system. Tenure has been equated as the mainstay of academic freedom. However, many critics of the tenure system claim this to be a false and misleading equation. Critics point to the fact that the tenure system fails to protect the nontenured faculty member. "Since less than half of the faculty members in the nation have tenure, less than half of them enjoy the guarantees of due process which should protect their academic freedom both from outsiders and from tenured faculty members in their own departments."¹⁴

The rise of collective bargaining in American higher education has produced some interesting side effects for the tenure system. The idea of contracts negotiated by collective bargaining agents seems contrary to the indefinite appointment concept which constitutes tenure. But inconsistency is not the case. "Virtually all major contracts negotiated in higher education in the last few years have contained an affirmation of the tenure system as a non-negotiable point."¹⁵ Critics

¹³Wall Street Journal, 16 April 1971, p. 1.

¹⁴The Chronicle of Higher Education, 4 June 1973, p. 16.

¹⁵Ibid.

claim that the union between collective bargaining and tenure will create an even greater burden to the financially distraught institutions of higher education.

Many academic departments find themselves in a position of being "tenured-in." In some departments the percentage of tenured faculty members is over 70 percent of the total faculty. This produces a situation where capable young faculty members will not be reappointed because of the "numbers game." "The insecurity created by all of this will cause more and more faculties to unionize, and thus ultimately will bring increasing pressure for the maintenance of the tenure system."¹⁶

In a study conducted for the American Council on Education, Elaine H. El-Khawas and W. Todd Furniss report that:

There has been no overall change between 1972 and 1974 in the general prevalence of tenure systems. Tenure systems are nearly universal among universities and four-year colleges and are found in about two-thirds of the two-year institutions.¹⁷

The report goes on to state that at 59 percent of the institutions with tenure systems more than half of their full-time faculty held tenure (as compared with 43 percent in 1972). This tends to support the claim that

¹⁶Ibid.

¹⁷Elaine H. El-Kawas and W. Todd Furniss, Faculty Tenure and Contract Systems: 1972 and 1974 (Washington, D.C.: American Council on Education, 1974), p. 1.

institutions are becoming "tenured-in" thus creating a financial burden to the institutions. Also, such a system does not follow for the hiring or retaining of new young faculty.

As the economic situation necessitates the dismissal of more and more faculty members, administrators must become knowledgeable of the evolving due process requirements concerning the nonretention of tenured and nontenured faculty in public institutions of higher education in the United States.

Limitations and Assumptions

For the purposes of this investigation, the following limitations will be made:

1. Only judicial decisions concerning the non-retention of tenured and nontenured faculty in public four-year institutions of higher education will be considered.
2. This study will be limited to public institutions of higher education in the United States. Following the distinction made by both the American Jurisprudence¹⁸ and the Corpus Juris Secundum,¹⁹

¹⁸American Jurisprudence, vol. 15, 2d ed. (Rochester, N.Y.: The Lawyers Co-Operative Publishing Co., 1964): 588.

¹⁹Corpus Juris Secundum, vol. 14 (Brooklyn: The American Law Book Co., 1958): 1327.

higher education will not include community and junior colleges.

3. The selection of cases is the choice of the author who recognizes the subjectivity involved and the possibility of missing a key case or of incorrectly assessing the importance of a certain case.
4. Particular emphasis will be given to the cases adjudged from 1972 to 1974.
5. Although some of the cases which will be studied involve a faculty member, or members, who are part of a collective bargaining unit, this investigation will not explore collective bargaining per se. Some of the issues or questions raised by this study may provide the basis for future research into collective bargaining but that topic is not within the scope of the proposed research.
6. This study is primarily limited to a consideration of federal-constitutional law.

Two assumptions are required for this investigation:

1. The judicial decisions of the courts are considered primary sources of data for the historical-legal method of research.

2. The method of legal research and reasoning used to test the hypothesis is standard legal procedure and is assumed to be applicable to educational research.

Hypothesis

Applying the constitutional doctrine of due process on a case-by-case basis, the courts apply a less severe standard of both procedural and substantive due process requirements to cases involving the nonretention of nontenured faculty than they do for tenured faculty.

Definition of Terms

Academic Due Process.--"Due Process" in termination proceedings should provide safeguards generally similar to those afforded by due process in legal proceedings: right to assistance by counsel or other advisor, confrontation of adverse evidence and witnesses, appropriate opportunity to cross-examine, to present evidence, and to submit argument, the making of a record, and decision by an unprejudiced tribunal.²⁰

²⁰Louis Joughin, Academic Freedom and Tenure (Madison: The University of Wisconsin Press, 1967), p. 6.

Bona Fide.--In or with good faith; honestly, openly, and sincerely; without deceit or fraud.²¹

Burden of Proof.--The necessity or duty of affirmatively providing a fact or facts in dispute on an issue raised between the parties in a cause.²²

Discharge.--The removal of a person, either temporarily or permanently, from employment.

Dismissal.--The termination of employment during the contractual period of a nontenured teacher for cause and the termination of employment of a tenured teacher for cause.

Nonrenewal of Contract.--Refers to the failure of the administration to renew the contract of a teacher upon completion of the present contract.

Nontenured Teacher.--A teacher who is still in the probationary period of employment, one to whom tenure has not been granted.

Professor.--A professor has been defined as a public teacher of any science or branch of learning especially in a university, college or other seminary.

²¹Henry Campbell Black, Black's Law Dictionary (St. Paul, Minn.: West Publishing Co., 1968), p. 223.

²²Ibid., p. 246.

Under some statutes or charters a professor in a college or university is deemed an officer thereof, removable only for cause shown and specified in the charter, although ordinarily a professor is not an officer, but occupies merely a contractual position as an employee. The term "professor" applies to higher education and refers to both the teaching and research function.²³

Property Rights.--No state may deprive any person of their interest in life, liberty or property without due process of law.²⁴ The Fourteenth Amendment's protection of "property" has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been interpreted to extend protection to "any significant property interest," . . . including statutory entitlements.²⁵

Public College or University.--Incorporated colleges or universities which are founded and supported by the state or a municipal subdivision thereof are public rather than private corporations, and are so treated by

²³Corpus Juris Secundum, Vol. 14, p. 1356.

²⁴U.S. Constitution, Amendment XIV, par. 1.

²⁵Fuentis v. Shevin 407 U.S. 67, 86 (1972).

the courts.²⁶ The charter of a public corporation may be changed with the consent of its members or of the trustees composing such body. Another result is that if the corporation is a public one it is not subject to taxation.²⁷

Shepardize.--The using of Shepard's Citation to: (1) trace the judicial history of each case appearing in an official or West reporter, including parallel citations to that case in the other reporter and citations to all later proceedings in that same case; (2) verify the current status of each case; and (3) find later cases which have cited the main case.

Substantive Due Process.--The term "due process of law," when applied to substantive rights, as distinguished from Procedural Rights, means that the state is without power to deprive a person of life, liberty or property by an act having no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of case as to be an arbitrary exercise of governmental power.²⁸

²⁶American Jurisprudence, Vol. 15, 2d ed., p. 589.

²⁷American Jurisprudence, Vol. 55 (1946), p. 4.

²⁸Valley National Bank of Phoenix v. Glover, 62 Ariz. 538, 159 P.2d 292 (1945) as cited in Alexander and Solomon, p. 431.

Tenure.--Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.²⁹

Writ of Certiorari.--Certiorari is an appellate proceeding for re-examination of action of inferior tribunal or as auxillary process to enable appellate court to obtain further information in pending cause. . . . It brings into superior court the record of the administrative or inferior judicial tribunal for inspection.³⁰

Related Literature

An examination of the standard sources reveals no doctoral dissertations related specifically to the proposed study. The sources examined were: A List of American Doctoral Dissertations, Doctoral Dissertations

²⁹"Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments," AAUP Policy Documents and Reports, 1973 ed. (Washington, D.C.: The American Association of University Professors, February, 1973), p. 2.

³⁰Black's Law Dictionary, p. 287.

Accepted by American Universities, Microfilm Abstracts of Doctoral Dissertations, Dissertation Abstracts, Dissertation Abstracts International and Comprehensive Dissertation Index 1861-1972.

Two doctoral theses appear to be related to this investigation:

Sullivan, Maurice Michel. "Academic Freedom in Historical-Legal Context." Miami University, 1971.

Wilkie, William R. "Faculty Academic Freedom: A Legal Analysis." Michigan State University, 1969.

The Sullivan study had a three-fold purpose to: "(1) analyze the historical-legal development of academic freedom in the United States; (2) ascertain the contemporary legal status and definition of classroom academic freedom; and (3) make recommendations to public school administrators for the purpose of creating a broader understanding of education's legal role in the democratic society."³¹ One further purpose of the study was to clarify any differences that exist between public higher education and public secondary education as to the character and meaning of academic freedom.

³¹Maurice M. Sullivan, "Academic Freedom in Historical-Legal Context" (Ph.D. dissertation, Miami University, 1971), pp. 2-3.

The philosophic roots of academic freedom are traced from Plato's academy, through its European heritage, and down to its development in the United States and the writings of Thomas Jefferson, Russell Kirk, Robert Hutchins and Sidney Hook. The changes in academic freedom relate to the social and historical conditions of the times. "Philosophic conceptualizations have given vent to the expression of academic freedom which social and historical conditions have shaped the thrust of the search for truth."³²

Sullivan categorizes the development of academic freedom in the United States into five chronological groups encompassing the years 1650 to 1970. The social and political history is discussed as it relates to the development of academic freedom. The emerging concept of academic freedom has been shaped by philosophic writings, position papers of the American Association of University Professors, and significant dismissals of professional scholars which have resulted in judicial decisions.

Although the recommendations are divided between elementary and secondary education and higher education, Sullivan makes little attempt to distinguish between teachers and professors throughout the dissertation. This practice leads to a serious omission of the

³²Ibid., pp. 45-46.

discussion of tenure statutes. Many states have tenure statutes which pertain only to elementary and secondary teachers, not to college and university faculty. Tenure statutes govern such procedures as tenure promotion and dismissal.

Two of the most important cases relating to faculty dismissal were heard by the Supreme Court in 1972, after Sullivan had completed his work. Board of Regents of State Colleges v. Roth³³ and Perry v. Sindermann³⁴ concern the appeals of untenured faculty members who were dismissed--in the Roth case after one year of teaching, and in the Sindermann case after many years of teaching in a school that did not have a tenure system. The Roth decision virtually eliminates further claims by untenured faculty to procedural rights in the consideration of reappointment; this does not seem to be guaranteed as a constitutional right. In Roth the Supreme Court reversed the decision of the Seventh Circuit and in effect rejected decisions from the Fifth and the First Circuits which had held that untenured faculty should be

³³408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972)

³⁴408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972)

constitutionally guaranteed some measure of pretermination procedural due process.³⁵

This investigation studies the judicial decisions since the Roth and Sindermann cases in order to determine the emerging constitutional rights of due process of faculty members--tenured and nontenured.

Wilkie studies academic freedom in public institutions of higher education in order to test the hypothesis that "Academic freedom is a constitutional right protected by the First and Fourteenth Amendments to the United States Constitution."³⁶ The term "academic freedom" is very rarely found in legal documents; legal analysts find little if any relationship between academic freedom and the law. Wilkie claims that legal scholars have made one common error by using a holistic approach to the legal study of academic freedom. By breaking academic freedom into its essential elements--freedom of speech, freedom of association, freedom of inquiry, and freedom to teach--one is able to analyze the relationship between academic freedom and the law.

³⁵William Van Alstyne, "The Supreme Court Speaks to the Un-Tenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann," AAUP Bulletin 58 (September 1972): 268.

³⁶William R. Wilkie, "Faculty Academic Freedom: A Legal Analysis" (Ph.D. dissertation, Michigan State University, 1969), p. 5.

Perhaps the most startling of the implications of Wilkie's conclusions is that:

Faculty academic freedom as a constitutional right is the subsequent demise of the tenure system. Because tenure was designed as a non-legal technique for protecting academic freedom, might not tenure become an anachronism in institutions of higher education?³⁷

Certainly there has been a great deal of debate generated over the tenure concept in recent years. However, with the rise of collective bargaining and the fact that the majority of the bargaining contracts have reaffirmed the tenure system as a non-negotiable point, Wilkie's prediction of the demise of the tenure system seems premature at best.

Doctoral dissertations which appear to bear only tangentially on the subject of the proposed investigation include the following:

Fein, Sherman Edward. "A Proposal for the Arbitration of Academic Freedom and Tenure Disputes." University of Massachusetts, 1969.

Gault, Lon Andrew. "California College Professors and the State Loyalty Oath 1950-1968." Stanford University, 1970.

Gerber, Wayne Jay. "A Study of Academic Freedom and Tenure in Selected Small Colleges." University of Michigan, 1972.

³⁷Ibid., p. 101.

- Grice, William Arthur. "Legal Basis for Decision-Making Relative to Professional School Personnel." McNeese State University, 1974.
- Hogancamp, Richard Lyle. "The Historical Significance of the Michigan Tenure Decisions since 1964." Wayne State University, 1971.
- Kerr, Kenneth Miller. "An Analysis of the Cases Leading to Institutional Censure by the American Association of University Professors, 1940-1965." Indiana University, 1967.
- Larabee, Lottie. "Administrative Denial of Academic Freedom or Tenure to University Staffs Related to Background of Administrators." New York University, 1955.
- Rockafellow, Theodore Frost. "The Philosophy, Purpose and Function of Tenure Legislation." University of Northern Colorado, 1967.
- Scott, James Arthur. "Survey of Academic Promotion and Related Personnel Practices and Policies of Selected Institutions of Higher Education in the State of Arkansas with Particular Emphasis Upon the Period 1968-1972." University of Arkansas, 1974.
- Shaw, Biswanath. "Academic Tenure Policies and Procedures in State Universities and Land-Grant Colleges which are Members of the National

Association of State Universities and Land-Grant Colleges." The University of Mississippi, 1971.

Snyder, Sam Ralph. "Academic Freedom at the University of Michigan: The Nickerson Case." The University of Michigan, 1970.

Vollbrecht, Clarke Earnest, Jr. "Educator Attitudes toward Teacher Tenure and Their Relationship to Tenure Legislation." United States International University, 1972.

Walters, James Charles. "Academic Tenure in Indiana Higher Education." Indiana University, 1971.

Waterbury, Kenneth Buell. "Ruling Case Law Definitions of Certain Teacher Tenure Terms." The Pennsylvania State University, 1939.

An ERIC search of the literature revealed that a great deal has been written about academic freedom and the tenure concept. However, there has been little research analyzing cases since Roth and Sindermann. There is very little in the educational literature on the relationship of law to higher education, and even less re cases concerning faculty dismissals.

The Commission on Academic Tenure in Higher Education was established in 1971. It was jointly sponsored by the Association of American Colleges and the American

Association of University Professors and worked under a grant from the Ford Foundation. However, the Commission functioned as a separate, autonomous unit from the sponsoring or funding groups. The creation of the Commission was a response to recommendations to re-examine faculty tenure practices by the Special Committee on Campus Tensions of the American Council on Education and the Scranton Commission (The President's Commission on Campus Unrest). The Commission states that its task "was to consider the operation of the tenure system in higher education, to evaluate the criticisms of academic tenure made during recent years, to consider alternatives to tenure in effect or proposed for adoption, and to recommend needed modifications or improvements in the tenure system if it is to be retained."³⁸

The recommendations of the Commission strongly support viable tenure practices. The Commission justifies the recommendations by stating that enlightened and properly administered tenure systems have a positive contribution to make in strengthening academic freedom and in improving the quality of faculties and in strengthening other conditions which support excellence in academy. Deficiencies in the application and

³⁸William R. Keast (Chairman), Commission on Academic Tenure in Higher Education, Faculty Tenure: A Report and Recommendations (San Francisco: Jossey Bass Publishers, Inc., 1973), p. xi.

administration of tenure practices have created the debate over the viability of the tenure concept. The recommendations of the Commission on Academic Tenure in Higher Education are designed to correct these deficiencies and are consistent with the repeated recommendations of the AAUP in its policy statements and case reports.

Recommendation 30 urges that "the probationary faculty member who is not recommended for reappointment or for award of tenure should always be given an explanation of the action in an informal conference with the department chairman, and, if he [sic] requests it, should be given a statement of reasons in writing."³⁹ Committee A of the AAUP debated this issue for some time before finally concluding "that the reasons in support of the faculty member's being informed outweigh the countervailing risks."⁴⁰ Committee A recognized that the requirement of giving reasons may lead to notice of nonreappointment becoming confused with dismissal for cause. This confusion could make the decision-making body reluctant to reach adverse decisions which could culminate in grievance procedures. "As a result there is a risk that the

³⁹ Ibid., p. 68.

⁴⁰ "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," AAUP Bulletin 57 (June 1971): 208.

important distinction between tenure and probation will be eroded."⁴¹

Recommendation 31 upholds a faculty member's constitutional rights and exercise of academic freedom by providing that permissible reasons for nonreappointment or failure to award tenure "must represent the deliberate exercise of professional judgment in the particular institutional circumstances."⁴²

The Commission on Academic Tenure in Higher Education rejected the proposed alternatives to the tenure system in favor of retaining academic tenure. The Commission felt that the alternatives were likely to lead to greater self-interest on the part of faculty members recommending colleagues for reappointment and to increased administrative involvement in these decisions. Such a process would increase faculty anxiety while decreasing faculty morale.

The Commission recommended that institutions develop limits or quotas on positions eligible for tenure with no more than half to two-thirds of the faculty on tenure appointments. This would allow institutions to appoint and retain younger faculty members, support institutional vitality, allow for the

⁴¹Ibid.

⁴²Keast, p. 70.

development of new programs, increase the numbers of women and minorities on the faculties and aid in allocating the limited financial resources of institutions. This recommendation is probably one of the most controversial.

The Commission warns that frequent use of the courts as the determiners of personnel questions will erode institutional and faculty autonomy and jeopardize the ability of the faculty and the institution to govern themselves. The role that the courts can and must play is one of "setting standards of reasonable procedure to which institutions must adhere."⁴³

Part of the reason for the alarming increase in the amount of litigation about personnel decisions is due to deficiencies in institutional policy and its application. There is no broad consensus within the profession as to what should constitute cause for dismissal. For the purposes of faculty dismissal proceedings, the Commission believes that "adequate cause" should be restricted to: "(a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual's fulfillment of his [sic] institutional responsibilities."⁴⁴ In dismissal proceedings the burden of proof rests with the institution.

⁴³Ibid., p. 33.

⁴⁴Ibid., p. 75.

Unfortunately "manifest neglect of duty" and "personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities" can be subject to capricious and/or arbitrary interpretations.

Fearing that some faculties might be tempted to "bargain away" basic tenure or academic freedom considerations, The Commission recommended that academic freedom and tenure issues be excluded from collective bargaining agreements.⁴⁵

Walter Metzger has a highly lucid, very interesting chapter⁴⁶ in Faculty Tenure tracing the history of academic tenure from the Middle Ages to its present development in the United States. The chapter is divided into three sections corresponding to the chronological development of the concept: "Tenure as Privilege: The Era of the Master," "Tenure as Time: The Age of the Employee," and "Tenure as Judiciality: The Age of the Professional."

For the purposes of this investigation, Rosenblum's chapter on the review of the current legal status of tenure was most helpful. In the Roth, Sindermann, and Healy cases

⁴⁵ Author's note: To date this is unfounded; see footnote 11, p. 6.

⁴⁶ Walter P. Metzger, "Academic Tenure in America: A Historical Essay," in Faculty Tenure: A Report and Recommendations, Commission on Academic Tenure in Higher Education, pp. 93-159.

the courts have been more concerned with examining questions relating to the First Amendment and basic due-process than with strict tenure considerations. The Roth and Sindermann cases support the fact that litigation "vindicating First and Fourteenth Amendment rights through the judicial process remains costly, complex, and uncertain."⁴⁷

Bardwell L. Smith and associates in The Tenure Debate⁴⁸ have tried to act as a catalytic in discussing areas of tenure that are frequently neglected. The four sections of this work focus upon: institutional or personal tensions related to academic tenure practices; interplay between probationary and tenure practices, faculty responsibility, professional development, and improving teaching; faculty unionism, legislative and judicial actions and the relationship of internal and external institutional forces; an analysis of the 1969 survey sponsored by the Carnegie Foundation Commission on Higher Education re the distributions of tenure.

One of the most thought-provoking chapters is by John R. Silber, "Tenure in Context." "My phenomenological sketch, though far from complete, leads persuasively, in

⁴⁷Keast, p. 191.

⁴⁸Bardwell L. Smith and Associates, The Tenure Debate (San Francisco: Jossey-Bass, Inc., Publishers, 1973).

my opinion, to the conclusion that tenure is an expression of the human concern for continuity and stability in personal, social, professional, and business life."⁴⁹

Silber argues that the existing practices of the American Association of University Professors supports a practice of sinecure allowing one with seven years or more of teaching experience "an absolute claim on continued employment." "The AAUP now throws so many obstacles in the way of removal or reassignment of professors and imposes such severe penalties on most institutions that dare to recognize tenure in its true meaning that administrators have acquiesced in the transformation of tenure into sinecure and use the terms interchangeably."⁵⁰ Silber claims that academic freedom will be exercised with or without tenure, but fails to provide a concrete remedy for the cases where academic freedom is exercised and results in the dismissal of the faculty member.

⁴⁹ John R. Silber, "Tenure in Context," in The Tenure Debate, ed. Bardwell L. Smith and Associates (San Francisco: Jossey-Bass Inc., 1971), p. 39.

⁵⁰ Ibid., p. 46. Author's note: For a response to some of Silber's charges see: "Report of the University of Utah Commission to Study Tenure," AAUP Bulletin 57 (September 1971): 421-32; Fritz Machlup, "In Defense of Academic Tenure," AAUP Bulletin 50 (June 1964): 112-24; Louis Joughin, ed., Academic Freedom and Tenure, A Handbook of the American Association of University Professors (Madison, Wisconsin: The University of Wisconsin Press, 1967).

The vigorous defense of academic freedom for
tenured faculty

. . . has unfortunately left the nontenured faculty exposed. Infringement by tenured professors of the rights of the nontenured faculty to develop their intellectual interests according to their own professional judgment--that is, the censuring of the nontenured faculty from the standpoint of a doctrinal orthodoxy defined by the senior men within a department--represents by far the most serious and most frequent violation of academic freedom in our colleges and universities.⁵¹

The need for careful consideration and review of departmental tenure recommendations which Silber demands can be supported by tenured and nontenured faculty. For if tenured faculty can impose arbitrary criteria on junior colleagues such capricious action could be extended to senior faculty as well.

In his critique of the tenure system, Silber gives very little attention to AAUP-sponsored documents designed to mediate a satisfactory resolution to disputes in their initial stages, i.e., "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," and "Statement on Procedural Standards in Faculty Dismissal Proceedings."⁵²

⁵¹Silber, p. 51.

⁵²"Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," AAUP Bulletin 57 (June 1971): 206-10; "Statement on Procedural Standards in Faculty Dismissal Proceedings," AAUP Bulletin 54 (December 1968): 439-44.

Arvo Van Alstyne's chapter summarizes the final report of the Utah Commission to Study Tenure. He warns that the "Abolition of tenure would undoubtedly transfer many claims of violations of academic freedom, arising from dismissal and nonretention cases, from the less cumbersome administrative processes of the university to the courthouse."⁵³ In a footnote he warns that the volume of court actions should not be underestimated.⁵⁴ Table 1.1 indicates the numbers of formal complaints received by the AAUP Committee A from 1960 to 1973. These data illustrate the tremendous increase in the number of complaints concerning faculty promotion and retention. Complaints handled through the AAUP processes are less costly both in terms of time and money to the individuals involved and the institutions, thus providing a strong argument in favor of the retention of the tenure system and the AAUP procedures.

William F. McHugh, in his chapter "Faculty Unionism," focuses on the implications of collective bargaining contracts for the tenure system.

So far, negotiated agreements at the community college, four-year institutions, and university level indicate that faculty are pursuing a tenure system with some or all of the following elements: a systematic means of awarding term appointments

⁵³Arvo Van Alstyne, "Tenure System at the University of Utah," in The Tenure Debate, pp. 87-88.

⁵⁴Ibid.

with prescribed notice requirements; specification of evaluation criteria; an evaluation procedure including committees and composition; location and character of the materials upon which a decision will be made for promotion and tenure (access to and content of personnel files); a means for challenging institutional violations of tenure policies; a dismissal for cause procedure; and an institutional commitment to principles of academic freedom, usually contained in general contract provisions at the beginning of the agreement.⁵⁵

TABLE 1.1

TOTAL NUMBER OF COMPLAINTS RECEIVED BY COMMITTEE A
OF THE AAUP 1960-1973

Year	Number of Formal Complaints ^a
1972-73	1150
1971-72	1139
1970-71	880
1969-70	750
1968-69	370
1967-68	359
1966-67	290
1965-66	78
1964-65	57
1963-64	72
1962-63	68
1961-62	55
1960-61	37

^aSources: Reports of Committee A for the respective years as found in the Summer issues of the AAUP Bulletin 1961 through 1973.

Collective bargaining negotiations raise basic questions concerning management's rights and prerogatives. The question of the extent to which

⁵⁵William F. McHugh, "Faculty Unionism," in The Tenure Debate, p. 163.

. . . such provisions could or would be used to encroach upon currently acceptable faculty prerogatives concerning tenure matters is not clear from experience. Such a question is likely to arise, if at all, in a retrenchment situation where the contract makes no provision for retrenchment; or it might arise in refusal to fill vacancies.⁵⁶

McHugh points out the importance of the inter-relationship between the negotiated agreement and the existing written tenure policies of the governing board. "Thus, the collective bargaining agreement can, in practical effect, freeze into the contract those portions of the board policies relating to tenure (for instance, the St. John's contract), or possibly be interpreted to require reopened negotiations on board tenure policies when such policies are intended to be changed by the trustees (for instance, the SUNY contract), or incorporate by reference certain provisions relating to tenure such as academic freedom provisions (for instance, the Rutgers contract)."⁵⁷

In the absence of collective bargaining grievance machinery, a faculty member's remedies include the AAUP grievance procedures and/or a lawsuit. For the individual faculty member the support of the union and use of the grievance machinery is less costly and faster than a lawsuit and the impact of the union on the institution is far greater than a possible censure by the AAUP. McHugh foresees that questions involving tenure and promotion will become increasingly subject to contract

⁵⁶Ibid., p. 165.

⁵⁷Ibid., p. 166.

grievance machinery. After the initial challenges the long-term potential of collective bargaining could reduce disputes and promote stability.

Because of the nature of the Commission on Academic Tenure in Higher Education and the fact that it made specific recommendations, Faculty Tenure will probably have a stronger impact on institutions of higher education and academic tenure practices than The Tenure Debate. The latter was by design intended to stimulate discussion.

Sources of Data, Procedure, and Method

The historical-legal method of research will be employed in this study. Our legal system is based upon precedent--the decisions of the past legal cases determine the outcome, or influence the outcome, of present cases. The court decisions are published in approximately the order in which they were decided. This study will utilize the West Key Number system to research the specific points of case-law.

A primary source of legal information is the American Digest System,⁵⁸ which is the master index to all the case law of the country. The Key Number classification is used in all of the units of the American Digest System except for the Century Digest.

⁵⁸American Digest System (St. Paul, Minn.: West Publishing Co., 1968).

Case-law evolves from the judicial decisions of the various local, appellate, and supreme courts. The National Reporter System⁵⁹ provides a record of all cases from all courts of record in the United States. The actual judicial opinion of the court is included in each case. The System is divided into nine geographical sections:

1. The Atlantic Reporter (Atl. or A. [2d]) includes Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, and Maryland.
2. The Northeastern Reporter (N.E. or N.E. 2d) includes Massachusetts, Rhode Island, New York, Ohio, Indiana, and Illinois.
3. The Southeastern Reporter (S.E. or S.E. 2d) includes Virginia, West Virginia, North Carolina, South Carolina, and Georgia.
4. The Southern Reporter (So. or So. 2d) includes Florida, Alabama, Mississippi, and Louisiana.
5. The Southwestern Reporter (S.W. or S.W. 2d) includes Kentucky, Tennessee, Missouri, Arkansas, and Texas.
6. The Pacific Reporter (Pac. or P. 2d) includes Montana, Wyoming, Idaho, Kansas, Colorado,

⁵⁹National Reporter System (St. Paul, Minn.: West Publishing Co., 1967).

Oklahoma, New Mexico, Utah, Arizona, Nevada, Washington, Oregon, and California.

7. The Northwestern Reporter (N.W. or N.W. 2d) includes Michigan, Wisconsin, Iowa, Minnesota, North Dakota, South Dakota, and Nebraska.

The following reporters are also units of the National Reporter System: Supreme Court, Federal, Federal Supplement, Federal Rules Decisions, New York Supplement, and California Reporter. In addition, all United States Supreme Court decisions may be found in United States Reports.⁶⁰

Secondary sources of information used in this research include the American Law Reports,⁶¹ Corpus Juris Secundum,⁶² and American Jurisprudence.⁶³

The annotated reports of the American Law Reports make it possible to research a problem and omit those cases which involve identical problems or cases dealing with purely local law. The cases included in the A.L.R.

⁶⁰United States Reports (Washington, D.C.: Government Printing Office, 1968).

⁶¹American Law Reports (Rochester, N.Y.: Lawyers Co-Operative Publishing Co., 1969).

⁶²Corpus Juris Secundum (New York: American Law Book Co., 1936 ff.), 101 vols.

⁶³American Jurisprudence (Rochester, N.Y.: The Lawyers Co-Operative Publishing Co., 1936 ff).

are those which are new or deal with questions on which there is conflict of legal opinion, or cases that represent outstanding legal reasoning.

Corpus Juris Secundum is a complete encyclopedic restatement of the entire body of American law based upon all reported cases from 1658 to date. The American Jurisprudence is encyclopedic in style but contains only the leading cases whereas Corpus Juris and Corpus Juris Secundum are all inclusive.

Procedure

The legal research method used follows that which is prescribed by Cohen⁶⁴ and Statsky,⁶⁵ both of whom outline the commonly accepted legal research method. The American Digest System provides the titles and location of useful cases with which to begin legal research on a specific topic. Once relevant cases are found Shepard's Citations to Cases⁶⁶ is the tool used to study whether there have been later cases which followed, disapproved, modified, or reversed the decision(s) in question.

⁶⁴Morris L. Cohen, Legal Research in a Nutshell (St. Paul, Minn.: West Publishing Co., 1971).

⁶⁵William P. Statsky, Legal Research Writing and Analysis: Some Starting Points (St. Paul, Minn.: West Publishing Co., 1974).

⁶⁶Shepard's Citation to Cases (Colorado Springs, Colorado: Shepard's Citation, Inc., 1967 ff).

Each time a case is cited in any decision, it will be noted in Shepard's Citations.

Each case will be read in its entirety in the National Reporter System and briefed. The Corpus Juris Secundum will be consulted for clarification of principles of law. The method described above is the standard method of research into case law.

Method

The solution to the problem involves investigation of the two component sub-problems.

Sub-problem I:

To study the substantive due process protections of tenured and nontenured faculty involved in non-retention proceedings as found in case law.

A. Relationship of the sub-problem to the hypothesis:

Due process can be divided into two components--procedural and substantive. The solution to this sub-problem will determine the differences in substantive due process required by case law for proceedings involving the nonretention of tenured faculty from those requirements needed for proceedings involving nontenured faculty. Only after the constitutional interests in either life, liberty, or property have been established, must the precise procedural safeguards required to protect that interest be determined.

B. Kinds of Data:

Descriptive and evaluative data analyzing the cases studied.

C. Sources of Data:

Judicial decisions, scholarly journal articles, books.

D. Treatment of Data:

The data will be analyzed to determine the evolving substantive due process requirements for tenured and non-tenured faculty in nonretention proceedings. The following serve as guides to the collection and synthesis of the data:

1. A brief history of the constitutional protections of substantive rights
 - a. extramural speech and association
 - b. loyalty oaths
 - c. privilege to withhold information
2. Property interests in continued public employment.

Sub-problem II:

To study the procedural component of due process to determine any differences necessitated by non-retention proceedings involving tenured faculty from those involving nontenured faculty.

A. Relationship of the sub-problem to the hypothesis:

The solution to this sub-problem will determine the differences in procedural due process required by case law for proceedings involving the nonretention of tenured faculty from those requirements needed for

proceedings involving nontenured faculty. Cases will also be studied to determine if the procedural requirements differ in cases involving dismissal as opposed to nonrenewal of contract.

B. Kinds of Data:

Judgmental and evaluative data analyzing the procedural requirements of due process and descriptive data analyzing the cases studied.

C. Sources of Data:

Judicial decisions, scholarly journal articles, books and statements from the American Association of University Professors concerning procedural due process.

D. Treatment of Data:

The data will be analyzed to determine the evolving procedural due process requirements for tenured and nontenured faculty in dismissal and nonrenewal of contract situations. The following serve as guides to the collection and synthesis of the data:

1. Procedure for dismissal of tenured and nontenured faculty
 - a. Termination of a tenured faculty member for cause; termination of employment during the contractual period of a nontenured faculty member.
 - b. Notification
 - c. Hearing

2. Procedural requirements for nonrenewal of contract
3. Procedural requirements for discharge from employment
 - a. Financial exigency
 - b. Other extraordinary circumstances
4. Balancing of interests test; demise of the right-privilege doctrine.

Overview

Chapter II will give a brief history of the substantive due process requirements as seen through recorded court cases. The AAUP statements on academic freedom and tenure as they relate to procedures re non-retention will be studied in light of the evolving substantive due process requirements. Chapter III will report on the substantive due process requirements as seen in the court cases since 1972. Chapter IV will analyze the procedural due process requirements as dictated by recorded court cases. The final chapter will summarize the findings and conclusions and state the implications for higher education and the recommendations for administrators and persons designing faculty grievance systems.

CHAPTER II

A BRIEF HISTORY OF SUBSTANTIVE DUE PROCESS REQUIREMENTS FROM RECORDED CASE LAW PRIOR TO 1972

Section I: The Demise of the Right/Privilege Doctrine in Constitutional Law

The purpose of Section I is to discuss the evolving definition of due process, and to trace illustrative decisions, both quasi-legal and case law, related to the substantive due process requirements of the earliest faculty dismissals in America leading to the eventual demise of the right/privilege doctrine in Constitutional law. Section II discusses the constitutional protection of substantive rights, including extramural speech and association, privilege to withhold information, personal freedom, and civil rights of nontenured and tenured faculty prior to 1972.

The Constitutional Provisions of Due Process

Both the Fifth Amendment and the Fourteenth Amendment to the Constitution guarantee that "no person shall be deprived of life, liberty, or property without

due process of law." The Fifth Amendment is a limitation upon the powers of Congress, while the Fourteenth Amendment is a limitation upon the powers of the states.¹

Arriving at a definition of due process is difficult if not impossible. The Supreme Court of the United States has never attempted to define "due process of law" with precision. Due process is not an ordered or fixed set of proscriptions applicable equally to all situations. Rather it is a guaranty, dating from our English heritage, which has been evoked in a large number of situations, to differing degrees depending upon the facts of the case, the particular law in question and its relation to the fundamental law which limited the power of the legislature. The application of due process is governed by some fundamental rules, the specific procedures of which will be discussed in Chapter IV. The concept of due process has undergone a gradual evolution as the "laws of the land" and the constitutional structures have changed. Generally, the courts rely upon two sources in ascertaining the meaning of due process: (1) the Constitution is examined to determine whether there is conflict with the case at the bench and any of its provisions; and (2) "if the act complained of does not

¹American Jurisprudence, vol. 16, 2d ed. (Rochester, N.Y.: The Lawyers Co-Operative Publishing Co., 1964), p. 931.

violate the constitutional provisions, the court must look to those settled usages and modes of proceeding existing in the common and statutory law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political conditions by having been acted on by them after the settlement of this country."²

The origin of the guaranty that no person should be deprived of life, liberty, or property except by due process of law predated the discovery of America. On the 19th day of June, 1215, Chapter 39 of the Magna Charta (sometimes referred to as "Chapter 29") declared: "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."³ Some historians believe that this principle was known before the Magna Charta, claiming that it was originally designed to secure the subject against the arbitrary action of the Crown and to place people under the protection of the law.⁴

The purpose of due process is to insure the fair and orderly administration of the laws. It is

²Ibid., p. 932.

³Ibid., p. 933.

⁴Ibid.

inapplicable where there is no interference with life, liberty, or a vested property right. Due process is the essence of a scheme of ordered justice. It "is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for this court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Mass., 291 U.S. 97, 105, or are 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325."⁵ This guaranty regards not only the enforcement of the law but also the authority for making the law; it is not merely a political right, but it is a legal right assertable in a court of law.

The concepts embodied in the guaranty of due process of law have been subject to a very broad, liberal interpretation. The concept of the guaranty is fluid; its application is less a matter of rule; rather it is tested and determined by the totality of facts in a given case.

In each case, "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, and on a judgment not ad hoc and episodic, but duly mindful of reconciling the needs both of continuity and of change in a progressive society.⁶

⁵ Rochin v. California 342 U.S. 165, at 169, 96 L.Ed. 183, 72 S.Ct. 205, 25 ALR 2d 1396 (1952)

⁶ Ibid.

Substantive due process concerns itself with studying the constitutional interests in life, liberty, or property. Only after it has been established that there is a substantive interest must the specific procedural safeguards to protect that interest be determined.

The Faculty and Due Process in
the 1700's and 1800's

Religious orthodoxy imposed on early American educational institutions a situation whereby the ostensible freedom in American Colonial colleges was often little more than a fiction. As a consequence the growth of academic freedom and professorial rights and privileges was retarded in the first decades of the Republic.

Richard Hofstadter and Walter P. Metzger, who have chronicled the development of academic freedom in the United States,⁷ note that the controversy over the intellectual freedom in American collegiate education began with the first president of Harvard, the first college. Henry Dunster was obliged to resign his position as president eighteen years after the enactment that created Harvard. "Although the event naturally bears only the remotest resemblance to a modern academic freedom case, it was the first instance in American

⁷ Richard Hofstadter and Walter P. Metzger, The Development of Academic Freedom in the United States (New York: Columbia University Press, 1955).

history in which a college official's tenure in his post was broken by a conflict between his personal beliefs and the established opinion of the community."⁸ Although his administrative competencies came into question by the Overseers, his downfall came when he refused to present his fourth child for baptism. Dunster was touching upon a sore issue by denying the scriptural validity of infant baptism. This was an intellectual stance that the Overseers found intolerable. Dunster was given the opportunity to retract his statement, but upon his failure to do so, he was forced to vacate the office of the presidency. The college was seen as a place where revealed truth was passed on to future generations. It was not a place in which to search for the truth. The president and faculty served at the pleasure of the Board of Overseers; the concept of academic due process was yet to be born.

The eighteenth century brought an increase in religious diversity and also an increase in the number of educational institutions challenging Harvard's supremacy in the colonies. The spirit of Enlightenment brought curricular changes. For the first time, faculties exhibited a degree of academic initiative as they

⁸ Richard Hofstadter, Academic Freedom in the Age of the College (New York: Columbia University Press, 1964), p. 86.

pressed for a new direction in curriculum content.⁹ But the idea of the Enlightenment did not extend to the faculty the right to openly express beliefs not in harmony with the opinions of Boards of Trustees.¹⁰ There was little academic freedom and even less thought of academic due process.

Hofstadter noted that one of the reasons for the low status of college faculties and for the derth of faculty rights is to be found in the lay governments of colleges.

The essence of lay government is that the trustees, not the faculties, are, in law, the college or university, and that legally they can hire and fire faculty members and make almost all the decisions governing the institution. This has hampered the development or organization, initiative, and self-confidence among American college professors, and it has contributed, along with many other forces in American life, to lowering their status in the community. Other professional groups have far greater power to determine the standards and conduct of their own professions.¹¹

One incident involving Provost Smith at Philadelphia turned out to be a landmark in the history of academic freedom and was also an unusual display of support for faculty involvement in political controversies. In 1757, Judge William Moore, a friend of Provost Smith,

⁹Frederick Rudolph, The American College and University (New York: Vintage Books, 1965), p. 41.

¹⁰Hofstadter, p. 208.

¹¹Hofstadter and Metzger, p. 120.

became embroiled with the dominant Quaker faction in the Pennsylvania Assembly. Judge Moore wrote a sharp counterattack which was published by Provost Smith in a German newspaper which Smith had established. Moore and Smith were both charged and ultimately jailed for libeling the Assembly. It is unclear whether the trustees of the college saw the case as one of political persecution, but in any event, they supported the Provost in a very unusual manner. Provost Smith indicated that he wished to continue to teach his classes, so the Board of Trustees gave permission to have his classes carried on "at the usual Hours in the Place of his present confinement." So for several weeks Smith met his twelve students in his jail cell.¹²

As an episode in American academic history it may provide an interesting precedent for the determination of trustees to draw a line of demarcation between educational decisions and political controversy. The Philadelphia trustees did not raise questions about Smith's legal status, but they acted upon the ineluctable fact that it had no bearing upon his competence as an educator.¹³

Most faculty members at that time were not afforded such a liberty by their boards of trustees. Although a professor usually taught indefinitely on good behavior, tenure depended upon usage and had no legal status. A professor could be fired at will by the governing board.

¹²Ibid., p. 205.

¹³Ibid.

During the Civil War, academicians were dismissed for reasons other than their particular stance on slavery.

Richard M. Johnston was forced out at the University of Georgia for opposing secession, Professor Totten at the University of Iowa for "disloyalty," President Woods at Bowdoin College for sympathy with the South and disapproval of the War, and President Lord at Dartmouth for support of Slavery and criticism of the purpose of the War.¹⁴

At this stage in the history of American jurisprudence, due process consisted of only those basic procedures granted a professor by the governing board. Substantive due process was yet to be defined. The faculty worked at the pleasure of the governing board; freedom of speech was not thought to be a protectable interest of the faculty.

The Right/Privilege Doctrine

In 1892, Justice Holmes delivered the majority opinion in the case of McAuliff v. Mayor of New Bedford.¹⁵ It was in this early statement by Justice Holmes that the right-privilege distinction appeared. This concept has long hampered individuals within the public sector in protecting themselves against arbitrary governmental action. In this opinion, Holmes dispatched the petition

¹⁴Maurice M. Sullivan, "Academic Freedom in Historical-Legal Context" (Ph.D. dissertation, Miami University, 1971), p. 58.

¹⁵McAuliffe v. Mayor of New Bedford 155 Mass. 216, 29 N.E. 517 (1892).

of a policeman who had been fired for violating a regulation which restricted his political activities by stating:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . There are few employments for hire in which the servant does not agree to suspend his constitutional right to free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.¹⁶

The devastating effect of this view on any constitutional claims of employees within the public sector was noted by William W. Van Alstyne when he found that in shepardizing McAuliffe more than seventy cases, 77 percent of which resolved the decision against the constitutional claim being asserted.¹⁷ Van Alstyne notes where the right-privilege distinction has been misapplied, then reexamines the essential soundness of the distinction itself.

What had happened was that over a period of time, the Court had recognized that even the personal liberty to contract in the private sector, to work in the private sector, or to own property was subject to a high degree of reasonable governmental regulation in the public interest against the claim that such "rights" were absolutely protected by the fourteenth amendment.¹⁸

¹⁶Ibid., at 220.

¹⁷William W. Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," Harvard Law Review 81 (1968): n. 7, 1441.

¹⁸Ibid., p. 1444.

However, in recognizing the right to property ownership or the right to work in the private sector, the Court had never asserted that such an interest was wholly outside the protection of the due process clause. "Thus the Court moved by negligent degrees in a few aberrant cases to the following neologism: the petitioner may have a right to talk politics, but he has no right to be a doctor--even a private one."¹⁹ Such a practice is a privilege granted by the State under its substantially plenary power to fix the terms of admission.

Van Alstyne suggests that there are several means by which to circumvent the harsh consequences of the right-privilege distinction as applied to private interests in the public sector. One of which is the doctrine of unconstitutional conditions. Essentially this doctrine concedes that the "petitioner had no right to be a policeman" but it emphatically emphasizes the petitioner's First Amendment right to "talk politics." The First Amendment forbids the government to condition its largess upon the willingness of the petitioner to surrender a right which would otherwise be available as a private citizen.

A second means is by balancing "indirect effects" and constitutional rights. "The Court attempts to balance competing public and private concerns to determine whether

¹⁹Ibid.

the regulation as applied has a sufficient connection with important enough state interests to outweigh the incidental effect on the constitutional rights of the affected class."²⁰ Shelton v. Tucker²¹ illustrates this approach. Here on Arkansas statute required every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which the teacher belonged or regularly contributed within the preceding five years. The statute did not penalize membership in any group. Van Alstyne reasons that "Had the Court wanted to apply the doctrine of unconstitutional conditions, it would first have had to hold that the First Amendment broadly guarantees, in addition to the freedom to speak, an absolute right to nondisclosure respecting one's political views and associations."²² Such a broad interpretation might have had serious consequences in related areas. The U.S. Supreme Court chose instead, to explore the probable effect of the statute in discouraging controversial political association. After considering the state's interests as well as individual interests, a majority of five concluded that the statute was invalid

²⁰Ibid., p. 1449.

²¹Shelton v. Tucker 364 U.S. 479 (1960).

²²Van Alstyne, p. 1450.

because of the chilling effect on the exercise of the First Amendment freedoms of association and speech. If the court had applied the doctrine of unconstitutional conditions, it would have failed to attach any significance to the legitimate public purposes which such a regulation might serve.

The equal protection clause circumvents the right-privilege distinction as it seemingly makes no difference that the threatened interest is a privilege rather than a 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."²³ It was with this reasoning that Mr. Justice Clark, in Wieman v. Updegraff, struck down a state statute loyalty oath. The issue in this case was whether the Due Process Clause permitted a state, in attempting to bar disloyal individuals from its employ, "to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged."²⁴ As a criterion for admittance to public

²³Wieman v. Updegraff 344 U.S. 183, at 192 (1952).

²⁴Ibid., at 190.

employment, the government may not classify individuals through means which are "arbitrary or discriminatory."

The equal protection clause protects an individual from an unreasonable rule in the narrow sense of the rights recognized under the Constitution and the Bill of Rights; it also protects a person in the broader sense of guaranteeing equal protection under the law, meaning all laws and rights, not just those found in the constitution. Van Alstyne argues that,

When viewed in this manner, an equal protection claim may, in fact, enable the petitioner effectively to raise virtually the same arguments that he could have raised directly under a concept of substantive due process as applied to interests in the public sector. A systematic review of the equal protection and due process lines of cases would, I believe, readily establish that the constitutional tests of "arbitrary classification" are rapidly becoming indistinguishable from the constitutional tests of "unreasonable regulation" under the due process clause. Indeed, it is fair to say that the two clauses have almost completely merged.²⁵

When either a direct substantive due process claim or an equal protection claim is raised, Van Alstyne believes that the Court tends to assign a certain value to the private interest in question and then the Court proceeds to require that the basis of the classification be more or less rationally connected to an allowable public interest not equally capable of accomplishment by alternative means. Presumably the alternative means would be less detrimental to the private interest. The

²⁵Van Alstyne, pp. 1455-1456.

use of the equal protection clause does not qualify the right-privilege doctrine, but it does render it inconsequential.

Using Holmes' own jurisprudence, Van Alstyne goes on to argue that the concept of "privilege" is today no longer viable, and that the size and power of the role of government in the public sector requires substantive due process control of all of the capacities of the state.

The United States Supreme Court in Keyishian v. Board of Regents²⁶ explicitly discredited the hypothesis that public employment is a privilege. The Court said that the Second Circuit, in an earlier stage of the Keyishian case, had correctly stated that:

. . . the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. . . . Indeed, that theory was expressly rejected in a series of decisions following Adler.²⁷

²⁶Keyishian v. Board of Regents 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967).

²⁷Keyishian v. Board of Regents 345 F. 2d 236, 239. Author's Note: For the cases following Adler see: Wieman v. Updegraff 344 U.S. 183 (1952); Cramp v. Board of Public Instruction 368 U.S. 287; Baggett v. Bullitt, 377 U.S. 360 (1964); Shelton v. Tucker, 364 U.S. 479 (1960); Speiser v. Randall 357 U.S. 513; Schwane v. Board of Bar Examiners 353 U.S. 232; Torcaso v. Watkins 367 U.S. 488; Sherbert v. Verner 374 U.S. 398; Elfbrandt v. Russell 384 U.S. 11; Aptheker v. Secretary of State 378 U.S. 500. For a discussion of Adler, see p. 61.

With the demise of the right-privilege doctrine, the validity of the limitations put on the teacher's substantive rights could be tested through due process procedures for the reasonableness of their denial under the specific circumstances. The courts are currently in the process of working out the content of substantive due process in the public sector. The remainder of the chapter reviews the development of substantive due process before the landmark cases of Roth²⁸ and Sindermann.²⁹

Section II: Constitutional Protection of Substantive Rights

Loyalty Oaths

During the depression of the 1930's "teacher-oath" statutes were enacted in a number of states. These oaths required an affirmation of loyalty to state and federal constitutions. Taking an oath seemed unnecessary if they were merely asking professors to obey the law of the land because every citizen has to do so. However, some oaths were intended to cause professors to refrain from criticizing or suggesting changes in laws and public policy. These "loyalty oaths" were seen as a clear threat to academic freedom. However, it was not until after

²⁸Board of Regents of State Colleges v. Roth 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d. 548 (1972).

²⁹Perry v. Sindermann 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d. 570 (1972).

World War II that the loyalty oath issue was brought to court in several states.

Wieman v. Updegraff³⁰ concerned the legality of legislative devices used to screen out disloyal teachers. An Oklahoma Statute required each state officer and employee, as a condition of employment, to take a "loyalty oath," "stating, inter alia, that he is not, and has not been for the preceding five years, a member of any organization listed by the Attorney General of the United States as 'communist front' or 'subversive.'"³¹ The Supreme Court of Oklahoma had upheld the judgment of the lower court³² sustaining the constitutionality of excluding persons from state employment solely on the basis of membership in such organizations, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged.

The United States Supreme Court reversed the opinion of the lower court stating that the Due Process Clause does not permit a state, in attempting to bar disloyal persons from its employment on the basis of organizational membership, to classify innocent with

³⁰Wieman v. Updegraff 344 U.S. 183 (1952).

³¹Ibid.

³²Board of Regents v. Updegraff 205 Okla. 301, 237 P. 2d. 131 (1951)

knowing association. "We hold that the distinction observed between the case at bar and Garner, Adler and Gerende is decisive. Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."³³

In reviewing these earlier decisions, the Court observed that in all the earlier loyalty oath decisions the statutes in question which had been upheld, scienter, or knowledge of the facts, was required either by implication or by state court interpretation. Wieman draws a very important distinction here. In the interests of protecting public schools from subversive influence, a state may not exclude from public school employment persons who are or who have been members or affiliates of subversive organizations if the persons were innocent of such knowledge. If, after proper notice and an opportunity to be heard, it is determined that the organization in question is subversive and the persons knew they were subversive, the public school has a right to exclude such persons from employment.

A 1951 New Jersey case, Thorp v. Board of Trustees,³⁴ ruled that loyalty oaths were valid in New

³³Wieman v. Updegraff at 191. Author's Note: Garner v. Board of Public Works 341 U.S. 716 (1951); Adler v. Board of Education 342 U.S. 485 (1952); Gerende v. Board of Supervisors 341 U.S. 56 (1951).

³⁴Thorp v. Board of Trustees 6 N.J. 498, 79 A. 2d. 462 (1951).

Jersey in order to insure the integrity of the educational process. In the New York case of Adler v. Board of Education,³⁵ the final appeal to the United States Supreme Court contended that the Feinberg Law and the State Board of Regents rules concerning that law violated certain First Amendment rights. This contention was denied as the United States Supreme Court could find no constitutional infirmity in the contested section of the Feinberg Law.³⁶

Baggett v. Bullitt,³⁷ the University of Washington case in 1964, concerned a 1955 state statute and a 1931 act which were struck down as violative of due process since they, as well as the oaths based thereon, are unduly vague, uncertain and broad.³⁸ The Baggett court relied

³⁵ Adler v. Board of Education of City of New York 342 U.S. 485, 96 L.Ed. 517, 72 S. Ct. 380 (1952).

³⁶ Author's Note: The Civil Service Law of New York makes ineligible for employment in any public school any member of any organization advocating the overthrow of the government by force, violence or any unlawful means. Section 3022 of the Education Law, added by the Feinberg Law, requires the Board of Regents (1) to adopt and enforce rules for the removal of any employee who violates, or is ineligible under section 12-a, (2) to promulgate a list of organizations described in section 21-a and (3) to provide in its rules that membership in any organization so listed is prima facie evidence of disqualification of employment in the public schools.

³⁷ Baggett v. Bullitt 377 U.S. 360 (1964).

³⁸ Ibid.

in part on Cramp v. Board of Public Instruction in which the Court invalidated an oath requiring teachers and other employees of the State to swear that they had never lent their "aid, support, advice, counsel or influence to the Communist Party," because the oath was lacking "terms susceptible of objective measurement and failed to inform as to what the State commanded and forbade."³⁹

The American Association of University Professors in 1965 sued the Georgia University Board of Regents to test whether the state loyalty oath was unconstitutional in part. The Georgia statute required teachers to state that they would refrain from directly or indirectly subscribing to or teaching any theory of government, economics, or social relations which would be inconsistent with the fundamental principles of patriotism and high ideals of America in addition to swearing to support state and federal constitutions. The court ruled that because violation of the oath was a misdemeanor and that violators were subject to immediate discharge from their positions, the statute was violative of due process under the Fourteenth Amendment. The court also upheld the

³⁹ Ibid., at 366. Author's Note: Cramp v. Board of Public Instruction 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed. 2d. 285 (1961).

charge that this Georgia resolution violated the First Amendment freedom of speech.⁴⁰

The case of Elfbrandt v. Russell in 1966 called the Arizona loyalty oath into question. The petitioner was a Quaker who refused to take the oath. Justice Douglas, stating that the oath could not stand, said that political groups may embrace both legal and illegal aims and one may join such a group without embracing the illegal aims. Those who join any organization without sharing in its unlawful purposes pose no threat to constitutional government, either as citizens or public employees.⁴¹

The question of whether a loyalty oath is to be read in isolation or in connection with Maryland's Ober Act (Act section 5A, MD Ann. Code, 1957) was the issue in Whitehill v. Elkins.⁴² The loyalty oath was held to be an integral part of the Ober Act. The unconstitutionality of the oath arose because the lines between permissible and impermissible conduct were indistinct. Although the Act contained such words as "other," "alteration,"

⁴⁰Georgia Conference of The American Association of University Professors v. Board of Regents of the University of Georgia 2046 F.Supp. 553 (1965).

⁴¹Elfbrandt v. Russell 384 U.S. 11, 17 (1966).

⁴²Whitehill v. Elkins 389 U.S. 54 (1967).

and "revolution," to define a subversive person, this definition was held to be unconstitutionally vague and overbroad.

Keyishian v. Board of Regents⁴³ concerned faculty members of the State University of New York at Buffalo and a nonfaculty employee challenging New York's teacher loyalty laws and regulations as being unconstitutional. The U.S. Supreme Court ruled that Adler⁴⁴ in which the Court had upheld some aspects of the New York teacher loyalty plan before its extension to state institutions of higher learning, was not controlling. The vagueness issue in Keyishian was not decided in Adler, and the validity of the subversive organization membership provision in Section 3022 of the law was upheld in Adler for reasons that were subsequently rejected by the U.S. Supreme Court.

Here the Court ruled that "mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by the appellants."⁴⁵ Justice Brennan, speaking for the

⁴³Keyishian v. Board of Regents 385 U.S. 589 (1967).

⁴⁴Adler v. Board of Education 342 U.S. 485 (1952).

⁴⁵Keyishian v. Board of Regents 385 U.S. 589, 606 (1967).

majority, gave strong support to the concept of academic freedom by stating,

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. 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.⁴⁶

In Keyishian the theory of public employment being a privilege to which a person may be denied altogether or subjected to any conditions, regardless of how unreasonable, was uniformly rejected. This opinion culminated a series of decisions after Adler in which this theory was expressly rejected.⁴⁷

Suzanne McCormick Thalberg, a lecturer at the Chicago Circle Campus of the University of Illinois, and Ernestine Krehbiel, a kindergarten teacher in Morgan County, Illinois, both objected to the loyalty oath which stated in part:

I . . . do swear (or affirm) that I am not a member of or affiliated with the communist party and that I am not knowingly a member or knowingly affiliated with any organization which advocates the overthrow

⁴⁶ Ibid., at 603.

⁴⁷ Ibid., at 605-606. See *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Board of Education* 350 U.S. 551; *Cramp v. Board of Public Instruction* 368 U.S. 278; *Baggett v. Bullitt* 377 U.S. 360; *Shelton v. Tucker* 364 U.S. 479; *Speiser v. Randall* 357 U.S. 513. See also *Schwartz v. Board of Bar Examiners* 353 U.S. 232; *Torcaso v. Watkins* 367 U.S. 488; and *Sherbert v. Verner* 374 U.S. 398.

or destruction of the constitutional form of government of the United States or of the State of Illinois, by force, violence, or other unlawful means.⁴⁸

The issues in the Thalberg and Krehbiel cases have been fully and finally determined by the United States Supreme Court in Keyishian,⁴⁹ Elfbrandt,⁵⁰ and Whitehill.⁵¹

The court was left with no recourse except to declare the Illinois statute void. The Keyishian ruling meant that the "knowledge" standard had been rejected in favor of the "test of specific intent" as an affirmation that the First Amendment protects the right to knowingly associate with proscribed organizations absent some participation in the organization's illegal activities.

Stella Connell, a teacher in the public school system of Orange County, Florida, brought suit asking that the Florida loyalty oath act be declared unconstitutional. Part of this statute had already been amended in Cramp v. Board of Public Instruction.⁵² The lower

⁴⁸Thalberg v. Board of Trustees of University of Illinois, Krehbiel v. Board of Education of School District No. 117, Morgan County, Illinois 309 U.S. 630 (1969).

⁴⁹Keyishian v. Board of Regents 385 U.S. 589 (1967).

⁵⁰Elfbrandt v. Russell 384 U.S. 11 (1966).

⁵¹Whitehill v. Elkins 389 U.S. 54 (1967).

⁵²Author's Note: see p. 62, footnote 39.

court ruled that loyalty oath phrases re the Communist Party were illegal. An appeal was based on the two phrases that were upheld by the lower court: "I do hereby solemnly swear or affirm (1) that I will support the Constitution of the United States and of the State of Florida," and (2) "that I do not believe in the overthrow of the Government of the United States or the State of Florida by force or violence."

Circuit Judge Simpson had dissented in part with the majority decision of the lower court. He would have also struck from the declaration, "I do not believe in the overthrow of the Government. . . ." His convincing argument was vindicated by the U.S. Supreme Court in 1971 when it affirmed in part and reversed in part the judgment of the lower court. Simpson's reasoning was that,

. . . this provision deals solely with belief, with what is in the mind and may remain there forever unexpressed by word or deed. It does not deal with action. It does not even deal with spoken or written words advocating overthrow of government. Surely a teacher is entitled to his or her private, secret thoughts and beliefs.⁵³

As has been noted, the U.S. Supreme Court has several times declared unconstitutional loyalty oaths which contain elaborate "disclaimer" type statements in which the oath-taker forswears past, present, or future

⁵³Connell v. Higinbotham, (U.S.D.C., Fla.) 305 F.Supp. 445, 18 A.L.R. 2d 268 (1969). Affirmed in part and reversed in part, 403 U.S. 207, 91 S.Ct. 1772.

beliefs or associations having the least tinge of subversiveness. The simple affirmation of allegiance resembling the constitutional oath of office for the president of the United States does not fall within the "disclaimer" category.

After having a "disclaimer" type of oath declared unconstitutional, the Regents of the University of Colorado then adopted a simple oath stating: "I solemnly swear that I will support the Constitution of the State of Colorado and of the United States of America and the laws of the State of Colorado and of the United States." A three-judge federal court decided that this oath was not unduly vague but is "plain, straightforward and unequivocal. A person taking it is not left in doubt as to his undertaking. The obligation assumed is one of simple recognition that ours is a government of laws and not of men."⁵⁴

A Kansas court struck down a statute in that state which contained provision for a loyalty oath characterized by negativism. Gerald A. Ehrenreich, a clinical associate professor of psychiatry at the University of Kansas Medical Center and several other professors from the state universities at Lawrence, Wichita, and Manhattan asked that the oath be declared

⁵⁴Hosack v. Simley, (U.S.D.C., Colo.) 276 F.Supp. 876 (1967); affirmed without opinion in 390 U.S. 744, 88 S.Ct. 1442, 20 L.Ed. 2d 275 (1968).

unconstitutional. The state statute was unconstitutional to the extent that it proscribed mere membership in an organization advocating the overthrow by violence of the government of the United States or of the State, without any showing of specific intent to further the aims of such an organization.⁵⁵

A Massachusetts Federal Court struck down a state statute because the loyalty oath contained overbroad wording. The word "oppose" was hopelessly vague and open to a wide range of interpretation, thus forcing an intelligent person to guess at what might be expected.⁵⁶

Besides relying on vagueness and overbreadth as grounds for invalidating disclaimer-type oath statutes, Federal courts have ruled that such oaths are unconstitutional where due process is violated because no provision is made for a hearing prior to a public employee's discharge in order to determine the nature and quality of membership, past or present, in an organization proscribed by the statute. In Heckler v. Shepard the District Court specifically stated that the statute was not "void for vagueness," "but no discharge of a public employee, which operates to bestow a 'badge of disloyalty' or to

⁵⁵Ehrenreich v. Londerholm 273 F.Supp. 178, 179 (1967).

⁵⁶Richardson v. Cole 300 F.Supp. 132 (1969); reversed and remanded in Cole v. Richardson 405 U.S. 676, 92 S.Ct. 1332 (1972).

create a 'built-in inference of guilt,' will be permitted without according the right to such hearing as is requisite to due process of law . . ."⁵⁷

The U.S. Supreme Court has ruled that an employer cannot bar a person from employment solely on the basis of organizational membership,⁵⁸ nor may a state exclude from public school employment persons who are or who have been members of subversive organizations if the persons were innocent of such knowledge.⁵⁹ A teacher may not be barred from employment on the grounds that the organization to which the individual belongs embraces both legal and illegal aims, if the teacher does not embrace the illegal aims.⁶⁰ Likewise, oaths which have been found to be unduly vague, uncertain and overly broad have been struck down as unconstitutional.⁶¹ An oath may not

⁵⁷Heckler v. Shepard (U.S.D.C., Idaho) 243 F.Supp. 841 (1965).

⁵⁸Wieman v. Updegraff 344 U.S. 183 (1952).

⁵⁹Ibid.

⁶⁰Elfbrandt v. Russell 384 U.S. 11 (1966); Keyishian v. Board of Regents 385 U.S. 389 (1967); Whitehill v. Elkins 389 U.S. 54 (1967); Thalberg v. Board of Trustees of the University of Illinois, Krehbiel v. Board of Education 309 U.S. 630 (1969).

⁶¹Baggett v. Bullitt 377 U.S. 360 (1964); Cramp v. Board of Public Instruction 368 U.S. 278 (1961); Whitehill v. Elkins 389 U.S. 54 (1967); Keyishian v. Board of Regents 385 U.S. 589 (1967).

interfere with the teacher's First Amendment right of freedom of speech as was the case in the Georgia Conference of the American Association of University Professors v. Board of Regents of the University System of Georgia.⁶² Oaths denying a person due process of law have also been declared unconstitutional.⁶³

But not all loyalty oaths contain "disclaimer" clauses. Those oaths which are straightforward and simple, asking only that a person affirm allegiance to the constitutions and laws of the United States and a particular state, have been upheld as constitutional.⁶⁴

Privilege Against Self-Incrimination

Teachers may refuse to furnish information to their employers by invoking the Fifth Amendment privilege against self-incrimination. The Supreme Court, by means of a series of cases, suggests that the Fifth Amendment privilege places certain limits on the power of the government to attach penalties, dismissal or nonrenewal of contract, when public employees refuse to furnish

⁶²2046 F.Supp. 553 (1965).

⁶³Heckler v. Shepard (U.S.D.C., Idaho) 243 F.Supp. 841 (1965).

⁶⁴Hosack v. Smiley (U.S.D.C., Colo.) 276 F.Supp. 876 (1967); affirmed without opinion in 390 U.S. 744, 88 S.Ct. 1442, 20 L.Ed. 2d 275 (1968).

information concerning conduct which might be regarded as criminal. In Slochower v. Board of Education⁶⁵ the dismissal of a professor at Brooklyn College for refusing to answer questions concerning his membership in the Communist Party was held to be unconstitutional. "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at the property, affairs, or government of the city, or . . . official conduct of city employees."⁶⁶

Beilan v. Board of Public Education⁶⁷ narrowed the interpretation of Slochower. In Beilan a teacher was dismissed for refusing to answer questions posed by the superintendent about the plaintiff's allegedly subversive activities.

The Court approved the action, holding that the dismissal was not predicated on an impermissible inference of guilt drawn from a refusal to answer, but on a finding of insubordination derived from the very fact of the refusal to answer. It distinguished Slochower in that here there was a

⁶⁵Slochower v. Board of Education 350 U.S. 551 (1956).

⁶⁶Ibid., p. 558.

⁶⁷357 U.S. 399 (1958).

specific, relevant inquiry into the fitness of the teacher by his superior and a specific finding of incompetency based on permissible inferences.⁶⁸

Political Activity

Public school and public university teachers have been subjected to restrictions on their freedom to engage in nonsubversive political activity, both partisan and nonpartisan, outside of school. In the absence of a showing that such activity interferes with performance in the classroom, there is little or no justification for restricting the right of a professor to engage in nonpartisan advocacy of social or political causes. There have been several cases where teachers were fired from Southern schools for conspicuous civil rights activities.⁶⁹ Actions of the school boards were reversed when it was found that the teachers' competency was not the cause for dismissal but rather the teachers were dismissed for impermissible reasons.

States have an interest in preserving the integrity of public service by divorcing public employees from politics. Participation in partisan political campaign activities is a form of political activity of

⁶⁸"Developments in the Law--Academic Freedom," Harvard Law Review 81 (1968): 1076.

⁶⁹See *Johnson v. Branch* 364 F. 2d 177 (4th Cir., 1966), cert. denied, 385 U.S. 1003 (1967).

teachers which has been challenged through the court system.

This governmental interest was recognized by the Supreme Court in a slightly different context in United Public Workers v. Mitchell, which upheld the Hatch Act against a First Amendment challenge. The Act, which prohibited federal civil service employees from taking "any active part in political management or in political campaigns," was held to be a reasonable measure to preserve the integrity, efficiency, and discipline of government employees by freeing them of most forms of political involvement.⁷⁰

Jones v. Board of Control⁷¹ involved a law professor at the University of Florida whose employment was terminated before the expiration of his contract for violating a board of trustee rule which prohibited university employees from seeking election to public office. The rule in effect required that Jones submit his resignation before filing to become a candidate for public office. The Florida Supreme Court relied heavily on the Mitchell decision in upholding the restriction on teacher's seeking public office. The court held that the rule was constitutional and did not constitute an abridgment of academic freedom or a denial of substantive due process of law. Instead of relying on the outmoded concept that a person has no constitutional right to

⁷⁰"Developments in the Law: Academic Freedom," Harvard Law Review 81 (1968): 1070.

⁷¹Jones v. Board of Control 131 So. 2d 713 (Fla., 1961).

government employment, the court settled the issue on a much broader plateau of reasoning: " . . . that any right which an individual does have to work for the government or to continue in the public employ or to seek public office must necessarily be subject to all reasonable rules and regulations promulgated by the government in the interest of the public and for the well-being of the public services."⁷²

If political activity does not detract from a teacher's classroom performance, it may be questionable as to whether " . . . the evils of political involvement to which the Hatch Act was addressed apply to teachers at public universities with sufficient force to justify curtailing their political freedom."⁷³ It is argued that the public should not be denied the benefit of hearing from intellectual leaders on issues of public importance.

On May 4 and 5, 1970, Dr. Stephen L. Rozman, an assistant professor without tenure in the Department of Political Science at the University of Nebraska, was involved in two demonstrations in protest of President Nixon's decision to cause a military invasion of Cambodia and of the killing and wounding of students at Kent State

⁷²Ibid., at 717.

⁷³"Developments in the Law: Academic Freedom," at 1070.

University. As a result of those demonstrations, the Board of Regents directed the chancellor to make an inquiry to determine the involvement of faculty and students. The Spelts Commission, composed of nonuniversity personnel, was formed for this task. Among the recommendations issued by the Spelts Commission was the following:

The Commission considers improper the action of faculty member Stephen Rozman for his participation in the demonstrations. The Commission recognizes Mr. Rozman's right to voice his opinions. His actions were highly inappropriate for a teacher.⁷⁴

The Board of Regents chose not to renew Dr. Rozman's contract for the coming year; Rozman brought suit charging, inter alia, that the Board of Regents acted for constitutionally impermissible reasons. The court ruled for the defendants,⁷⁵ a judgment which was later upheld.⁷⁶

The court reasoned that fitness for faculty status is not limited to performance in the classroom alone, but rests upon a broad range of factors, including numerous personality and character traits.⁷⁷ "Two areas of

⁷⁴Rozman v. Elliott 335 F.Supp. 1086, 1089 (1971).

⁷⁵335 F.Supp. 1086.

⁷⁶467 F.2d 1145.

⁷⁷Here the court cited: Beilan v. Board of Public Education, School District of Philadelphia 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed. 2d 1414 (1958); Smith v. Board of Education 365 F.2d 770 (C.A. 8th Cir., 1966).

activity of Dr. Rozman were outside the scope of constitutionally protected speech: One was in the negotiating room, when he intruded into the responsibilities of the administrators for negotiating an evacuation of the building; the other was in the 'pit,' when by his presence he contributed to a cancellation of a class and defied a directive of the administration to leave the building promptly."⁷⁸

District Judge Urbom was not suggesting that on substantive issues faculty members "must parrot" the views of the administration. However, a faculty member cannot use the protective umbrella of the federal Constitution, to assume the role of or intrude into another's rightful role of conducting the workings of a university.

A fair reading of Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, (1969) and Esteban v. Central Missouri State College, 415 F.2d 1077 (C.A. 8th Cir., 1969), is persuasive for the proposition that potentially disruptive conduct is sufficient to remove the conduct from protected freedom of expression.⁷⁹

Dr. Rozman did not give up his right to freedom of speech, assembly, or petition by assuming a teacher position at the University of Nebraska. However, in signing a contract to work at the University he did undertake obligations of cooperation with reasonable

⁷⁸Rozman v. Elliott 335 F.Supp. 1086, 1096 (1971).

⁷⁹Ibid., at 1097.

directives of the administration. "Insubordination is a proper ground for nonrenewal of a contract, even when it becomes enmeshed with reliance upon constitutional rights, Nelson v. Los Angeles County, 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed. 2d 494 (1960), at least where reasonable alternatives for expression of dissent are available, as they were in the present case."⁸⁰

As a general rule there appears to be no justification for restricting the right of a professor to engage in nonpartisan advocacy of social or political causes. Justification would come only after a showing of cause that the classroom performance of the teacher was impaired by the activity in question.⁸¹ The state's interest in preserving the integrity of public service and insisting that public employees refrain from politics has been upheld.⁸² The right to political activity is closely associated with the right of freedom of speech.⁸³ Again it has been argued that barring interference with classroom activity, the public should not be denied the

⁸⁰Ibid., at 1098.

⁸¹Johnson v. Branch 364 F.2d 177 (4th Cir., 1966), cert. denied, 385 U.S. 1003 (1967).

⁸²United Public Workers v. Mitchell 330 U.S. 75 (1947); Jones v. Board of Control 131 So.2d 713 (Fla., 1961).

⁸³See page 79.

benefit of hearing from the intellectual leaders regarding social and political issues.⁸⁴

When a faculty member becomes involved in a campus demonstration concerning political or social issues facing the country, the protective umbrella of the Constitution cannot be used to disrupt the conduct of the administrators in charge of the workings of the university.⁸⁵ Insubordination cannot be justified under the guise of free speech and political freedom if alternative methods of expression of dissent are available.⁸⁶

Freedom of Speech and Association

As a general rule, no teacher may be discharged from employment or not have a contract renewed because of an expression protected under the First Amendment. Freedom of speech, however, is not an absolute right. The classic approach to a problem when governmental authority and the individual's rights are in conflict has been to balance those rights to determine whose rights should prevail.

⁸⁴"Developments in the Law: Academic Freedom," Harvard Law Review 81 (1968): 1070.

⁸⁵*Rozman v. Elliott* 335 F.Supp. 1086, 1097 (1971).

⁸⁶*Rozman v. Elliott* citing *Nelson v. Los Angeles County* 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed. 2d 494 (1960).

One of the most famous cases for the issue of free speech was Schenck v. United States. In that case Justice Holmes eloquently stated:

The character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words are used in such circumstances and of such nature as to create a "clear and present danger" that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.⁸⁷

This case introduced one of the most famous principles of law in the interpretation of the oppression of free speech.

Murphy claims that the " . . . first recognition of academic freedom as constitutionally protected speech came in a dissenting opinion by Justice Douglas in Adler v. Board of Education."⁸⁸ Douglas argued that "The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher."⁸⁹

Pursuant to authorization by the legislature, the attorney general of New Hampshire questioned Sweezy about his connections with the Progressive Party and the

⁸⁷Schenck v. United States 249 U.S. 47, 52 (1919).

⁸⁸William P. Murphy, "Educational Freedom in the Courts," AAUP Bulletin 49 (December 1963): 314. Author's note: Adler v. Board of Education 432 U.S. 485 (1952), see note 36, p. 61.

⁸⁹342 U.S. at 508.

material used in a series of lectures he delivered at the University of New Hampshire. Sweezy refused to answer the questions, claiming that they infringed on his First Amendment rights. In Sweezy v. New Hampshire,⁹⁰ by a majority of six members of the U.S. Supreme Court,⁹¹ academic freedom was recognized as a constitutional right.

We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression-- areas in which government should be extremely reticent to tread. . . . The essentiality of freedom in the community of American universities is almost self-evident.⁹²

The six Justices felt that the contents of classroom lectures, at least at public universities, should be protected from legislative inquiry.

In 1959, the case of Barenblatt v. United States⁹³ cited Sweezy and noted the differences between the case at the bench and the material facts in Sweezy. Justice Harlan distinguished the two cases by stating that the Communist Party and the Progressive Party were "very

⁹⁰Sweezy v. New Hampshire 354 U.S. 234 (1957).

⁹¹Author's note: Justices Warren, Black, Douglas, Brennan with Justices Frankfurter and Harlan concurring in the result.

⁹²354 U.S. 234, 250; see also: Murphy at 315.

⁹³Barenblatt v. United States 360 U.S. 109 (1959).

different things" and he further noted that the interrogation as to the content of a lecture was a factor absent from the Barenblatt case. This opinion leaves the teacher as citizen in the difficult position of ascertaining the shades of political differences between political parties or organizations as interpreted by the Justices of the Supreme Court.

Barenblatt was summoned to testify before a Subcommittee of the House of Representatives Committee on Un-American Activities. He refused to answer questions as to whether he has then or had ever been a member of the Communist Party. Selecting not to claim privilege against self-incrimination, he opted to object generally to the right of the Subcommittee to inquire into his "political" and "religious" beliefs, "private or personal affairs" or "associational activities" on the basis of the First, Ninth, and Tenth Amendments. Barenblatt's conviction was sustained by the U.S. Supreme Court.

Shelton v. Tucker⁹⁴ protects nontenured teachers⁹⁵ from having to answer overly broad inquiries as to their fitness as public servants. A statute was struck down that required teachers to list every organization to which they have belonged or contributed. This was ruled

⁹⁴Shelton v. Tucker 364 U.S. 479 (1960).

⁹⁵Author's note: Arkansas had no tenure system.

by the U.S. Supreme Court as having an inhibitory effect on their associational activities. However, the state does have the authority to require applicants or incumbent teachers to answer questions concerning extramural conduct that are relevant to one's fitness to teach in a public institution.⁹⁶ Wieman and Keyishian held that mere evidence about membership in "subversive" organizations is not constitutionally relevant to the fitness of a teacher, thus narrowing the criteria used to determine fitness to teach in a public school.

From the beginning, the case of Koch v. Board of Trustees of the University of Illinois⁹⁷ was something of a cause célèbre and an example of dismissal because of speech. Koch, a biology teacher, was dismissed because of a letter which he published in the university newspaper advocating a more lenient attitude toward premarital sexual intercourse between college students. The Supreme Court of Illinois transferred the case to the Appellate Court contending that no constitutional issues were involved. The Appellate Court affirmed the dismissal of the entire case. It is unfortunate that the Illinois Supreme Court felt that ideas offensive, repugnant or

⁹⁶ Beilan v. Board of Education 357 U.S. 399, 2 L.Ed. 2d 1414, 78 S.Ct. 1317 (1958).

⁹⁷ 187 N.E. 2d 340 (1963).

contrary to commonly accepted standards of morality were outside the area of constitutionally protected speech.

In defense of faculty constitutional civil rights, Pickering v. Board of Education⁹⁸ is probably most often cited. Marvin Pickering, a high school teacher, was dismissed for writing and publishing in a newspaper a letter criticizing the Board of Education's allocation of school funds between educational and athletic programs. The Circuit Court affirmed his dismissal, a decision that the U.S. Supreme Court reversed.

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.⁹⁹

Justice Marshall, writing for the majority, stated that it would not be appropriate or feasible to attempt to lay down a general standard against which all statements made by faculty may be judged. The enormity of fact situations in which critical statements by faculty

⁹⁸ 391 U.S. 563 (1968).

⁹⁹ Supra at 572-573.

members could be made make it necessary to balance the interests of the state against those of the teacher in each individual case.

Pred v. Board of Public Instruction of Dade County, Florida¹⁰⁰ held that the allegations of two teachers who were denied fourth year contracts, tantamount to tenure, because of participation by each in teacher's association to protect the interests of all teachers and by one in the advancement in the classroom of new demands for campus freedom, stated a cause of action as to whether the plaintiffs were denied their First Amendment rights. The Pred decision classifies such rights as constitutional and not contractual, thus aligning the Fifth Circuit with the Fourth Circuit,¹⁰¹ and against the Tenth Circuit.¹⁰²

Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by (section) 1983 (of the Civil Rights Act). But in the posture of this case this misconceives the whole thrust of their claim. The right to be vindicated is not a contractual one, nor could it

¹⁰⁰ 415 F.2d 851 (5th Cir., 1969).

¹⁰¹ Johnson v. Branch 364 F.2d 177 (4th Cir. en banc, 1966), cert. denied 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967).

¹⁰² Jones v. Hopper, 410 F.2d 1323 (10th Cir., en banc, 1969), cert. denied 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970).

be since no right to reemployment existed. What is at stake is the vindication of constitutional rights--the right not to be punished by the State or to suffer retaliation at its hand because of public employee persists in the exercise of First Amendment rights.¹⁰³

Consistent with the Pred decision, the Fifth Circuit, in Orr v. Thorpe¹⁰⁴ held that complaint alleging discrimination against members of a teachers association by school board members stated a claim on which relief could be granted, even though it did not appear that discrimination had extended to the actual discharge.

The basic requirements of a complaint based upon 42 U.S.C. section 1983 are: (1) that the conduct complained of was engaged in under color of state law, and (2) that such conduct subjected the plaintiff to a deprivation of rights, privileges, or immunities secured by the Federal Constitution and laws.

George Jones, Jr., as associate professor of philosophy at Southern Colorado State College, claimed that he was not reappointed because he exercised his constitutionally protected rights when he: (1) objected to the disqualification of an applicant for his department because the applicant was an Oriental; (2) attacked an English department textbook in a student newspaper;

¹⁰³415 F.2d at 856.

¹⁰⁴427 F.2d 1129 (1970).

and (3) founded an independent faculty-student publication which contained articles criticizing the Viet Nam War, and comments concerning other issues of social and political importance. The 10th Circuit Court of Appeals held that in absence of an allegation that conditions of employment were unreasonable or an allegation that the board of trustees had gone beyond authority granted in them by Colorado statutes, the plaintiff's claims were not sufficient to identify an interest or right secured by the Civil Rights Act.¹⁰⁵

The Fifth Circuit held in Rainey v. Jackson State College¹⁰⁶ that the complaint of a college teacher who had testified in an obscenity trial as to the literary and artistic merits of a film and who was dismissed from his teaching position on allegedly constitutionally impermissible grounds stated cause of action under the Civil Rights Act.

In 1970 the Fifth Circuit heard another case involving a claim that a faculty member had been dismissed for allegedly impermissible reasons. Dr. Ferguson, a professor in the Department of Business Administration at Texas A & M, was terminated because, inter alia, he had used classroom periods for discussions with students

¹⁰⁵410 F.2d 1323 (1969).

¹⁰⁶435 F.2d 1031 (5th Cir., 1970).

unrelated to the subject matter required to be taught. The school claimed that such action resulted in inferior instruction on Dr. Ferguson's part. The difference between the dismissal of Rainey, who testified in the area of his expertise, and Ferguson can be found in the following statement from the court's opinion:

Here the proof before the district court showed that Dr. Ferguson exercised his rights of speech and association to such an extent as to seriously impair, if not to destroy, his effectiveness as an instructor in an organized program of academic tutoring. This was his choice to make. The college had no right to control his speech or to curtail his freedom of association, but they did have a right to terminate his employment as a classroom instructor at the point where the exercise of his constitutional privileges clearly over-balanced his usefulness as an instructor.¹⁰⁷

The comments of a probationary teacher at an open public hearing before the school board in which the teacher labeled the director of secondary education a liar and questioned the administrator's honesty and competence and also challenged the integrity of the entire administrative staff of the board of education were not constitutionally protected.¹⁰⁸ Nor were the comments concerning Viet Nam and anti-semitism made by an

¹⁰⁷Ferguson v. Thomas 430 F.2d 852, at 859 (5th Cir., 1970).

¹⁰⁸Jones v. Battles 315 F.Supp. 601 (2nd. Cir., 1970).

instructor training foreign military officers in basic English held to be constitutionally protected.¹⁰⁹

H. Brent Davis, a language and literature teacher at the Arkansas A & M College at College Heights, was summarily dismissed on October 29, 1965 without explanation. Davis charged that he was dismissed for impermissible reasons; claiming that the real reason was that he had spoken out about the treatment of prisoners in the Arkansas state penitentiary and had advocated the abolition of corporal punishment in the prison. The Circuit Court held that Davis did have a cause for action and a well-stated claim for relief under 42 U.S. Code 1983 and the case was remanded to the District Court.¹¹⁰

Freedom of speech is not an absolute right although it has been recognized as indispensable to academic freedom.¹¹¹ In order to determine the scope of permissible governmental investigation of associations, speech, and other activities protected by the First

¹⁰⁹Goldwasser v. Brown 417 F.2d 1169 (D.C. Cir., 1969).

¹¹⁰Board of Trustees of Arkansas A & M College v. Davis (USCA, Ark.) 396 F2d 730 (1968); affirming (USDC, Ark.) 270 F.Supp. 528 (1967). Cert. denied, 393 U.S. 962, 89 S.Ct. 401, 21 L.Ed.2d 375 (1968).

¹¹¹Adler v. Board of Education 342 U.S. 485 (1952); Sweezy v. New Hampshire 354 U.S. 234 (1957).

Amendment, the interests of government must be weighed against the infringement of the protected rights of the individual.¹¹² Nontenured teachers are protected from having to answer overly broad inquiries as to their fitness as public servants.¹¹³ The mere evidence of membership in a "subversive" organization is not necessarily proof of being unfit for teaching.¹¹⁴ One criterion used to determine the appropriateness of speech is the extent to which it interferes with classroom performance of the teacher.¹¹⁵

Section III: Summary

The origin and general concepts of due process have been discussed in this chapter. A specific definition of due process is elusive. An understanding of the meaning of due process involves an analysis of its meaning on a case-by-case basis. The guaranty that no person shall be deprived of life, liberty, or property except by due process of law is fundamental to jurisprudence.

¹¹²Pickering v. Board of Education 391 U.S. 563 (1968), balancing of interests test.

¹¹³Shelton v. Tucker 364 U.S. 479 (1960).

¹¹⁴Wieman v. Updegraff, supra., and Keyishian v. Board of Regents supra.

¹¹⁵Pickering, supra; Ferguson v. Thomas 430 F.2d 852 (1970).

Procedural due process encompasses a long history dating back to (and possibly before) the signing of the Magna Charta. A faculty member's tenure was precariously tied to the pleasure of the governing board in the early history of American higher education. Only minimal procedural due process requirements were required in situations involving faculty dismissal. Substantive due process was not recognized by the courts until this century.

Within the sector of public employment, Justice Holmes' famous quotation articulating the right-privilege doctrine established a legal precedent devastating to the constitutional claims of employees. The essential soundness of the distinction has been overshadowed by the instances of its misapplication. The demise of the right privilege distinction has been traced through the concepts used to circumvent it. The United States Supreme Court in the Keyishian opinion explicitly stated that the hypothesis that public employment is a privilege is no longer a viable concept.

Once public employees were recognized as having certain rights within the realm of their employment, the substantive rights of teachers could be tested through due process procedures. The reasonableness of such claims could be tested through their denial under a specific set of circumstances.

The legality of legislative devices used to screen out disloyal teachers has a long judicial history. The sensitive nature of the classroom has led the state, in many instances, to make teachers account for their outside activities. Teachers have been questioned about their membership in organizations and have been asked to affirm that they have never been members of subversive organizations. In a series of court cases the United States Supreme Court has ruled that an employee cannot be barred from employment solely on the basis of membership in an organization, including subversive organization if they were innocent of the illegal aims of that organization. Loyalty oaths cannot be vague or overbroad, neither may they interfere with a teacher's First Amendment right of freedom of speech.

Loyalty oaths which do not contain a "disclaimer clause" but rather conform to the type of oaths taken by officials being sworn into public office have been upheld as constitutional.

It has been shown that it is one thing to dismiss a teacher for a specific finding of incompetency but quite another to deny continued employment to a professor refusing to furnish information to a federal committee and invoking the Fifth Amendment privilege against discrimination.¹¹⁶

¹¹⁶ Compare *Slochower v. Board of Education*, supra, with *Beilan v. Board of Education*.

In the absence of a showing that political activity or advocacy of social causes interfered with classroom performance, there is little justification for restricting such faculty activity. Freedom of speech and freedom of political activity are closely associated and considered to be fundamental rights of every person, including those in the public employ. However, political activity and advocacy of social causes on the campus, require a faculty member to exercise reasonable conduct, and not to interfere with the normal administrative functioning of the college or university. The Rozman case points out that insubordination cannot be justified as a logical consequence of freedom of speech and political activity if alternative methods of expression of dissent are available.

The right to freedom of speech is a right closely aligned with academic freedom. Generally the rights of the individual are balanced against the rights of the state in an effort to determine whose right should prevail. The Sweezy court determined that the contents of classroom lectures should be protected from inquiry by the state or its agency. However, there is a fine line between freedom of speech within a classroom lecture and interference with classroom performance due to lecturing outside of one's area of expertise.¹¹⁷

¹¹⁷ Author's note: compare *Rainey v. Jackson State College* with *Ferguson v. Thomas*.

CHAPTER III
SUBSTANTIVE DUE PROCESS REQUIREMENTS
FROM RECORDED CASE LAW
1972-1974

A professor may show entitlement to minimal due process by proving an interest in "property" or "liberty" within the meaning of the Fourteenth Amendment. The recent cases of the Board of Regents of State Colleges v. Roth¹ and Perry v. Sindermann² provide guidelines by which a professor who has no specific statutory or contractual guarantee of continuing employment may show a deprivation of liberty or property within the meaning of the Fourteenth Amendment. The purpose of Section I is to define and explore the property rights of tenured and nontenured faculty members. The circumstances which may cause a justifiable claim to an expectancy of reemployment are analyzed. Then the substantive rights of faculty

¹Board of Regents of State Colleges v. Roth 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972).

²Perry v. Sindermann 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972).

dismissed from institutions which claim the dismissal actions are necessitated by a situation of financial exigency are discussed.

Section II analyzes the liberty interests of faculty, including free speech, political beliefs, and association. A liberty interest is also invoked when the nonrenewal of a professor's contract forecloses eligibility for future employment opportunities where a teacher's good name, reputation, honor, or integrity is injured by such a nonrenewal of the contract. Substantive due process demands that the reasons for dismissing a faculty member must not be arbitrary or capricious. The test of arbitrariness as it has been applied to various dismissal cases is analyzed.

Historic Cases of Roth and Sindermann

David F. Roth was retained on a one-year contract for the school year 1968-1969 as an assistant professor at Wisconsin State University-Oshkosh. He did not have tenure as defined by the Wisconsin state statutes. During that year Roth was very vocal in his expressions of opinion regarding disturbances and controversies surrounding the administration. "Though Roth was rated by the faculty as an excellent teacher, he had publicly

criticized the administration for suspending an entire group of 94 black students without determining individual guilt."³

On January 30, 1969 the President of the University, Roger E. Guiles, informed Roth that he would not be offered an employment contract for the 1969-1970 school year. No reasons were given and no hearing was offered the plaintiff. Claiming that his rights under the First, Fifth and Fourteenth Amendments were violated, Roth filed suit.

The substantive protections of both tenured and nontenured faculty's First Amendment rights are "crystal clear." A faculty member cannot be terminated for exercising a freedom guaranteed by the federal constitution. District Judge Doyle cited Pickering, Keyishian, Slochower, Wieman, Pred, McLaughlin and Bomar in support of this statement.

With the issues re Roth's First Amendment rights settled, the issue then became whether the Fourteenth Amendment permits nonretention "on a basis wholly without factual support, or wholly unreasoned."⁴ Doyle

³33 L.Ed. 2d at 562.

⁴310 F.Supp. at 976.

noted that the case of Cafeteria Workers v. McElroy⁵ provides the most recent guidance.⁶

Doyle felt bound by Cafeteria Workers v. McElroy "to undertake the balancing process described there: that is, to determine 'the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'"⁷ After carefully weighing the interests of both the defendants and the plaintiff, Doyle held that procedural safeguards necessary to afford professors in a state university substantive constitutional protection against non-retention in violation of First Amendment rights or arbitrary nonretention include a statement of reasons why the university intends not to retain the professor, notice of a hearing at which the teacher may respond to the stated reasons, and a hearing if the teacher appears at the appointed time and place. The defendant's motion

⁵367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed. 2d 1230 (1960).

⁶Author's note: A worker at a Gun Factory had her ID taken away and was denied access to her place of employment for "security reasons." No reasons were given, no hearing was afforded. "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action" 367 U.S. 886, 895.

⁷310 F.Supp. at 977.

for summary judgment was denied. The plaintiff's motion for partial summary judgment and to be reinstated for the 1969-1970 academic year was also denied. The defendants were ordered to provide Roth with the reasons for dismissal and a hearing on those reasons. (The Court of Appeals affirmed the District Court's decision.)⁸

The United States Supreme Court granted writ of certiorari.⁹ The only question before the Court was whether the plaintiff had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. The Court held that he did not.¹⁰

Robert P. Sindermann became a member of the faculty at Odessa Junior College in September of 1965. He was employed as a college teacher in the state system for ten years at three different institutions. He remained a member of the faculty at Odessa College through the 1968-1969 academic year on a series of one-year contracts. In May of 1969 the president notified him that the Regents had voted to approve the president's recommendation not to renew Sindermann's contract for 1969-1970.

⁸446 F.2d 806.

⁹404 U.S. 909, 30 L.Ed. 2d 181, 92 S.Ct. 227.

¹⁰For a discussion of the procedural issues see Chapter IV.

Sindermann was elected president of the Texas Junior College Teachers Association in February, 1969. He also became aligned with a group known as "The Committee to Elevate Odessa," a group seeking to make Odessa a four-year baccalaureate granting institution. Such a change was officially opposed by the Board of Regents.

The reasons for Sindermann's dismissal became public when the Board of Regents issued a press release setting forth allegations of the teacher's insubordination. The press release, inter alia, stated that Sindermann had defied his superiors by attending legislative committee meetings concerning the proposed change of status of the junior college. The college officials had specifically refused his request to leave classes to attend such meetings.

In his complaint, Sindermann alleged " . . . that his contract was not renewed in order to retaliate against him for expressions of opinion, that he was a competent classroom teacher, that he had not been offered an impartial hearing in connection with the nonrenewal of his contract, that the action taken against him had a chilling effect on other professors at Odessa College, and that he had been damaged in his professional reputation and standing."¹¹

¹¹430 F.2d at 942.

The lower court granted the defendant's motion for summary judgment. The Court of Appeals held that the District Court's summary judgment was incorrect and that Pred v. Board of Public Instruction¹² invalidates the legal basis of the summary judgment. (The Pred case was decided by the 5th Circuit after the lower court made its finding.) The issue upon which the case should be decided is not a contractual one but rather involves whether the college refused to renew the teaching contract as a reprisal for the exercise of constitutionally protected rights. The nonrenewal of his contract would violate the 14th Amendment if it, in fact, was based on Sindermann's protected free speech, a First Amendment right.

The Pred and Sindermann decisions align the 5th Circuit with the 4th Circuit¹³ in finding that persons so situated have standing to sue re constitutional rights rather than contractual rights. The 10th Circuit, in Jones v. Hopper¹⁴ took the opposite view holding that at issue were contractual rights.

¹²415 F.2d 851 (5th Cir. 1969).

¹³Johnson v. Branch 364 F.2d 177 (1966).

¹⁴410 F.2d 1323 (10th Cir. en banc, 1969), cert. denied 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970).

Circuit Judge Clark noted that "Summary judgment should be granted only when the truth is clear, where the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts."¹⁵ The Circuit Court found that the truth of Sindermann's constitutional position was "far from clear." For this reason the District Court's finding was reversed and the case remanded.

On certiorari the United States Supreme Court affirmed the decision of the Court of Appeals.¹⁶ The decisions of Roth and Sindermann were considered at the same time.

Although the cases of Roth and Sindermann were adjudicated by the U.S. Supreme Court on procedural issues only, they are at least historic decisions in the field of public education and deserve close scrutiny. They are important not only for the rulings regarding procedural due process but for the implications concerning substantive matters.

¹⁵430 F.2d at 943.

¹⁶408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

Section I: Property Interests

Property is a legal institution designed to provide the protection of due process of law of certain private rights of any kind of wealth.

The institution (property) performs many different functions. One of these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. Within that circle the owner has a greater degree of freedom than without.¹⁷

Property interests are not created by the Constitution as are the rights of liberty, which are based upon provisions in the federal Constitution. Property interests

. . . are defined by "rules or understandings that stem from an independent source such as state law." The Court thus seemed to leave federal and state courts free to fashion "constitutional common law" rules to fit public employees into the various categories entitled to protection.¹⁸

Property in the legal sense extends beyond land and material goods to include an interest in continued employment if one has tenure or if one has a contract. A property interest may also be invoked if one has a clearly implied promise of continued employment. A subjective expectancy of reemployment does not create a property interest.

¹⁷Charles A. Reich, "New Property," Yale Law Journal 73 (1964): 771.

¹⁸Norman B. Smith and Patricia Gerbala, "Job Security for Public Employees," Washington and Lee Law Review 31 (1974): 559.

Expectancy of Reemployment

The Court held in Sindermann that the absence of statutory tenure, or express contractual provisions granting some form of job security, does not, per se, deny the lack of a protected property interest such as would entitle the plaintiff to a due process hearing. Sindermann offered to prove through the following statement from the faculty handbook, "Faculty Guide," that a teacher with his long period of service at Odessa College had a property interest in continued employment equal to a similar claim of a tenured teacher at any other institution:

Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.¹⁹

Sindermann claimed that he had legitimately met these conditions and, therefore, had an expectancy of continued employment, i.e., de facto tenure. The Court agreed stating that the absence of a written contract with an explicit tenure provision does not always foreclose the possibility that a "nontenured" faculty member has a property interest in re-employment. If the rules, policies, practices, or understandings of an institution lead to a "common law" in a particular university or

¹⁹33 L.Ed.2d at 579.

college, the employees have the equivalent of tenure.

"It is not required that a teacher show himself [sic] actually within a protected status; it may be sufficient to demonstrate eligibility for a protected status in order to get a hearing at which he may vindicate a legitimate claim to a secured property interest."²⁰

Sindermann provides a test of "mutually explicit understandings" to determine if there is an implied promise of continued employment to entitle a faculty member to due process protections.

But the Supreme Court didn't have to decide, and did not decide, whether that statement alone (in the faculty handbook) created an implied promise, or that the policy or practice of renewal entitled the teacher to a hearing. What the court held was that the statement alone was enough to entitle a teacher to a trial in which the court would, in the first instance, determine whether teacher in that college, based on the policies and practices of that institution, had an objective--not subjective--expectancy that they would be reemployed absent good cause.²¹

Besides the number of years that each plaintiff had been employed on one-year contracts at the same

²⁰Donald W. Griffis and John Richard Wilson, "Constitutional Rights and Remedies in the Non-Renewal of a Public School Teacher's Employment Contract," Baylor Law Review 25 (Fall 1973): 566.

²¹Michael Gottesman, "Due Process for Nontenured Teachers from the Teacher's Viewpoint," Frontiers of School Law (Topeka, Kansas: The National Organization on Legal Problems of Education, 1973), p. 12. Author's note: Gottesman argued the Sindermann case before the Supreme Court, and his firm was also involved in the Roth case.

institution, and important difference between the property interest claims of Roth and Sindermann can be found in the laws of the states of Wisconsin and Texas. In his concurring opinion in the Sindermann case, Chief Justice Burger specifically stated that the "right to a prior administrative hearing turns in each case on a question of state law. . . ." ²² Roth specifically did not meet the tenure requirements under the state statutes and, therefore, had no claim to an expectancy of re-employment. In the Sindermann opinion, the Court distinguished Roth, in holding that more than a "mere subjective 'expectancy' of re-employment" was involved.

From the Roth and Sindermann cases four factors evolve, any one of which would present a property interest claim sufficient to entitle the faculty member to a hearing prior to dismissal. First, tenure is a property interest. Tenured faculty cannot be dismissed without a prior hearing and good cause. A property interest is invoked if there is a contract and a faculty member, tenured or nontenured, is dismissed during the contract period. Third, if a faculty member can prove a "clearly implied promise of continued employment" a due process hearing is required. The fourth property interest involves the "objective expectancy of re-employment."

²² 33 L.Ed.2d at 581.

If the policies and practices of the institution or the school district contemplate or communicate, or can reasonably be understood by teachers that employment will be continued for subsequent years absent good cause, then the teacher has a sufficient property interest to entitle him to a hearing before renewal is denied.²³

Job promotions as well as dismissals involve the issue of whether a person has a property interest in employment. The Second Circuit in Schwartz v. Thompson²⁴ held that an attorney whose name failed to be placed on the promotion list was not deprived of any property interest to which he was entitled. The plaintiff, therefore, had no constitutional right to a due process hearing. The Second Circuit agreed with the Roth and Sindermann cases that where an employee must be accorded due process in a career decision, the right to a hearing of some kind is "paramount." But the range of property interests protected by procedural due process is not infinite, and in this case did not extend to promotion.

The Schwartz case aligns with the Ninth Circuit's holding in Olson v. Trustees of the California State Universities.²⁵ Olson was a tenured associate physics professor at California State University at Northridge. He was not promoted to the rank of Professor of Physics

²³Gottesman, supra, 11-12.

²⁴497 F.2d 430 (2d Cir. 1974).

²⁵351 F.Supp. 430 (9th Cir. 1972).

and consequently brought suit. The Court held that the plaintiff's promotion does not fit within the definition of property as defined in Roth.²⁶ District Judge Hauk, in explaining the elusive concept of property, relied on the Sindermann case: "A person's interest in a benefit, 'the Supreme Court explained,' is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."²⁷ No such agreements existed in Olson's case. The rules of the college clearly state this.

Of the cases studied, the Third, Fourth, Fifth, Seventh, Eighth and Ninth Circuits²⁸ have all held that where a nontenured faculty member's contract is not renewed and there is no implication in the rules of the

²⁶408 U.S. at 577.

²⁷351 F.Supp. at 433.

²⁸Author's note: See: Berry v. Hamblin 356 F.Supp. 306 (3rd Cir. 1973); Sheppard v. West Virginia Board of Regents 378 F.Supp. 4 (4th Cir. 1974); Johnson v. Harvey 382 F.Supp. 1043 (5th Cir. 1974); Ortwein v. Mackey 358 F.Supp. 705 (5th Cir. 1973); Shirck v. Thomas 486 F.2d 691 (7th Cir. 1973); Watts v. Board of Curators, University of Missouri 363 F.Supp. 883 (8th Cir. 1973); Perkins v. The Regents of the University of California 353 F.Supp. 618 (9th Cir. 1973); and Toney v. Reagan 326 F.Supp. 1093 (9th Cir. 1971).

institution, institutional practices or state statutes of a promise of continued employment, the plaintiff fails to have a protectable property interest.

Some public employees who have been employed for a long period of time at the same institution have looked to the longevity issue in Sindermann in support of a claim to a protected property interest through an expectancy of continued employment. "A teacher, like the respondent (Sindermann), who has held his position for a number of years, might be able to show from the circumstances of this service--and from other relevant facts--that he has a legitimate claim of entitlement to job tenure."²⁹ Simmonds was dismissed from a government construction job after having been employed for more than four and one-half years. He had initially been employed on a temporary basis and through administrative oversight was never changed to a permanent employee. Here the court held³⁰ that the length of Simonds' employment was relevant but without more, it alone could not create due process rights.

Evelyn J. Johnson sought relief against the School Board and Superintendent of Schools of Russell County, Virginia for refusal to reemploy her as a

²⁹33 L.Ed.2d at 580.

³⁰Simmonds v. Government Employees' Service Commission 375 F.Supp. 934 (1974).

teacher, despite her continuous service of twenty-nine (29) years in Johnson v. Fraley.³¹ The lower court had dismissed her case and the plaintiff appealed. Senior Circuit Judge Albert V. Bryan reversed the lower court's holding on the authority of Sindermann. The court reasoned that injury to a teacher's professional reputation or livelihood caused by abrupt termination of employment after a substantial longevity warrants an inquiry upon whether means pursued satisfied constitutional due process.

In his concurring opinion in Johnson v. Fraley, Judge Boreman specifically wanted to clarify the significance of employment longevity in dismissal situations:

Referring to both Sindermann and Roth, my brothers state, "These decisions avouch that continuous employment over a significant period of time--such as appellant's 29 years--can amount to the equivalent of tenure." If my brothers intend by their statement to say that those opinions positively assert this conclusion I would be inclined to disagree, but the Court's opinions might be so interpreted as to provide for it. The teacher's allegations in the instant case seem to me to be sufficient to show the possible existence, in light of all the circumstances (citation omitted), of the "equivalent of tenure."³²

In Cannady v. Person County Board of Education³³ a black, nontenured elementary teacher brought suit

³¹470 F.2d 179 (1972).

³²470 F.2d at 184.

³³375 F.Supp. 689 (1974).

claiming that she was dismissed because of race and color and that she was denied due process of law in spite of her nineteen years of longevity with the school. The District Court held that the termination was the result of ineffectiveness in team teaching and individualized instruction rather than being based on racial bias, and that the plaintiff's nineteen-year longevity, in itself, did not raise a presumption that her termination constituted an infringement on her liberty.³⁴ Because of the similarity of the cases in terms of longevity, Cannady relied heavily upon Fraley. The court, however, concluded that Fraley "Does not go so far as to hold that longevity of employment, per se, raises a presumption of an infringement of "liberty."³⁵ The Fraley case involved a summary judgment at the District Court and the Court of Appeals was merely saying that she stated a cause of action under the Fourteenth Amendment.

In another case, Skidmore v. Shamrock Independent School District,³⁶ the court found that a long period of employment under one-year contracts does not constitute de facto tenure. The Fifth U.S. Circuit Court of Appeals found that a public school teacher who had been employed

³⁴Supra.

³⁵Supra at 699.

³⁶464 F. 2d 605 (5th Cir. 1972).

for twenty-two years on a series of one-year contracts, and who was not renewed for the 23rd year, failed to state a claim upon which relief could be granted.

The charge that the Supreme Court in Roth and Sindermann was creating de facto tenure on campuses where no tenure system existed seems unwarranted. Employment longevity is important and may create rights similar to tenure but only when considered with other factors. Longevity alone is not sufficient to create a property interest demanding satisfaction by constitutional due process. What is still unclear is what the length of time is required to define longevity thus making it a factor to be considered with others in a claim of property interest? In Johnson v. Harvey the plaintiff had been employed on two consecutive one-year contracts which was not sufficient to give rise to a property interest; Sindermann had been employed for four years as professor on a series of one-year contracts and this was sufficient to be taken with other factors to create a property interest.

Where no tenure system exists or where an employee is on nontenured status, the policies, practices or procedures of an institution might justify the implication of a sufficient property interest--despite lack of tenure. Official school policy in the Sindermann case, a teacher's

handbook in the case of Thomas v. Ward³⁷ and in the case of Johnson v. Fraley a school board regulation existed, which, when considered together with continuous satisfactory employment over a long period of years implied a sufficient property interest.

When Walker was hired as an English professor at California State College the president sent him a letter in which he stated that he hoped Walker would have a fruitful "tenure," at the institution. When Walker was dismissed without being given reasons for the action, he claimed that he had a right to continuous employment. The court held that he did not have tenure or expectancy of tenure arising from de facto tenure policy where the faculty manual explained that new members were hired with a probationary period of from three to five years. The letter from the president might have contained an unfortunate choice of words, but it in no way implied de facto tenure.³⁸

Dr. Zimmerer was employed as a teacher at San Jacinto Junior College in Texas for six years, five of

³⁷374 F.Supp. 206 (M.D.N.C. 1974). Author's note: Thomas p. 210 from the Handbook: "Once the teacher has signed a contract, she is employed until the teacher resigns or is dismissed. Cases of dismissals are rare and result from incompetence or from immoral or disruptive conduct."

³⁸Walker v. California State Board of Trustees 351 F.Supp. 997 (1972).

which she had been department chairperson. Zimmerer v. Spencer³⁹ clearly falls within "the common law of the institution" test as outlined in Sindermann. The Faculty Handbook contained a section entitled "Tenure" which stated inter alia, that "Tenure is expected to be stable."⁴⁰ The Board did not explain what the sentence meant, nor did they say that it was in the handbook by accident. The court examined these facts and with the guidance of the Sindermann decision held that the policy of the institution created the existence of a protectable property interest.

One of the issues in Gordenstein v. The University of Delaware⁴¹ involved the question of whether there can be "de facto" tenure at a university with a de jure tenure system. Gordenstein claimed that because of the university's evaluation procedures, nontenured faculty have a clear expectation of continued employment absent inadequate performance.⁴²

Ordinarily, it will be a difficult task indeed for a teacher to prove that despite the fact that he or she has not been expressly granted tenure there is a tacit mutual understanding that he or she has

³⁹485 F.2d 176 (1973).

⁴⁰485 F.2d at 178.

⁴¹381 F.Supp. 718 (1974).

⁴²Supra at 723.

something like the equivalent of that status. The Court, however, is unwilling to rule that the existence of a tenure system is inconsistent as a matter of law with the existence of an objective expectation of continued employment sufficient to bring the Fourteenth Amendment into play.⁴³

Because there was nothing brought out in the lower court trial about the assurances inherent in tenured status at the University of Delaware or about the evaluation procedures the District Court stated that the possibility of the existence of a "de facto" tenure system sufficient under Sindermann had not been eliminated. This is in contrast to a ruling of the Ninth Circuit in Toney v. Reagan.⁴⁴

After reading of Ferguson, and other cases discussing "expectancy of reappointment," makes clear that such concept is applicable only in those situations where the institution does not have a formal tenure system but deals with its faculty as though they do have tenure. The concept does not apply where there is, as in our pending case, a formal tenure system under which the institution makes clear distinction between those who have tenure and those who do not.⁴⁵

Often times public employee tenure rights arise from state statutes. Michael Papadopoulos was employed at Oregon State University from 1967 to 1970 teaching mathematics. In 1969, he was denied tenure and the decision was made to terminate his employment. "Whether

⁴³Supra at 723-24.

⁴⁴326 F.Supp. 1093 (1971).

⁴⁵Supra at 1096.

the Board was required by constitution to accord petitioner a pretermination hearing depends upon the existence and extent of petitioner's entitlement to future employment under the Board's regulations."⁴⁶ One of the Board's regulations stated that a twelve-month notice would be given before termination. In effect the faculty continued working unless and until they received timely notice in accordance with the Board's regulations. This differs from the Roth case where the Wisconsin statutes stated: "The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made."⁴⁷

Under the Board's regulations, Papadopoulos had an entitlement to continued employment until June 1971; the Board discharged him effective June 1970. A proper hearing was not given. The court held, *inter alia*, that the petitioner's "expectation of continued employment was a property interest within the meaning of the Due Process Clause--he could not be deprived of continued employment until June 1971 without a pretermination hearing. . . ."⁴⁸

⁴⁶Papadopoulos v. Oregon State Board of Higher Education 511 P.2d 854, 872 (Ore. App. 1973).

⁴⁷Supra at 873.

⁴⁸Supra at 877.

Milton O. Pelisek, a school teacher at Trevor State Graded School District No. 7 in Salem, Wisconsin, challenged his dismissal on the grounds that his contract was automatically renewed by operation of a state statute because the school system failed to comply with the contract renewal and nonrenewal notice deadlines provided in the state statute. Citing Connell v. Higginbotham⁴⁹ the court stated that Pelisek "alleges facts which if proved, could, conceivably, show that there was an implied promise of future employment."⁵⁰

In Shirck v. Thomas⁵¹ the fact that an Illinois statute requiring that high school teacher who had no statutory tenure be given notice of nonrenewal did not create a sufficient "property" interest to bring into play the Due Process Clause of the Fourteenth Amendment.

The courts have also adjudicated several cases where the dispute revolved around whether the plaintiff had achieved a tenured status within an institution. Dr. Peacock went to the University of Arizona from the

⁴⁹ 305 F.Supp. 445, 18 A.L.R.2d 268 (1969); affirmed in part and reversed in part 403 U.S. 207, 29 L.Ed.2d 418, 91 S.Ct. 1772 (1971). Author's note: the court found that a "property" interest may also arise by implication.

⁵⁰ Pelisek v. Trevor State Graded School District No. 7 of the Town of Salem, Kenosha County, Wisconsin 371 F.Supp. 1064 at 1066 (1974).

⁵¹ 486 F.2d 691 (1973).

University of North Carolina in 1969 as Head of the Department of Surgery, College of Medicine. After three years he received written notice that his performance as Head of the Department was less than satisfactory. A report made by the Liaison Committee of the Association of American Medical Colleges and the American Medical Association was critical of the operation of the department of surgery and led to the president asking Peacock for his resignation. When it became evident that he wasn't going to resign the plaintiff was dismissed without notice and a hearing.

Peacock alleged that he had a property interest secured by a contract with the University. He also claims that his expectancy of employment as Head of the Department of Surgery was for six to ten years since that was the period of time that he and President DuVal had estimated as necessary to fully establish the Department of Surgery. The court rejected both of these claims.

While it is true that plaintiff gave up a rewarding and comfortable position at the University of North Carolina to come to Arizona, such conduct merely indicated plaintiff's confidence in his abilities and his subjective expectancy that all would proceed well in Arizona. Such a subjective expectancy is not a "legitimate claim of entitlement" as required by Roth, supra, before due process protections apply.⁵²

⁵²Peacock v. Board of Regents of the Universities and State Colleges of Arizona 380 F.Supp. 1081, at 1086 (1974).

His property interest in the Head of the Department came only from the written contract which was for the 1973 academic year.

Peacock's due process rights as a tenured professor were considered as a separate question from claims of a property interest in the Headship. The court stated that "it is so clear as to require no citation to authority that a tenured professor has a protected property interest."⁵³

Peacock argued that a department head is a representative of the department faculty and as such must be accountable to, and only to, that constituency. Peacock was quite well liked by the faculty in his department but reflected an attitude that the welfare of the Department of Surgery took precedence over that of the College of Medicine. The court stated that the case did not involve the extent to which democratic principles are relevant in academe. "The character or nature of department head is not a matter for this court to decide, rather it is a matter to be left to collective bargaining and private persuasion."⁵⁴

Dr. Raj P. Soni was employed by the University of Tennessee in the Department of Mathematics. At an

⁵³Supra at 1087.

⁵⁴Supra at 1085.

October 29, 1968 faculty meeting the University would have granted him tenure but he was not an American citizen. From then on they treated him like a tenured faculty member and he attended faculty meetings and voted on the tenure of others. On December 15, 1971 he became an American citizen. On March 9, 1973 he was summarily notified by letter that his appointment would be terminated in August of that year. The court held that he in effect did have tenure and was entitled to due process hearing before his employment was terminated and that he was entitled to back pay from the date of termination until the date on which the university complied with the due process requirements.⁵⁵

In Francis v. Ota⁵⁶ the court held that the procedures for determining whether to grant tenure to a probationary faculty member were not followed and that the plaintiff had a legitimate expectation of future employment until the university administration deprived him of that expectation by not following their proscribed procedures. This expectation of future employment was sufficient to create a property interest and since neither notice nor a hearing was granted before the decision to

⁵⁵ Soni v. Board of Trustees of the University of Tennessee 376 F.Supp. 289 (1974).

⁵⁶ 356 F.Supp. 1029 (1973).

dismiss was made the property interest was denied to the plaintiff without due process of law.

In-Cho Chung brought suit against Mansfield State College claiming that he possessed a contractual right to continuous employment under the College's Tenure Policy which was violated when his employment was terminated without an adequate hearing. The lower court held that where the state college failed to dismiss the professor at the end of the third probationary year, the professor obtained tenure and was entitled to due process hearing prior to termination of employment; the fact that in the past no one had ever demanded a due process hearing when fourth- and fifth-year probation had not been granted could not abrogate terms of the contract, which incorporated the college's tenure policy. The tenure policy stated that "After a three year probationary period, a faculty member shall either be (1) released from duty, (2) given tenure, or (3) extended on probation for two more years if he be given specific requirements to be met on a yearly basis, subject to review at the end of each semester."⁵⁷ Dr. Chung did not receive any specific requirements to be met during the two extra probationary years. The tenure policy became part of his contract and he in effect received tenure at the end of his third probationary year.

⁵⁷Chung v. Park 369 F.Supp. 959 at 965 (1975).

The cases of Francis and Chung both point out the need for University administrative officials to comply with "the letter of the law" of university tenure policies. Tenure Policies when incorporated into an employment contract are just as binding as any other paragraph in the contract.

Financial Exigency

Financial exigency is one situation that cuts across the claims of expectancy of reemployment of both tenured and nontenured faculty. This situation received much national press when Southern Illinois University was forced to terminate the employment contracts of 104 faculty and staff members in 1974 who had been dismissed because of the institution's alleged financial troubles. Such measures were necessitated when the statewide board of higher education cut \$2.7 million from the Carbondale campus's basic budget. The situation is similar in many states and on many campuses.

The decision of the American Association of University Professors, Bloomfield College Chapter v. Bloomfield College⁵⁸ indicates suggested guidelines of what institutions of higher education must do if they want to dismiss tenured professors claiming circumstances of financial exigency. Thirteen tenured professors of

⁵⁸129 N.J. Supra, 249, 322 A.2d 846 (1974).

Bloomfield College were informed on or before June 30, 1973 that they would be dismissed from employment after the 1973-1974 academic year; they were all given one-year terminal contracts. During the period between June 21, 1973 and commencement of the school year in September, 1973, the College engaged the services of twelve new and untenured teachers to serve on the faculty. The plaintiffs questioned the extent of the financial exigency in light of the employment by the College of twelve new faculty members;⁵⁹ plaintiffs brought suit claiming denial of due process.

Judge Antell, in the Superior Court of New Jersey, relied heavily on the basic tenets of the 1940 Statement of Principles on Academic Freedom and Tenure. "Except for the fact that the 1925 Conference Statement recognized discharges for financial exigency 'provided they were undertaken as a last resort,' Metzger, Academic Tenure in America: A Historical Essay, appearing in Faculty Tenure, A Report and Recommendations (by the Commission on Academic Tenure in Higher Education, 1973), the term is highly relative and must be applied within a given

⁵⁹ There was also a question about the unwillingness of the College to sell The Knoll Country Club as a viable alternative to the abrogation of tenure.

context."⁶⁰ Financial exigency is almost as elusive and difficult to define as due process.

Its applicable register of meaning is to be found somewhere between the understanding offered by the Chairman of the College's Board of Trustees as "an urgent financial situation about which something had to be done in order to stay in business" and that propounded by the Princeton Professor of Economics who advocated that financial exigency exists "when, taking into account all assets, potential assets, sources of funding, income and all alternative courses of action, the continued viability of the institution becomes impossible without abrogating tenure."⁶¹

Financial exigency finds its meaning in light of the circumstances of the institution. "To say that it connotes a state of pressing urgency, a time of crisis or immediate need, is meaningless without knowing the nature of the particular need, its relationship to the purposes of the institution, and what will be sacrificed by its nonfulfillment."⁶² The process of defining financial exigency involves weighing the alternative proportions of cost and objectives. Such value judgments are determined, influenced, by the occasion.

The importance of Judge Antell's decision and the clarity it affords as a guideline to other colleges

⁶⁰"The Bloomfield College Case--The Decision of the New Jersey Superior Court (AAUP et al. v. Bloomfield College et al.)," AAUP Bulletin 60 (September 1974): 326.

⁶¹Supra.

⁶²"The Bloomfield College Case," supra, p. 326.

is based on two factors: (1) the decision is based on contract law; and (2) the college administration had the burden of proof to justify the assertion of financial exigency. An examination was made to see if the contracts of the dismissed faculty members were valid in conferring tenure. The language of the 1940 Statement of Principles was held to be sufficient to establish a contract between the tenured faculty and the college. Finding that they were valid, it was then determined that the contracts had been breached. The remedy for the breach of contract involved reinstatement of the aggrieved faculty members.⁶³

The parties to the case outlined three conditions to be met by the College as limiting the Board's discretion. The conditions are: (1) that the Board's action be demonstrably bona fide, (2) extraordinary circumstances, (3) that the staff expansions in other areas not be undertaken except in "extraordinary circumstances."⁶⁴

The test used by the court to determine the intent of the Board's action was to examine the economic conditions of the College, the standards used in determining the necessity for terminating tenured faculty members and other extraordinary circumstances claimed by the College,

⁶³ Author's note: this remedy is unusual for breach of employment contracts.

⁶⁴ "The Bloomfield College Case," *supra*.

and to evaluate the extent to which such actions relieved or alleviated the conditions of financial exigency.

The College had the burden of proving that the state of financial exigency existed at the institution. Because of the nature of the case the burden of proof was changed from the plaintiff to the defendant. "But especially when the substantive content of financial exigency is still so uncertain, and when in any event it must be drawn from the facts of the particular case, it may be decisive that the administration must establish the required exigency rather than making the dismissed faculty member bear the usual burden of a plaintiff, namely to persuade the trier of every element of the case."⁶⁵

The Court also had to determine whether sufficient credible evidence of "exigency" and "extraordinary circumstances" existed to justify the conclusion reached by the college and their resulting actions. The intent of the court was to safeguard the tenured faculty from dismissal under capricious or arbitrary circumstances. This decision-making process required the court to make an allowance for:

. . . the obligation incumbent upon the Board of Trustees to manage the business of the College, to appraise and project existing and future needs and resources and to act in the light of its own best judgment free of outside interference, its duty to honor solemnly undertaken tenure commitments, the objective data relating to the College's

⁶⁵Supra, p. 321.

financial circumstances, its financial history, the authenticity of the financial threat, evaluation expressed by the Board of Trustees, the existence of real alternatives to the action taken, and the nature and extent of academic tenure itself. We must somehow orchestrate these dissonant and uncongenial values, rights, obligations, objective facts, and subjective judgments into a unified standard by which to judge whether the defendants have carried their extraordinary burden of proof in justification for the firing of tenured faculty members and the abrogation of tenure for others.⁶⁶

After careful scrutiny the court concluded that the actions of Bloomfield College regarding the dismissal of some tenured faculty and placing others on one-year contracts constituted a breach of contract as such actions extended beyond the rightful authority of the institution.

The plaintiffs had all fulfilled the seven-year probationary period and in return for the full performance of their obligations they had been granted tenured status. Tenure in academe is not a guarantee of life employment. However, following the 1940 Statement of Principles, tenured faculty can be released only for cause or financial exigency.

The college failed to demonstrate that financial exigency warranted the actions taken against the thirteen faculty members. The court noted that twelve untenured teachers were hired after the thirteen tenured teachers were dismissed. Obviously this substantially weakened administrative claims of financial exigency. The

⁶⁶Supra, p. 327.

financial benefit afforded the College by placing all of the faculty on terminal one-year contracts was unclear to the court and was instead seen as "repudiation of a contractual duty without any semblance of legal justification."⁶⁷ When dismissal for economic reasons has been used as a subterfuge the courts have not hesitated to invalidate the dismissal of tenured faculty.⁶⁸

The distinction between the right of tenured and nontenured faculty dismissed in order to reduce the size of the college personnel staff is made in Collins v. Wolfson.⁶⁹ In a move toward financial economy seven instructors at Miami-Dade Community College were not renewed. It was held that the allegedly subjective criteria did not in and of itself violate the First Amendment rights of the nontenured faculty, the tenured instructor should have been permitted to establish entitlement in a pretermination hearing. The hearing

⁶⁷Supra, p. 327.

⁶⁸Author's note: precedent cases include: Walker v. Wildwood Board of Education 120 N.J.L. 408 (Sup. Ct. 1938); Viemeister v. Prospect Park Board of Education 5 N.J. Super. 215 (App. Div. 1949); Downs v. Hoboken Board of Education 13 N.J. Misc. 853, 181 A. 688 (Sup. Ct. 1935); Wall v. Stanley County Board of Education 378 F.2d 275 (4th Cir. 1967); Chambers v. Hendersonville City Board of Education 364 F.2d 189 (4th Cir. 1966); 68 Am. Jur.2d Schools, 168; Annot., 100 A.L.R. 2d 1141, 1179.

⁶⁹498 F.2d 1100 (1974).

would be for the purpose of determining that the position was in fact "discontinued" within the meaning of the instructor's contract and, if he was the victim of a reduction in force, that the college trustees made the decision pursuant to their announced criteria.

A Washington D.C. court ruled that nontenured faculty do have a cause for civil action when dismissal is necessitated by financial stringencies and persons of lesser seniority are retained.⁷⁰ This issue is particularly acute in light of the affirmative action efforts of colleges and universities.⁷¹

In sharp contrast to the procedures used at Bloomfield College, The University of Wisconsin system provided detailed procedures to be used by the tenured faculty laid off due to financial exigency.⁷²

⁷⁰Cardinale v. Washington Technical Institute
500 F.2d 791 (1974).

⁷¹Author's note: In the state of Washington, the Higher Education Personnel Board enacted in December, 1974, regulations for personnel layoffs consistent with their affirmative action programs. One of the rules mandates the selective retention of minorities and women when they are under-represented in their respective employing units. The Washington State Employees Association and the Washington Federation of State Employees AFL-CIO have filed suit against the implementation of these procedures. See American Association for Affirmative Action Newsletter, Volume 1, No. 7, September 15, 1975, p. 4.

⁷²Author's note: For a discussion of the procedural requirements mandated by case law re dismissal due to financial exigency, see Chapter IV.

Because of budgetary decisions of the governor's office and reduced enrollments on several of the campuses of the University of Wisconsin, several tenured faculty members were selected to be laid off.⁷³ In Johnson v. The Board of Regents of the University of Wisconsin System⁷⁴ the tenured faculty alleged that they had been denied minimal procedural due process.

The fact that the University had grounds to declare a state of financial exigency was not in dispute. The University System biennial budget contained " . . . a flat requirement that there be a 2.5% reduction in the base budget of the System for 1973-1974 and another 2.5% reduction for 1974-.975."⁷⁵ Reduced enrollments by state law required a reduction in funds available to the affected campuses also.

Section 37.31(1)(a) of the Wisconsin Statutes governs the dismissal of faculty from public institutions in that state. "This statute provides, in part, that the 'employment shall be permanent, during efficiency and good behavior . . . ' and that the employment may not be

⁷³ Author's note: Originally the plaintiffs were terminated but the Regents decided to refer to the action as "lay-off." The state statutes did not specify fiscal exigency as a basis for the termination of tenured faculty.

⁷⁴ 377 F.Supp. 227 (1974).

⁷⁵ Supra, 230.

terminated involuntarily, except for cause upon written charges."⁷⁶ At no time did the defendants charge or imply that the plaintiffs were inefficient. The state statutes do not declare what must be done in a situation of financial exigency. Likewise the state courts, at the time the defendants made their decision, had not made a clear declaration on this point. The defendants contend that the nature of the property rights of the plaintiffs due to an involuntary cessation of employment based on declining student enrollments and budget reductions would not afford them due process procedures to which they normally would be entitled. Judge Doyle relied on the United States Supreme Court ruling in Arnett v. Kennedy⁷⁷ in deciding this point.

. . . three members of the Court held that all of the attributes of the "property" interest which an appointee acquires in a position in public employment may be completely defined by the entity which creates the position (in Arnett, the Congress), including whether any procedural protections whatever are to be afforded and, if so, which procedural protections and whether they are to be afforded prior to or subsequent to termination or lay-off. But six members rejected this position . . . and expressed the view that once the entity creating the position has afforded it the attribute of permanence or "tenure," then the due process clause of the Fifth or Fourteenth Amendment determines the minimal procedural protection which must attend termination or lay-off.⁷⁸

⁷⁶Supra, 231.

⁷⁷416 U.S. 134 (1974).

⁷⁸377 F.Supp. at 235.

Doyle then concluded that the state legislature had granted the employment of the plaintiffs with a certain amount of permanence to prevent dismissal or lay-off without minimal due process procedures. The property right of the faculty in continued employment granted by the state law gives the federal court reason to rule on the procedural protections of the faculty afforded by the Fourteenth Amendment.

The questions of whether tenured faculty in a situation of financial exigency have a constitutional right to continued employment and whether actions by an institution foreclosed future employment opportunities for the dismissed faculty were central to the case of Levitt v. Board of Trustees of the Nebraska State College.⁷⁹

The plaintiffs were given a hearing and all due process rights including the questioning of adverse witnesses. The court held that the discharged faculty members failed to demonstrate that the method of selection of faculty members to be terminated to meet the budget reduction was arbitrary or capricious, and that the fact that the termination or nonretention might create difficulties in the subsequent academic careers of the discharged members such action did not establish any loss of constitutional

⁷⁹ 376 F.Supp. 945 (1974).

rights or liberties. Nonretention is not itself a stigma. Tenure does not imply an absolute right to continued employment.

The criteria that the Peru College used to determine who would be dismissed was applied to each member of the faculty and related to the maintenance of only the most necessary programs at the institution. Faculty who were not instrumental in one of these programs were the most likely to be terminated. The court agreed with such procedures stating that "the use of objective criteria in selecting faculty members for termination has generally been looked upon with favor by the courts when faced with substantially the same problem in desegregation cases."⁸⁰

The college or university has the burden of proof in a situation of dismissal due to financial exigency. The employing institution must be able to show that such action is demonstrably bona fide, that extraordinary conditions relating to the financial economy of the

⁸⁰Supra, 950. The court cited: Rolfe v. County Board of Education of Lincoln County Tennessee, 282 F.Supp. 192, 200 (E.D.Tenn. 1966), aff'd 391 F.2d 77 (6th Cir. 1968); McFerren v. County Board of Education of Fayette County, Tennessee 455 F.2d 199, 201 (6th Cir. 1971); Moore v. Board of Education 448 F.2d 709, 713 (8th Cir. 1971).

institution do in fact exist,⁸¹ and that these conditions justify the measures taken in dismissing tenured faculty.

Tenure is not a guarantee of life employment. Good cause or financial exigency must be proved in most cases to terminate the tenured status of an employee. Nontenured faculty may be dismissed due to financial exigency without an entitlement to a pretermination hearing. However, tenured faculty are entitled to such a hearing to determine if dismissal decisions are made according to established university criteria.⁸² Although nontenured faculty are not afforded the same degree of due process as tenured faculty, they do state a cause for action if dismissed when persons of lesser seniority are retained.⁸³ Such action would necessitate a determination of whether they were dismissed for arbitrary or capricious reasons.

Section II: Liberty

Liberty connotes freedom from extraneous control. It includes and comprehends all personal rights and their

⁸¹American Association of University Professors, Bloomfield College Chapter v. Bloomfield College 129 N.J.Super. 249, 322 A.2d 846 (1974).

⁸²Collins v. Wolfson 498 F.2d 1100 (1974).

⁸³Cardinale v. Washington Technical Institute 500 F.2d 791 (1974).

enjoyment.⁸⁴ The Roth Court quoted from Meyer v. Nebraska to explain the concept: "Without a doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to orderly pursuit of happiness by free men."⁸⁵

Freedom of Speech and Expression

The extent to which academic freedom permits a nontenured teacher to practice a pedagogical style and philosophy different from that thought appropriate by school administration was the issue in Hetrick v. Martin.⁸⁶ Phyllis B. Hetrick was employed as an assistant English Professor at Eastern Kentucky University. Students and parents complained about certain of her in-class activities. " . . . in an attempt to illustrate the 'irony' and 'connotative qualities' of the English language, she told her freshman students 'I am an unwed mother.' At

⁸⁴Black's Law Dictionary, supra, at 1064.

⁸⁵33 L.Ed.2d at 558.

⁸⁶480 F.2d 705 (1973).

the time, she was a divorced mother of two, but she did not reveal that fact to her class."⁸⁷ She also took the liberty of discussing the Vietnam war and the military draft during one of her freshman English classes. Circuit Judge McCree held that the public school university consistent with the First Amendment was entitled to fail to renew a nontenured professor's contract because of displeasure with her pedagogical attitude.

The district court had discussed the scope of the protection afforded teachers by the First Amendment concluding:

The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A University has a right to require some conformity with whatever teaching methods are acceptable to it. . . . The court is not in a position to weigh the merits of Dr. Hetrick's educational philosophy--it may be that her methods of teaching were and are more desirable than those embraced by the other members of the English department--but the fact that the University decided that they were not and chose not to renew her contract, does not mean that her constitutional rights to academic freedom and freedom of speech were impinged.⁸⁸

Hetrick's attempt to have the court convert the vague term "teaching methods" into a form of speech that is protected by the First Amendment, making it an issue

⁸⁷Supra, at 706.

⁸⁸Supra, at 707-708.

that could not be considered by the university administration as a reason for nonrenewal, failed. The court plainly rejected the notion of substituting the First Amendment for tenure and elevating the contractual nature of tenure to constitutional status.

Hetrick aligns the Sixth Circuit with a district court in the Fourth Circuit which held in Cannady v. Person County Board of Education that teaching methods and teaching effectiveness were valid reasons for nonrenewal of a nontenured teacher's contract. Likewise a district court in Pennsylvania stated that incompetence and intrasincence with respect to dealings with superiors were both valid reasons for dismissal of a tenured faculty member.⁸⁹

President Carter, of Oklahoma College of Liberal Arts, demanded absolute loyalty from his faculty members. Failure to visit with him to discuss problems rather than discussing problems of the college with faculty colleagues was considered by Carter to be "diversive." President Carter terminated eleven faculty members and three administrative officials without giving reasons. In later testimony he stated that the reason for the dismissals was "divisiveness." Four of the dismissed faculty members had tenure before the College's Board of Trustees abolished tenure in 1972. The Tenth Circuit held that the dismissed faculty and administrative staff

⁸⁹Chung v. Park 377 F.Supp. 524 (1974).

were exercising First Amendment rights and were dismissed for impermissible reasons. "Surely the right to be free from this kind of personality control is a constitutionally protected right under the First Amendment since it is a species of expression."⁹⁰

The Tenth Circuit adjudicated another case with facts almost indistinguishable from Rampey v. Allen. In Smith v. Losee⁹¹ the court held that a faculty member's rights were violated when his contract was not renewed because of his anti-administration attitude and his outspoken criticism of and negative attitude toward the administration.

A college has a right to expect faculty to follow instructions and to work cooperatively with department heads and the administration. Academic freedom does not allow one to interrupt or infringe upon the normal operation of a college or university. In Chitwood v. Feaster⁹² the Fourth Circuit held that bickering and running disputes with department heads was not the kind of speech protected by the First Amendment. However, Pickering and later Sindermann protect faculty from recrimination

⁹⁰Rampey v. Allen 501 F.2d 1090 at 1098 (1974).

⁹¹485 F.2d 334 (10th cir. 1973).

⁹²468 F.2d 359 (1972).

when making public statements on political matters or publically criticizing the administration of public institutions.

In general, faculty are protected from recriminations when they are speaking out on a subject of public concern. Clark v. Holmes,⁹³ like Chitwood, distinguished between protected speech and disputes with superiors. The Seventh Circuit held that the plaintiff did not have a constitutional right to override wishes and judgment of his superiors and fellow faculty members as to proper content of a required course; nor did he have the right to engage in extensive personal counseling of students against the wishes of his superiors. Such disputes were not matters of public concern but rather involved Clark as a teacher rather than as an interested citizen. This is the important difference between Pickering and either Clark or Chitwood.

. . . we do recognize that, although academic freedom is not one of the enumerated rights of the First Amendment, Parducci v. Rutland, 316 F.Supp. 352, 355 (M.D.Ala. 1970), it is not clear that academic freedom, the preservation of the classroom as a "market place of ideas," is one of the safeguarded rights. Healy v. James, 408 U.S. 169, 180-181, . . . (1972). But we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution.⁹⁴

⁹³ 474 F.2d 928 (1972), cert. den. 93 S.Ct. 2148 (1973).

⁹⁴ Supra, at 931.

The cases of Clark and Chitwood involved disputes with superiors over actions outside the specific areas of assigned duties. The Hostrop⁹⁵ case involves action by a discharged college president who had every reason to believe that the actions for which he was dismissed were part of his assigned duties. On May 25, 1970, as part of his official duties, President Hostrop prepared a confidential memorandum for circulation among his administrative staff which requested that the staff consider certain proposed changes in the college's ethnic studies program. The memo leaked to the Board of Trustees. The Board questioned his administrative duties and claimed that the proposal was a breach of his administrative duties and was not a matter of free expression.

The district court dismissed the Hostrop case reasoning that Pickering restricted the rights of persons in personal and intimate working relationships with their superiors. The Seventh Circuit court reversed the district court's decision reasoning that the holding in Pickering has been misapplied. Pickering holds that an employee's speech may be regulated only if a public institution can show that its functions are being

⁹⁵ Hostrop v. Board of Junior College District No. 515, Counties of Cook and Will, and State of Illinois 471 F.2d 488 (1972).

substantially impeded by the employee's statements.⁹⁶
 It is contradictory to the spirit of Pickering to silence
 "vigorous and robust debate" in the formulation of edu-
 cational policy on the administrative level.

The Fourth⁹⁷ Circuit and the Ninth⁹⁸ Circuit share
 the view that an allegation that dismissal was for con-
 stitutionally impermissible reasons is sufficient to
 entitle plaintiffs to present evidence at a hearing.⁹⁹
 As the Fifth Circuit explained in Duke v. North Texas
State University, "When a violation of First Amendment
 rights is alleged, the reasons for dismissal or for non-
 renewal of an employment contract must be examined to see
 if the reasons given are only a cloak for activity or
 attitudes protected by the Constitution."¹⁰⁰ However,
 First Amendment claims must always be applied "in light

⁹⁶ 471 F.2d at 492.

⁹⁷ Chitwood v. Feaster 468 F.2d 359 (1972).

⁹⁸ Toney v. Reagan 467 F.2d 953, 956 (9th Cir.
 1972).

⁹⁹ Author's note: See also: Hirsch v. Green 368
 F.Supp. 1061 (1973). Held that allegations of plaintiff
 that he lost his position as deputy state's attorney in
 retaliation for his testimony before grand jury investi-
 gating activities of defendant state's attorney were suf-
 ficient to entitle him to present evidence at hearing on
 claim that he was thus denied his First Amendment rights.

¹⁰⁰ Duke v. North Texas State University 469 F.2d
 829, 837 (1973).

of the special circumstances of the environment," a test from the holding of the U.S. Supreme Court in Tinker v. Des Moines Independent Community School District.¹⁰¹

Mrs. Duke's use of profane language in a speech to students criticizing the administration of North Texas State University and her preparation of and distribution of leaflets announcing a protest meeting which violated school regulations were not found to be protected under the First Amendment. "The constitutionally protected right of a public schoolteacher to criticize the school administration and to comment on matters of public concern is a limited right, a right which must be balanced against the need for orderly school administration."¹⁰² The Circuit Court felt that Mrs. Duke owed the University a minimal duty of loyalty and civility to refrain from extremely disrespectful and grossly offensive remarks aimed at the administration. Because of her breach of this duty, the interests of the University outweighed her claim to protection under the First Amendment.

A college or university has no right to control or curtail a faculty member's speech. But at the point where constitutional privilege of freedom of speech clearly impairs a faculty member's usefulness as an

¹⁰¹393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

¹⁰²469 F.2d at 838.

instructor, the college or university has a right to terminate the employment contract. This is supported by the Fifth Circuit cases of Ferguson and Duke, and Dougherty v. Walker¹⁰³ in the Eighth Circuit.

The case of Mabey v. Reagan¹⁰⁴ involves a fact situation very similar to Pickering and substantially dissimilar to the student disruptions involved in the cases of Duke and Skehan v. Board of Trustees of Bloomsburg State College.¹⁰⁵ Maybe and five other nontenured faculty members at the California State University at Fresno allege that their contracts were not renewed as a direct result of their exercise of free speech and assembly. During a meeting of the academic senate in 1970, Maybe interrupted the proceedings to attempt to add to the agenda a discussion of an article which appeared in the Los Angeles Times which quoted the acting President as calling the younger members of the faculty "punks." At issue was whether the plaintiff's actions were so disruptive as to go beyond the traditionally protected expression. In considering the balance of interests of the parties the court cited Skehan, Duke and Ferguson and concluded that the

¹⁰³349 F.Supp. 629 (1972).

¹⁰⁴Maybe v. Reagan 376 F.Supp. 216 (1974).

¹⁰⁵501 F.2d 31 (1974).

plaintiff's conduct was not substantially disruptive of the school's normal functioning and was within the plaintiff's constitutionally protected First Amendment rights as a teacher.

The administration of a college or university has a right to expect faculty to work cooperatively with department chairpersons and other administrators. Differences in pedagogical style, teaching methods and teaching effectiveness are valid reasons for the non-renewal of a nontenured teacher's contract.¹⁰⁶ While encouraging vigorous debate over the subject content of courses, the court establishes that a university has a right to require some conformity to desired teaching methods.¹⁰⁷

Administrative control cannot extend to personality control. In the case of Rampey v. Allen both tenured and nontenured faculty were dismissed and their First Amendment claims were treated in the same manner.

The protection afforded faculty members who engaged in a dispute with superiors depends upon the nature and degree of the argument. Bickering and running

¹⁰⁶Hetrick v. Martin 480 F.2d 705 (1973); Cannady v. Person County Board of Education 375 F.Supp. 689 (1974); Chitwood v. Feaster 468 F.2d 359 (1972); Clark v. Holmes 474 F.2d 928 (1972), cert den. 93 S.Ct. 2148 (1973).

¹⁰⁷Hetrick v. Martin, supra, at 707-708.

disputes with department chairpersons is not considered to be protected speech.¹⁰⁸ Public statements criticizing public university administration or another topic of public concern is protected by the First Amendment.¹⁰⁹ Controversy arising because of actions that are a part of a person's assigned duties is considered to be within the meaning and spirit of Pickering.¹¹⁰ Criticism against a school administration is balanced against the need for orderly administration in an effort to determine whose interests and rights should prevail.¹¹¹

Political and Associational Activities

Nontenured teachers who were dismissed for allegedly exercising constitutional prerogatives of free speech, association and political beliefs found the circuit courts split on the issue of whether they

¹⁰⁸Chitwood, supra.

¹⁰⁹Pickering, supra, and Sindermann, supra.

¹¹⁰Hostrop, supra.

¹¹¹Maybe v. Reagan 376 F.Supp. 216 (1974); Skehan v. Board of Trustees of Bloomsburg State College 501 F.2d 31 (1974); Duke v. North Texas State University 469 F.2d 829 (1973); Ferguson v. Thomas 430 F.2d 852 (1970).

were entitled to a due process hearing prior to the Supreme Court holdings in Roth and Sindermann¹¹² as Table 3.1 indicates.

TABLE 3.1

DECISIONS OF CIRCUIT COURTS WHERE PLAINTIFFS ALLEGE
DISMISSAL BECAUSE OF IMPERMISSIBLE REASONS

Hearing Granted	Hearing Denied
Roth v. Board of Regents (7th Cir.)	Jones v. Hopper (10th Cir.) cert. denied.
Sindermann v. Perry (5th Cir.)	Drown v. Portsmouth School District (1st Cir.) cert. denied. (no hearing, but written reasons are required.)
Orr v. Trinter (6th Cir.)	Freeman v. Gould Special School District (8th Cir.) cert. denied.
Pred v. Board of Public Instruction (5th Cir.)	
Johnson v. Branch (4th Cir.) cert. denied.	

The fact situation in Katz v. Board of Trustees
of Gloucester County College¹¹³ is very similar in some
respects to Sindermann. Katz had been employed at the

¹¹²Roth v. Board of Regents of State Colleges 446
F.2d 806 (7th Cir. 1971); Sindermann v. Perry 430 F.2d
939 (5th Cir. 1970); Orr v. Trinter 444 F.2d 128 (6th Cir.
1971); Johnson v. Branch 364 F.2d 177 (4th Cir. 1966);
Jones v. Hopper 410 F.2d 1323 (10th Cir. 1969); Drown v.
Portsmouth School District 435 F.2d 1182 (1st Cir. 1970);
Thaw v. Board of Public Instruction 432 F.2d 98 (5th Cir.
1970); Pred v. Board of Public Instruction 415 F.2d 851
(1969).

¹¹³288 A.2d 43 (1972), reversed 310 A.2d 491
(1973).

college for three years, the fourth year would have carried tenure. However, he organized and became the first president of the Gloucester County College Faculty Association. Sindermann was also involved in faculty organizational activities at Odessa College prior to his dismissal. Katz, like Sindermann, was dismissed without reasons or without a hearing. The Superior Court of New Jersey granted judgment for the defendants saying, *inter alia*, that they disagreed with the lower court's decision in Roth.

We agree that the balancing process used in Cafeteria Workers is perhaps the proper approach; we disagree with the result reached in Roth. We fail to understand how the tenure system, which is the legislatively enacted policy of New Jersey and which was approved inferentially in Shelton v. Tucker, . . . can long co-exist along-side the procedures promulgated in Roth.¹¹⁴

The court reasoned that if nontenured teachers were entitled to a statement of reasons and a hearing prior to dismissal the differences between tenured status and nontenured were negated.

The Circuit Court (3rd) disagreed with the lower court's holding, finding that Katz had made a showing that the activities related to the Faculty Association were an element in his nonrenewal decision and therefore he was entitled to a "full expression of this issue."¹¹⁵

¹¹⁴288 A.2d 43, 48 (1972).

¹¹⁵310 A.2d 491 (1973).

Even though a faculty member may have reason to show cause of dismissal for impermissible reasons, many may be discouraged because of the tremendous cost involved in a legal battle. Not unaware of this problem the Second Circuit in Stolberg v. Members of the Board of Trustees for the State Colleges of the State of Connecticut,¹¹⁶ awarded attorney's fees to the plaintiff. Attorney fees were granted to assure those so situated that they need not be prohibited from vindicating clear constitutional claims.

The circuit courts have been unwilling to carte blanche allow a nontenured faculty member the right to a hearing for an allegation of impermissible reasons such as freedom of speech or political activities. See Balen v. Peralta Junior College District¹¹⁷ and Lewis v. Spencer¹¹⁸ in which the 9th and the 5th Circuits did not find merit to the appellents' contentions. A nontenured faculty member in such a situation has the burden of proof of going forward with the evidence that political or associational activities result directly in an administrative decision for nonrenewal or dismissal.

¹¹⁶474 F.2d 485 (1973).

¹¹⁷111 Cal. Rptr. 343 (1974).

¹¹⁸369 F.Supp. 1219 (1974).

Of the cases listed in Table 3.1 four were denied a writ of certiorari by the United States Supreme Court--Johnson v. Branch, Jones v. Hopper, Drown v. Portsmouth School District, and Freeman v. Gould Special School District. Circuit courts in the latter three cases had all denied hearings for nontenured teachers alleging dismissal or nonrenewal for impermissible reasons. Both the Roth and Sindermann cases were granted a writ of certiorari, but summary judgments by lower courts precluded the Supreme Court's holding on any substantive due process issues.

Irreparable Harm

There have been cases where a dismissed public employee charges that the state, in declining to rehire the plaintiff, made charges such that would damage the person's standing and association in the community. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."¹¹⁹ Similarly, Roth states that if dismissal or nonrenewal charges impose a stigma upon the faculty member or forecloses the freedom to take advantage of

¹¹⁹Wisconsin v. Constantineau 410 U.S. 433, 437, 27 L.Ed. 2d 515, 519, 91 S.Ct. 507. Wieman v. Updegraff 344 U.S. 183, 191, 97 L.Ed. 216, 222, 73 S.Ct. 215; Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123, 95 L.Ed. 817, 71 S.Ct. 624.

other employment opportunities, then the plaintiff would have a right to a hearing to clear one's good name, reputation, honor and integrity.¹²⁰

Roth was not able to sustain the burden of proof that he was deprived of liberty when he was not rehired for the second year in one job. The Court suggested that this stretched the concept of liberty too far as he remained free as before to seek another job. The Court distinguished between the ordinary and foreseeable hardship where a person is not given reasons for nonrenewal of contract after an initial one-year academic appointment from consequences which would be sufficient to require procedural due process insofar as the university might be directly responsible for such collateral consequences.¹²¹ A post hoc hearing is constitutionally required in order for a person to clear good name, reputation, honor or integrity and not because of the nonrenewal per se. Relief, therefore, cannot come in the form of reinstatement but only as a benefit to reputation.

Although the Roth court stated that failure to renew a one-year contract is hardly a "badge of infamy"

¹²⁰408 U.S. at 573.

¹²¹William Van Alstyne, "The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann," AAUP Bulletin 58 (September 1972): 269.

which would foreclose future employment, Perkins, an assistant professor at UCLA who was dismissed after seven years of employment on the basis of renewed one-year contracts alleged that such termination virtually precludes a professor from similar employment at other institutions of higher learning.¹²² The California District Court disagreed with Perkins reasoning that as long as the opportunity to pursue new employment persists her liberty has not been abridged. If the State had barred her from employment in all other state universities, such a disability that foreclosed freedom to take advantage of other employment opportunities would have been an injury to the plaintiff's liberty interests.¹²³

Interest in one's reputation triggers procedural due process. Likewise, if the reasons for dismissal become public and such reasons suggest immorality or dishonesty the dismissed employee's liberty interests demand a hearing to clear "good name, reputation and

¹²²Perkins v. The Regents of the University of California 353 F.Supp. 618 (1973).

¹²³Roth, supra. Compare Board of Regents v. Roth (no foreclosure where the employee was barred from teaching at only one state university); Crabtree v. Brennan 466 F.2d 480, 481 (6th Cir. 1972) (no right to work in a particular school district); Robinson v. Jefferson County Board of Education 485 F.2d 1381, 1382 (5th Cir. 1973) (no foreclosure problem where a teacher was barred from a county school district).

honor."¹²⁴ Prior to being reassigned from classroom teaching duties to assisting the librarian, Stewart was ordered to undergo a psychiatric examination to determine his mental competency to perform his duties. It was later learned that the examination was ordered because of Stewart's participation in anti-war protest activities which were critical of the Vietnam War. It was held that the ordering of such an examination was invalid absent prior giving to instructor of reasons, notice of hearing, and a proper hearing.¹²⁵

The Circuit Courts are divided as to whether a statement of reasons indicating professional incompetence led to dismissal or nonrenewal is sufficient to injure a person's reputation and trigger procedural due process requirements. The Sixth Circuit held that failure to renew a teacher's contract on the grounds of failure to meet minimum standards in relationship with students, may injure the reputation of the teacher in the academic

¹²⁴ Suarez v. Weaver 484 F.2d 678 (7th Cir. 1973).

¹²⁵ Stewart v. Pearce 484 F.2d 1031 (9th Cir. 1973).
 Author's note: See also Lombard v. Board of Education of City of New York, 502 F.2d 631 (1974). "A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through his life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceedings," at 637-38.

community but does not require a hearing.¹²⁶ The court in Berry v. Hamblin (3rd Cir.) agreed stating "discharge based on allegedly poor professional performance is not a badge of infamy."¹²⁷ The reasons for the dismissal in Berry included complaints of inadequate attention to students who not excel at sports (plaintiff was a physical education instructor), hostility to colleagues, indifference to rules and regulations of physical education department, and failure to evidence potential for professional growth.¹²⁸ An unsatisfactory rating of a teacher did not damage the teacher's reputation, and without more was not found to cause a liberty interest necessitating due process.¹²⁹

A District Court in the Seventh Circuit found that charges that an instructor's teaching was in effect inadequate and he was immature were too vague to make effective refutation possible and failure to give him

¹²⁶Blair v. Board of Regents of the State University and Community College System of Tennessee 496 F.2d 322 (6th Cir. 1974).

¹²⁷Berry v. Hamblin 356 F.Supp. 306, 308 (1973).

¹²⁸Supra.

¹²⁹Lipp v. Board of Education of City of Chicago 470 F.2d 802 (1972).

a chance to challenge publicly the specific reasons for not rehiring him, when his standing in the eyes of the public was injured, denied him due process.¹³⁰

A court in the Fifth Circuit¹³¹ held that a person dismissed by reason of lack of professional competence does have a liberty interest sufficient to warrant due process of law. The reasons listed for the dismissal of Ortwein included: (1) lack of performance in the functional program; (2) contribution to the Division confined to the limited area of tennis instruction; (3) lack of contribution to the profession outside of the realm of the tennis classes and (4) an unfavorable vote by the faculty in the Division. By terminating Ortwein for reasons of "nonperformance" without according him the benefit of a hearing to clear his reputation, the University of South Florida had deprived him of liberty without due process of law.

The plaintiff has the burden of proof of showing that the reasons for nonrenewal or dismissal cause irreparable harm and, therefore, create an interest in liberty sufficient to warrant a due process hearing. The courts differ as to what constitutes damage to or injury to reputation, honor and integrity. The courts

¹³⁰Whitney v. Board of Regents of University of Wisconsin 355 F.Supp. 321 (1973).

¹³¹Ortwein v. Mackey 358 F.Supp. 705 (1973).

also differ in their interpretation of whether a reason injures a person's honor, reputation or integrity to the extent where a due process hearing is required. In an attempt to avoid litigation, colleges and universities may find that offering no reasons to a nontenured faculty member at the time of nonrenewal or dismissal is the best recourse.

The issue in Holliman v. Martin¹³² is whether it is constitutionally permissible for a state college to conduct hiring practices in an arbitrary way.

The due process clause of the Fourteenth Amendment forbids a state university from basing its decision not to retain a professor, even probationary, on a ground wholly unsupported in fact or on a ground totally without reason. It is most important that this standard is considerably less severe than the standard of "cause" used in the dismissal of tenured faculty. To recognize this due process limitation on the hiring discretion of state universities is in no way to raise nontenured positions to tenured status.¹³³

An Iowa school teacher's contract was not renewed on the ground of professional incompetence as indicated by the low scholastic accomplishment of students on specified tests. This action was held to be arbitrary and capricious since the teacher's professional competency "could not be determined solely on the basis of students'

¹³²330 F.Supp. 1 (1971).

¹³³Supra, at 11.

achievement on tests, especially where the students maintained normal educational growth rates."¹³⁴

Section III: Summary

The concept of property as related to public employment has been defined in this chapter and an analysis has been made of the various situations in which a property interest can occur. The absence of statutory tenure or express contractual provisions granting job security does not, per se, deny nontenured faculty the lack of a protected property interest. If through the rules, policies, practices, or understandings of an institution, a nontenured faculty member who has been dismissed or not had a contract renewed can prove a reasonable expectancy of reemployment, then the interest in property secures the right to procedural due process of law. There must, however, be more than a "mere subjective expectancy" of reemployment for a property interest claim sufficient to entitle the faculty member to a hearing prior to dismissal.

Where a faculty member has been employed for a number of years by the same institution, employment longevity may create rights similar to tenure when taken with other factors. However, longevity alone was not sufficient to create a property interest demanding

¹³⁴Scheelhaase v. Woodbury Central Community School District 349 F.Supp. 988, 998 (1972).

satisfaction by constitutional due process in any of the cases studied. As Table 3.2 indicates, of the seven cases studied claiming longevity as an issue, the plaintiffs were not successful in five or 71.4 percent of the cases. The plaintiffs in these five cases had held positions within their respective institutions from four and one-half to twenty-two years. In the two cases in which the decision was favorable to the plaintiff, the issue of longevity was one of other issues supporting an interest in property and liberty.

In the absence of tenure, official school policy (Sindermann), a teacher's handbook (Thomas), a school board's regulation (Johnson v. Fraley), and state statutes (Papadopoulos) when considered with continuous satisfactory employment over a long period of time, have been held sufficient to create a property interest.¹³⁵ The issue of whether there can be "de facto" tenure at a university with de jure tenure system has not been heard by the U.S. Supreme Court and the District Courts are split on the issue (compare Gordenstein v. the University of Delaware with Toney v. Reagan).

The status of tenure automatically grants the presumption of expectancy of continued employment, thus guaranteeing a property interest sufficient enough for due process of law. If there is a question of whether

¹³⁵See Table 3.2.

TABLE 3.2

EXPECTANCY OF CONTINUED EMPLOYMENT--SUMMARY OF CASES REVIEW, BY CIRCUIT OF ORIGIN,
RE SPECIFIC CLAIM OF ENTITLEMENT

Cases by Circuit of Origin	(Subjective) Expectancy	Longevity	Inst. Policy Procedures	State Statute	Decision for Plaintiff
<u>2d Circuit</u>					
Schwartz v. Thompson (1974)	X				no
<u>3rd Circuit</u>					
Berry v. Hamblin (1973)	X				no
Chung v. Park (1974)			X		no
Gordenstein v. Univ. of Delaware (1974)			X		yes
Skehan v. Bd. of Trustees, Bloomsburg State College (1974)				X	no
Simmonds v. Govt. Employees' Service Assoc. (non- faculty) (1974)		4 1/2 yr.			no
Walker v. California State	X		X		no
<u>4th Circuit</u>					
Cannady v. Person County Bd. of Ed. (1974)		19 yr. 29			no
Johnson v. Fraley (1972)			X		yes
Sheppard v. West Virginia (1974)	X				no
Thomas v. Ward (1974)		X	X		yes

TABLE 3.2--Continued

Cases by Circuit of Origin	(Subjective) Expectancy	Longevity	Inst. Policy Procedures	State Statute	Decision for Plaintiff
<u>5th Circuit</u>					
Johnson v. Harvey (1974)	X	2 yr.			no
Ortwein v. Mackey (1973)	X				no
Skidmore v. Shamrock (1972)		22 yr. ^a			no
Sindermann v. Perry (1972)		10 yr. ^a	X		yes ^b
Zimmerer v. Spencer (1973)			X		yes
<u>6th Circuit</u>					
Soni v. Board of Trustees, Univ. Tennessee (1974)			X		yes
<u>7th Circuit</u>					
Pelisek v. Trevor State Graded School Dist. (1974)				X	yes
Roth v. Board of Regents (1972)	X				no ^b
Shirck v. Thomas (1973)				X	no
<u>8th Circuit</u>					
Scheelhaase v. Woodbury Central School Dist. (1972)				X	yes
Watts v. Board, Univ. Missouri	X				no

TABLE 3.2--Continued

Cases by Circuit of Origin	(Subjective) Expectancy	Longevity	Inst. Policy Procedures	State Statute	Decision for Plaintiff
<u>9th Circuit</u>					
Francis v. Ota (1973)			X		yes
Olson v. Trustees Calif. State Univ. (1972)					
(promotion case)	X				no
Papadopoulos v. Oregon State Bd. of Higher Ed. (1973)		X		X	yes
Peacock v. Bd. of Regents Arizona (1974)	X				no
Perrin v. Oregon State (1974)	X				no
Perkins v. The Regents, Univ. of Calif. (1973)	X	7 yr.			no

^aIndicates employed ten years in the state system, four years, on one-year contracts, at institution in question.

^bIndicates decision of Supreme Court.

someone has achieved tenure, the courts will follow the letter of the law of university tenure policies or state statutes. Where specified that Tenure Policies of the college or university are part of a faculty member's contract, they are just as binding as any other clause in that contract.

The one administrative claim, if proved, which negates both tenured and nontenured claims of expectancy of continued employment is financial exigency. When an institution uses as its reason for dismissing faculty financial exigency, then the burden of proof rests with the institution to demonstrate its actions to be bona fide. When dismissed due to financial exigency tenured faculty do have a right to a pretermination hearing for the purpose of determining that the action was made pursuant to announced criteria. Nontenured faculty may be given the right to a hearing if persons of lesser seniority are retained.

Liberty protects individuals from extraneous control. The First Amendment does guarantee faculty freedom of speech and expression. But a university or college is not required to tolerate any manner of teaching method a faculty member may choose to employ. Teaching methods are not a form of speech protected by the First Amendment. Disputes between faculty and their superiors are not protected by freedom of speech.

A college, as any other employer, has a right to expect reasonable cooperation from its employees.

The First Amendment protects a faculty member's freedom of speech. The point at which the faculty member's usefulness as a teacher is diminished because of the faculty's freedom of expression, the college or university has a right to terminate the employment contract at the end of that employment period. The Courts will go through the process of balancing of interests to determine the merits of plaintiffs and defendants. In weighing the balance of interests of all parties, the courts have generally held that a faculty member's freedom of speech is constitutionally protected in so far as it is not substantially disruptive of the school's normal functioning.

The Circuit Courts are divided on the issue of due process hearing for nontenured faculty dismissed for allegedly exercising freedom of association and political beliefs.¹³⁶ The lower court in Katz v. Board of Trustees would not allow a nontenured faculty member to have a hearing reasoning that if such were granted the differences between tenured status and nontenured would be negated; the decision was overturned by the Third Circuit Court.

¹³⁶See Table 3.1, p. 145.

Interest in one's honor, reputation, integrity and good name can also trigger a liberty interest sufficient to invoke due process procedures. However, the courts differ in their interpretation of what constitutes damage or injury to reputation, honor and integrity.

CHAPTER IV

PROCEDURAL DUE PROCESS REQUIREMENTS

After a person has shown an entitlement to due process, the question becomes one of determining the specific procedures required by case law. Section I discusses, in brief detail, some of the historic cases in American case law relating to education which helped to define procedural due process. The contributions of the American Association of University Professors to academic due process are reviewed. Section II analyzes the specific due process requirements of notice, reasons, and hearing, as required for tenured and nontenured faculty. The procedural due process requirements necessary for dismissals relating to financial exigency are also outlined.

Section I: Educational Cases of Historical Significance

Over the years an initial obstacle to legally enforceable tenure has been found in the charters of some institutions. Professors employed under a contract for a fixed term and subsequently discharged during that

term have been denied recovery by the courts.¹ The courts have reasoned that the term contract is an invalid restriction of the original power conferred upon the governing board of the institution, in the case of public institutions, by the state constitution and statutes.² The governing boards of institutions have been granted the continuing power to discharge, therefore, any contract not terminable at will is a limitation on the exercise of the power by subsequent governing boards.

The Supreme Court of Kansas, in 1878, took a more enlightened view in Board of Education v. Mudge.³ The court awarded damages to a professor wrongfully discharged despite a reservation clause empowering the board to remove "whenever the interests of the college shall require." In 1896, a Kansas appellate court ruled the language of a contract stating that a teacher was hired for one year "unless sooner removed by a vote of the board," meant that removal during the contract period could only be for good and sufficient cause.⁴

¹Head v. The University of Missouri 19 Wall (U.S.) 526, 22 L.Ed. 160 (1873).

²William P. Murphy, "Educational Freedom in the Courts," AAUP Bulletin 49 (Winter 1963): 309.

³21 Kan. 169 (1878).

⁴Board of Education v. Cook 3 Kan. App. 269, 45 Pac. 119 (1896).

A Wisconsin court declared that a Board of Regents could remove a professor without a trial of charges.⁵ In Hartigan v. Board of Regents of West Virginia University⁶ the court denied the Board the right to exercise judicial review on its own. Arbitrary and unilateral dismissals gained sanction under the law in many states. A Kansas court declared that the state statute which authorized the Regents to remove any professor, when the interests of the college required such, was a condition of employment.⁷

Since the advent of the American Association of University Professors in 1915, great importance has been attached to academic tenure as being the handmaiden to academic freedom. The AAUP encouraged the adoption of tenure plans in American colleges and universities. The idea behind the tenure plan was to protect faculty from dismissal except for proper cause and after a hearing. The early cases and legal principles which invalidated a contract for a fixed term, would obviously invalidate one for what amounts to an indefinite term with tenure.

⁵Gillian v. Board of Regents of Normal Schools 88 Wisconsin 7 (1894).

⁶49 West Virginia Reports 14 (1901).

⁷Ward v. Kansas State Agricultural College Board of Regents 138 F.372, 70 C.C.A. 512 (1905).

The sole question in State ex rel. Keeney v. Ayers⁸ (1939) was whether the petitioner had attained tenure under the college regulations so as to require a hearing and investigation of whether he was still under temporary or limited appointment requiring only notice of termination. The Montana Supreme Court ordered a state university to reinstate the professor as he was found to have acquired tenure under a plan adopted by the university in 1918. The court did not, unfortunately, discuss the reason for its holding, as the university failed to advance the argument that the tenure regulations were a restriction upon the board's continuing power of control.

Powerful support to the position that tenure plans are legally enforceable was given by the court in State ex rel. Richardson v. Board of Regents of University of Nevada⁹ (1953). Here the court held that the tenure rule adopted by the board and requiring a showing of cause for removal could not be ignored by the board and that the evidence could be reviewed upon certiorari to determine the existence of jurisdictional facts. In 1957, the Supreme Court of North Dakota reached the opposite conclusion of the Richardson court. In Posin

⁸92 P.2d 306 (1939).

⁹261 P.2d 515 (1953).

v. State Board of Higher Education¹⁰ the court held that if the board could only remove a professor as provided in the college constitution, then the board would lose some of the "full authority" given to it by the state constitution. The state constitution and statutes gave the board full authority to discharge tenured faculty without assigning cause for their removal and without a hearing if the board saw fit to do so.

In an opinion that relied on Posin and distinguished Keeney and Richardson, the court in Worzella v. Board of Regents of Education¹¹ held that the tenure system at South Dakota State College was legally unenforceable. In South Dakota, under the tenure policy at the State College, the Board of Regents cannot remove a faculty member for any reason or cause on its own volition. Without the prior action and approval of the President and the Tenure Committee the Board could not act. The action and approval of the President and the Tenure Committee are conditions precedent to any dismissal of college personnel by the Board. The court held that such delegation of authority

¹⁰86 N.W. 2d 31 (ND 1957).

¹¹93 N.W. 2d 411 (1958).

to subordinates is an unlawful encroachment upon the Board of Regents' constitutional and statutory power of control.¹²

Where there is no tenure statute applicable and the governing board agrees to adopt a tenure system by regulation or by-law, judicial enforcement may be denied on the theory that the rules unlawfully limit the statutory power of the board to dismiss arbitrarily and without cause. However, the Keeney and Richardson cases give persuasive authority for enforcing the tenure rules and reinstating the professor through the use of the prerogative writs. This remedy is similar to the remedy of specific enforcement of a contract of employment. "Teacher tenure laws have been recognized as benefiting the whole school system, not just the individual teacher, and contractual tenure should be viewed in a similar light; the enactment of a tenure system by regulation would seem to be a valid exercise of the board's discretion to provide a high quality of education for the student by attracting the most qualified personnel available."¹³ The only certain way to assure the legal

¹² Author's note: Clark Byse strongly criticizes the court's ruling in "Academic Freedom, Tenure, and the Law: A Comment on *Worzella v. Board of Regents*," AAUP Bulletin 46 (June 1960): 209-17.

¹³ "Developments in the Law: Academic Freedom," Harvard Law Review 81 (1968): 1101.

enforceability of tenure in a state university or college is through a state constitution or statutes.

Contributions of the American
Association of University
Professors

By the opening decade of the twentieth century academic freedom gained no legal recognition and faculty tenure was subject to the pleasure of the president and board of trustees of each institution. The AAUP was born out of the need faculty across the country felt for a comprehensive professional organization which would recognize and fight for the university teaching profession at large and their legitimate concerns. The founding of the organization followed the dismissal of Professor Ross from Stanford and Professor John M. Mecklin from Lafayette.¹⁴ Mecklin's case was investigated by a joint committee of the American Philosophical and the American Psychological Associations headed by Professor A. O. Lovejoy of The Johns Hopkins University. The committee found for Mecklin and went on to censure the college severely for its unwillingness to make a full and complete statement of the facts of the case.

Arthur Oncken Lovejoy wrote the famous Hopkins letter which was signed by eighteen of his colleagues,

¹⁴ John S. Brubacher and Willis Rudy, Higher Education in Transition (New York: Harper & Row, Publishers, 1958), p. 307.

all full professors on the faculty of The Johns Hopkins University, and sent to their colleagues of equal rank at nine other leading universities urging them to join in the formation of a national association of professors.¹⁵ The letter proposed that " . . . the new professional body undertake 'the gradual formation of general principles respecting the tenure of the professional office and the legitimate ground for the dismissal of professors' and that it establish 'a representative judicial committee to investigate and report in cases in which freedom is alleged to have been interfered with by the administrative authorities of any university or in which serious and unwarranted injury to the professional standing and opportunities of any professor is declared to have occurred.'"¹⁶

In 1913, 867 professors representing sixty different institutions came to the initial meeting which resulted in the formation of the American Association of University Professors. The founding of the AAUP marked the beginning of an era "in which the principles of

¹⁵William R. Keast and John W. Macy, Jr., Commission on Academic Tenure in Higher Education, Faculty Tenure: A Report and Recommendations (San Francisco: Jossey Bass, Publishers, 1973), p. 135.

¹⁶*Ibid.*, pp. 135-36.

academic freedom were codified, and in which violations of academic freedom were systematically investigated and penalized."¹⁷

In 1915 the Report of Academic Freedom and Academic Tenure of Committee A of the Association marked the first attempt to define the scope and limits of academic freedom. The "1915 Declaration of Principles--Academic Freedom and Tenure" was formally accepted by the AAUP December 31, 1915, and January 1, 1916 at their first annual meeting. The report suggested that in the classroom the professor should be limited only by competence, objectivity and neutrality. The professor's rights outside the classroom should be those of any other citizen but applied according to a professional code of ethics.¹⁸

In Academic Freedom in the Age of the University, Walter Metzger writes that the first proposal of the famous 1915 Statement was

. . . to place some limitations on the trustees' prerogatives to fire teachers. Quite tentatively, the Committee suggested that aberrant opinion should never be grounds for dismissal. It

¹⁷Walter P. Metzger, Academic Freedom in the Age of the University (New York: Columbia University Press, 1955; 5th printing, 1964), p. 194. For an interesting discussion of the background, formulation and early struggles of the Association read Chapter V: "Organization, Loyalty and War."

¹⁸"The 1915 Declaration of Principles--Academic Freedom and Tenure," AAUP Bulletin 40 (March 1954): 90.

recognized, however, that differences in traditions and local conditions made it difficult to apply uniform substantive limitations. But it held that the procedural limitations could and should be uniform.¹⁹

The procedural requirement advocated by the 1915 Statement included a written statement of charges, a hearing, an opportunity to face accusers, a formal written report of the hearing if the charge is professional incompetency.²⁰ The AAUP was first organized as an elitist organization admitting to membership those university teachers who had held positions of teaching or research for ten or more years. The procedural due process proposals to be implemented at trials of faculty dismissals pertained only to those teachers with the rank of associate professor or higher.

In 1925, the American Council on Education convened a conference attended by representatives of the American Association of University Women, the American Association of University Professors, the Association of Governing Boards, the Association of Land Grant Colleges, the Association of Urban Universities, the National Association of State Universities, the Association of American Colleges, and the Association of American Universities. The conference adopted, with slight textual

¹⁹Metzger, pp. 206-07.

²⁰"Report," Committee on Academic Freedom and Academic Tenure, AAUP Bulletin 1 (December 1915): 41-42.

changes, the Associations of American College's 1922 statement on academic freedom. The 1925 Statement was adopted in spirit by many institutions although it was not formally incorporated in the by-laws of the majority of institutions because of their rejection of its mandatory rules.²¹

The efforts of a quarter century of thought and labor culminated in the 1940 Statement of Academic Freedom and Tenure.²² Metzger outlined three benefits faculty derived from the 1940 Statement:

First, of all, they cut through the intellectual tangles in which thinking on the subject of academic freedom had become ensnarled. They indicated, for example, how professors could fight for academic freedom and yet accept the presence of denominational colleges in their midst. They demonstrated how greater faculty participation in choosing and retaining personnel could be reconciled with the unlimited prerogatives granted trustees by the charters. They showed how the need for a competent faculty could be adjusted to the equally strong need for a secure one. Secondly, the lex scripta provided the standard for measuring publicized reforms.

Finally, the AAUP was effective in getting academic administrators to accept its rules. Not all of its rules, not every administrator.²³

²¹Metzger, pp. 212-13.

²²"Academic Freedom and Tenure--Statement of Principles, 1940," Bulletin of the American Association of University Professors 27 (February 1941): 40-46.

²³Metzger, pp. 215-16.

Although it has been interpreted by the AAUP, the significance of the 1940 Statement is seen in the fact that it has yet to be totally revised.

Before outlining the procedural requirements of academic due process the statement declared that:

Tenure is a means to certain ends; specifically:
 (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.²⁴

The statement then went on to outline the procedural process of academic tenure:

Academic Tenure

(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of fulltime instructor or a higher rank, the probationary period should not exceed seven years, including within this period fulltime service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing

²⁴"Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments," AAUP Bulletin 60 (June 1974): 270.

that his new appointment is for a probationary period of not more than four years even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.²⁵

The 1963-64 Report of Committee A²⁶ of the American Association of University Professors realized that one of the weaknesses of the whole concept of academic freedom and tenure in the United States is the

²⁵Ibid.

²⁶"Report of Committee A, 1963-1964," AAUP Bulletin 50 (June 1964): 125.

fact that at that time it had not yet been integrated into the mainstream of American law. The case law outlining substantive due process as defined in Chapter III and the case law requirements of procedural requirements pertaining to faculty nonretention and dismissals as outlined through case law in the remainder of this chapter indicate that this fundamental weakness of the concept of academic freedom and tenure has changed.

Section II: Procedural Due Process
Requirements of Faculty Dismissal
and Nonretention

The Requirement of Notice

Prior to the 1972 decisions of Roth and Sindermann, Cafeteria Workers v. McElroy²⁷ was considered to be the precedent case setting forth the procedural due process requirements for probationary employees. Utilizing the balancing of interest test, where private interest is privilege subject to Executive power, notice and hearing are not required to be given to probationary employees.²⁸

The Roth court reiterated the Bell v. Burson²⁹ decision that "it is fundamental that except in emergency situations (and this is not one) due process requires

²⁷367 U.S. 886 (1961).

²⁸Supra at 895.

²⁹402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586.

that when a State seeks to terminate (a protected) interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."³⁰ Procedural due process applies only when the plaintiff has been deprived of interests encompassed within the Fourteenth Amendment's protection of liberty and property. Such protection applies only to the person who has already acquired these specific interests. The range of these interests is not infinite.

The Supreme Court in Roth made it clear that the fact, by itself, that one suffers a loss because of a state or governmental act does not alone give the injured party a right to prior notice and hearing. In Zumwalt v. Trustees of the California State Colleges,³¹ the court followed Roth and ruled that the temporary nontenured status of a department chairperson serving at the pleasure of the President, in spite of the fact that as a faculty member he had tenure, did not entitle Zumwalt to a pretermination notice and hearing.

³⁰Supra, 542. Author's note: In rare and extraordinary situations the Supreme Court has held that deprivation of a protected interest need not be preceded by the opportunity of a hearing: see, e.g., Central Union Trust Co. v. Garvan, 254 U.S. 554, 556; Phillips v. Commissioner, 283 U.S. 589, 597.

³¹107 Cal. Rptr. 573 (1973).

However, timely notice was upheld in the case of Papadopoulos v. Oregon State Board of Higher Education³² because the tenure rights of public employees arise solely from the statutes of Oregon which state in part: "If any appointment of an academic staff member . . . not on indefinite tenure, is to be terminated otherwise than for cause, he shall be given a timely notice of termination at least 12 months in advance."³³

Tenured faculty have a property interest in continued employment and are, therefore, entitled to timely notice of dismissal. Whereas, nontenured faculty are only entitled to timely notice if required by state statute or if one has suffered injury as a result of deprivation of previously acquired interests in property or liberty. However, many institutions have incorporated the 1940 Statement of Principles into faculty contracts which gives the nontenured faculty members added protection. The "1970 Interpretive Comments"³⁴ of the 1940 Statement expand the original AAUP Statement to include that notice of nonreappointment, or of intention not to recommend reappointment, should be given in writing according to the following schedule:

³²511 P.2d 854 (Ore. App. 1973).

³³Supra, at 872.

³⁴"1970 Interpretative Comments," AAUP Bulletin 60 (June 1974): 271-72.

1. Not later than March 1 of the first academic year of service, if the appointment expires at the end of that year; or, if a one-year appointment terminates during the academic year, at least three months in advance of its termination.
2. Not later than December 15 of the second academic year of service, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.
3. At least twelve months before the expiration of an appointment after two or more years in the institution.³⁵

Statement of Reasons

The cases of Roth and Sindermann are the first in which the Supreme Court examined the question of the re-employment rights of nontenured public school teachers whose contracts are not renewed. Prior to these cases the Supreme Court had been silent of the issue of whether probationary teachers are entitled to a statement of reasons and a hearing when their contracts are not renewed. With no guidance from the Supreme Court, the courts of appeals decided cases involving this question which led to the formulation of three divergent views.

Overtuning a lower court decision, the Sixth Circuit in Orr v. Trinter³⁶ held that neither a statement of reasons nor a hearing is required for a nontenured teacher whose contract is not renewed because the

³⁵Supra, 272. Author's note: These standards were endorsed by the Fiftieth Annual Meeting of the American Association of University Professors in 1964.

³⁶444 F.2d 128 (6th Cir. 1971).

nontenured teacher has no claim for these safeguards based on the Fourteenth Amendment. The Fourth,³⁷ Eighth³⁸ and Tenth³⁹ Circuits are in agreement with the Sixth Circuit's decision in Orr. These circuits said that the matter should be resolved on the basis of state tenure law.

The Fifth Circuit in Sindermann v. Perry⁴⁰ and other⁴¹ cases held that nontenured teachers are entitled to both a statement of reasons and a hearing when they can show that they have an "expectancy" of continued employment where no formal tenure system exists. Where there is an official tenure system, it was thought to be impossible for a nontenured person to support a claim of expectancy of reemployment. However, a Delaware Court was unwilling to rule that the existence of a tenure system "is inconsistent as a matter of law with the existence of an objective expectation of continued

³⁷Parker v. Board of Education 237 F.Supp. 222 (D.Md. 1965), aff'd per curiam, 348 F.2d 464 (4th Cir. 1965).

³⁸Freeman v. Gould Special School District 405 F.2d 1153 (8th Cir. 1969).

³⁹Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert. den. 397 U.S. 991 (1970).

⁴⁰430 F.2d 939 (5th Cir. 1970), aff'd 408 U.S. 593 (1972).

⁴¹Ferguson v. Thomas 430 F.2d 852 (5th Cir. 1970); Lucas v. Chapman 430 F.2d 945 (5th Cir. 1970).

employment sufficient to bring the Fourteenth Amendment into play . . . the possibility of a 'de facto' status below that of tenure and yet sufficient under Sindermann has not been eliminated."⁴²

The decision of Drown v. Portsmouth School District⁴³ in the First Circuit represents the third divergent view. Here the court held that the interests of a nontenured public school teacher in knowing the basis for the nonretention are so substantial and the inconvenience and disadvantages for the school board of supplying the information are so slight as to require a written explanation, in some detail, of the reason for nonretention, together with access to evaluation reports in the teacher's personal file. But the First Circuit did not require a hearing. The Seventh Circuit in Roth v. Board of Regents⁴⁴ and Shirck v. Thomas⁴⁵ held that a teacher is entitled to both reasons and a hearing.

It is against this background of diverse opinions on the subject of the procedural rights of nontenured

⁴²Gordenstein v. The University of Delaware 381 F. Supp. 718, 723-24 (1974).

⁴³435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971).

⁴⁴446 F.2d 806 (7th Cir. 1971), rev'd, 408 U.S. 564 (1972).

⁴⁵447 F.2d 1025 (7th Cir. 1971).

teachers that the Supreme Court considered the cases of Roth and Sindermann. The majority opinion in Roth turned on the fact that he made no showing that the decision not to rehire him deprived him of an interest in "liberty" or "property." Because he was unable to prove a deprivation of a protected interest, Roth was unable to support his claim of a statement of reasons and a hearing on the procedural due process clause of the Fourteenth Amendment.

The majority's decision in Roth supports the reasoning of the Fourth, Sixth, Eighth, and Tenth Circuits that the matter should be resolved on the basis of state law. Chief Justice Burger elaborated on this point in his concurring opinion filed in the Sindermann case:

There is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause of nonrenewal of his contract. Thus whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law.⁴⁶

The importance of state law concerning the procedural protections of probationary employees was emphasized in

⁴⁶Perry v. Sindermann 408 U.S. at 603-04.

Redman v. Department of Education, Alaska.⁴⁷ Here it was held that a state statute providing that absent argument on a new contract the prior contract continues where a teacher has not been given timely notice of non-retention does not automatically continue a teacher's contract of employment for the following school year. However, a teacher who has not been given proper notice of nonretention may enforce her statutory right to be given a new contract and may then sue for breach of that contract but cannot base an action for damages on a prior contract that has expired.⁴⁸ (See also Burns v. Decker⁴⁹ where a Board of Education failed to comply with its own rules concerning the issuance of reasons for dismissal to probationary teacher. The illegal action cost the Board a cash settlement of \$1,800.)

In essence the Supreme Court said that when a nontenured faculty member can apply tests as to what employment interests are encompassed within the terms of "liberty" and "property" under the Fourteenth Amendment, then one knows when to apply due process protections. The most significant question left unanswered by the Court is what specific procedures are required

⁴⁷519 P.2d 760 (1974).

⁴⁸Supra.

⁴⁹212 N.W. 2d 886 (Minn. 1973).

under the Fourteenth Amendment to protect a nontenured teacher who is not rehired. The determination of this issue will have to be made on a case-by-case basis for those teachers who can initially show that the source of their alleged "property" interest is based on state law, tenure law or de facto tenure provisions promulgated by state officials.⁵⁰

For those faculty members who do not have express contractual or statutory guarantees of continued employment, the "mutually explicit understandings" test in Sindermann will provide the basis for due process claims if a de facto job expectancy policy on the part of the employer can be proven. Recent cases have consistently held that a decision not to reappoint a nontenured faculty member does not need to be accompanied by any reason at all. (See: Watts v. Board of Curators, University of Missouri,⁵¹ Clark v. Holmes,⁵² and Zumwalt v. Trustees of the California State Colleges.⁵³)

⁵⁰William E. Kenny, "Constitutional Law--Procedural Due Process--The Rights of a Nontenured Teacher Upon Non-Renewal of His Contract at a State School," De Paul Law Review 22 (Spring 1973): 711.

⁵¹363 F.Supp. 883 (1973).

⁵²474 F.2d 928 (1973).

⁵³107 Cal. Rptr. 573 (1973).

In a case involving the dismissal of a county employee, a court in the Ninth Circuit stated "in short, personnel decisions concerning public employees are within the unfettered discretion of their employers."⁵⁴ Judge Hufstedler in his dissenting opinion in Geneva Towards Tenants Organization v. Federated Mortgage Investment⁵⁵ accurately summed the direction of the lower courts since the Sindermann decision when he stated: "The Supreme Court has made it clear, however, that the fact alone that one suffers grievous loss because of a governmental act does not give the injured person a right to prior notice and hearing."⁵⁶

Although it would seem as if the procedural protections of nontenured faculty have been dealt a severe blow by the decisions of Roth and Sindermann, universities may be persuaded to give reasons to nonrenewed faculty members, because as the court noted in Roth, "Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a

⁵⁴Schlichting v. Bergstrom 97 Adv. Sh. 717, 511 P.2d 846 (1973).

⁵⁵504 F.2d 483 (1974). Author's note: Compare Board of Regents v. Roth (1972) 408 U.S. 564 with Joint Anti-Fascist Refugee Committee v. McGrath (1951) 341 U.S. 123, 168, 71 S.Ct. 624 (Frankfurter, J. concurring).

⁵⁶Supra.

hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities."⁵⁷

In a survey conducted by the American Council on Education's Higher Education Panel, it was found that although the number decreased slightly from 1972 to 1974, almost half of the public universities have an established practice of sometimes or always providing a statement of reasons in nonrenewal cases.⁵⁸ As Table 4.1 indicates, the 1974 Survey found that for all institutions only 16.8 percent had a policy of never giving formal, written reasons to a faculty member who was denied tenure or whose contract was not renewed.⁵⁹

Hearing

It is well supported that an administrative decision not to renew a contract of a nontenured faculty member does not have to be accompanied by supporting

⁵⁷408 U.S. at 578-79.

⁵⁸Elaine H. El-Khawas and W. Todd Furniss, "Faculty Tenure and Contract Systems: 1972 and 1974," American Council on Education, Higher Education Panel Reports, No. 22, December 1974, p. 20.

⁵⁹Author's note: A topic for further study would be the extent to which faculty unions exert pressure to continue and extend the probationary teacher's opportunities for receiving written reasons prior to nonrenewal.

TABLE 4.1

TWO-YEAR CHANGES IN TENURE POLICIES

August 1974 Survey

Item 8: Does your institution give formal, written reasons to a faculty member who was denied tenure or whose contract (probationary or recurring term appointment) was not renewed?

Public Institutions

	Universities	College (4 yr)	2 yr.	All inst.
<u>All institutions</u>				
Never	20.0	21.8	12.6	16.8
Sometimes	48.9	59.2	16.3	38.8
Always	31.1	18.9	71.7	44.4
<u>Institutions with tenure systems</u>				
Never	20.0	21.8	18.9	19.4
Sometimes	48.9	59.2	20.9	44.0
Always	31.1	18.9	60.2	36.6

April 1972 Survey

Item 8: Does your institution give written reasons to the faculty member concerned for nonrenewal of contracts (probationary or recurring term appointments) or for denial of tenure?

	Universities	College (4 yr)	2 yr.	All inst.
<u>All institutions</u>				
Never	13.3	26.9	14.0	14.7
Sometimes	50.8	34.9	18.0	38.0
Always	35.9	38.2	68.1	47.3
<u>Institutions with tenure systems</u>				
Never	13.3	26.9	17.5	16.4
Sometimes	50.8	34.9	19.5	40.5
Always	35.9	38.2	63.0	43.1

SOURCE: "Faculty Tenure and Contract Systems: 1972 and 1974," by Elaine H. El-Khawas and W. Todd Furniss, American Council on Education, Higher Education Panel Reports, No. 22, December 1974, p. 20.

reasons.⁶⁰ In many cases, nontenured faculty claim that the permissibility of the discharge or nonrenewal depends upon the existence of certain facts which cannot be ascertained without a hearing. However, before a nontenured faculty member can show denial of procedural due process, it must be shown that there was an entitlement to that process. The dismissed or nonrenewed faculty member has the burden of proof of going forward and showing that there is reasonable evidence to support the possible existence of impermissible reasons for dismissal.

Table 4.2 shows the case studied from 1972 to 1974 indicating whether the plaintiff sustained the burden of proof and was able to force a college administration to grant a pretermination hearing. Of the thirty-one cases studied which involved faculty dismissal or nonrenewal, 14 or 45 percent of the decisions were in the plaintiffs' favor and the judges ruled that the colleges had to provide the faculty members with hearings. The colleges or universities lost in their battle not to offer hearings to dismissed or nonrenewed faculty in 33 percent of the cases involving the issues of freedom of speech and interests of liberty. The liberty interests involved a claim by the plaintiff of "irreparable harm" as a result of the reason or situation of dismissal. Regarding

⁶⁰ See notes 51, 52, 53 on page 184.

TABLE 4.2

SUMMARY OF CASES RE NONTENURED FACULTY CLAIMS TO A
PRETERMINATION HEARING

Issue	Plaintiff Sustained Burden of Proof	Hearing Required
Freedom of Speech		
<u>Chitwood v. Feaster</u> (1972)	no	no
<u>Frazier v. The Curators of the University of Missouri</u> (1974)	no	no
<u>Hirsch v. Green</u> (not a faculty dismissal case) (1973)	yes	yes
<u>Hostrop v. Board of Junior College District No. 515, Counties of Cook and Will, and State of Illinois</u> (1972)	yes	yes
<u>Katz v. Board of Trustees of Gloucester County College</u> (1972)	yes	yes
<u>Roseman v. Hassler</u> (1974)	no	no
<u>Wahba v. New York University</u> (1974)	no	no
Expectancy of Re-Employment		
<u>Balen v. Peralta Junior College</u> (1974)	no	no
<u>Berry v. Hamblin</u> (1973)	no	no
<u>Francis v. Ota</u> (1973)	yes	yes

TABLE 4.2--Continued

Issue	Plaintiff Sustained Burden of Proof	Hearing Required
Expectancy of Re-Employment (continued)		
<u>Johnson v. Fraley</u> (1972)	yes	yes
<u>Simmonds v. Government Employees' Service Comm.</u> (not faculty case) (1974)	no	no
<u>Soni v. Board of Trustees of University of Tennessee</u> (1974)	yes	yes
<u>Watts v. Board of Curators</u> (1973)	no	no
<u>Zimmerer v. Spencer</u> (1973)	yes	yes
<u>Zumwalt v. Trustees of the California State Colleges</u> (1973)	no	no
Liberty Interests		
<u>Adams v. Walker</u> (not a faculty case) (1974)	no	no
<u>Berry v. Hamblin</u> (1973)	no	no
<u>Blair v. Board of Regents of the State University & Community College System of Tennessee</u> (1974)	no	no
<u>Jaroch v. Board of Regents, University of Wisconsin System</u> (1974)	no	no
<u>Kota v. Little</u> (1973)	no	no

TABLE 4.2--Continued

Issue	Plaintiff Sustained Burden of Proof	Hearing Required
Liberty Interests (continued)		
<u>Ortwein v. Mackey</u> (1973)	yes	yes
<u>Stewart v. Pearce</u> (1973)	yes	yes
Professional Conduct		
<u>Clark v. Holmes</u> (1973)	no	no
<u>Larkin v. Withrow</u> (not a faculty case) (1973)	yes	yes
<u>Whitney v. Board of Regents of University of Wisconsin</u> (1973)	yes	yes
State Statute or Administrative Rules of Trustees		
<u>Buhr v. Buffalo School District No. 39</u> (1973)	no	no
<u>Chung v. Park</u> (1974)	no	no
<u>Davis v. Barr</u> (1973)	yes	yes
<u>Johnson v. Netterville</u> (1974)	yes	yes
<u>Papadopoulos v. Oregon State Board of Higher Education</u> (1973)	yes	yes
<u>Pelisek v. Trevor State Graded School District No. 7, Kenosha County, Wisc.</u> (1974)	yes	yes

TABLE 4.2--Continued

Issue	Plaintiff Sustained Burden of Proof	Hearing Required
State Statute or Administrative Rules of Trustees (continued)		
<u>Perrin v. Oregon State Board of Higher Education</u> (1974)	no	no
<u>Skehan v. Board of Trustees of Bloomsburg State College</u> (1974)	yes	yes
<u>Walker v. California State Board of Trustees</u> (1972)	no	no

the issue of expectancy of reemployment the plaintiffs won their cases, and claims, in 50 percent of the cases studied.

When a hearing is required by due process the timing is crucial. "It can be said with reasonable certainty that, in all but highly unusual cases, the hearing must precede final action upon the termination or nonrenewal of a teacher's contract."⁶¹ In the Peacock case the court held that even in an emergency situation there are limitations on the kind of action that the University can take. The college or university should "respond to the emergency in the manner least intrusive on the plaintiff's rights."⁶² However, in this kind of a situation, the burden of proof is on the college or university to demonstrate the need to deny a hearing before the action for dismissal or nonrenewal is taken.

The matter of timing also involves the question of termination as distinguished from suspension from duties pending and administrative hearing. "So long as the teacher receives his [sic] salary during a suspension pending administrative determination, it would seem

⁶¹Donald W. Griffis and John Richard Wilson, "Constitutional Rights and Remedies in the Non-Renewal of a Public School Teacher's Employment Contract," Baylor Law Review 25 (Fall 1972): 567.

⁶²Peacock v. Board of Regents of the Universities and State Colleges of Arizona 380 F.Supp. 1081, 1088 (1974).

difficult for a teacher to show a suspension damaging."⁶³
 Suspension with pay adds the extra incentive for the
 administration to provide a just and speedy hearing.

The procedure for a hearing is usually determined
 by the statements in the faculty handbook; or lacking
 such published procedures, common law practice within the
 system should prevail. In their book on Tenure in American
 Higher Education,⁶⁴ Byse and Joughin, in 1959, outlined
 procedures which, as a matter of "intelligence or fairness"
 should be followed. These include:

- (1) the right to be present;
- (2) the right to separation of prosecutory and
 judicial functions;
- (3) the right to counsel;
- (4) the right to cross-examine;
- (5) the right to present and "summon" witnesses;
- (6) the right to an available full record;
- (7) the right to prompt adjudication;
- (8) the right to appeal procedures.

Goldberg v. Kelley⁶⁵ held that a pre-termination evi-
 dentiary hearing need not take the form of a judicial or

⁶³Griffis and Wilson, *supra*, at 568.

⁶⁴Clark Byse and Louis Joughin, Tenure in American
 Higher Education (Ithaca, N.Y.: Cornell University Press,
 1959), pp. 62-68.

⁶⁵397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011
 (1970).

quasi-judicial trial, "but the recipient must be provided with timely and adequate notice, detailing the reasons for termination, and an effective opportunity to defend by confronting adverse witnesses and by presenting his own arguments and evidence orally before the decision maker."⁶⁶ The Supreme Court went on to say that counsel need not be furnished at the pre-termination hearing, but if the plaintiff desired to have an attorney present, the request must be allowed.⁶⁷

The guidelines set by the Supreme Court in Goldberg v. Kelley were specifically likened to situations involving discharge from public employment. Ferguson v. Thomas⁶⁸ provides one of the earliest and most detailed statements a court has made on the minimum procedural due process requirements for nontenured faculty.

Within the matrix of the particular circumstances present when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that:

1. he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist,
2. he be advised of the names and the nature of the testimony of witnesses against him,
3. at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense,

⁶⁶Supra, at 266-70.

⁶⁷Supra at 270.

⁶⁸430 F.2d 852 (1970).

4. that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.⁶⁹

Taken together Goldberg and Ferguson provide the leading case law regarding the procedures for a pretermination hearing.

The adequacy of the time between notice and the hearing is arbitrary but the Fifth Circuit has given some guideline by stating that the reasons for nonrenewal of a contract must be given within fifteen days after a faculty member requests them, and upon receipt of the reasons the teacher has fifteen days in which to ask for a hearing.⁷⁰

The question of who within the university could sit on an administrative hearing body was raised in the appeal of Duke v. North Texas State University.⁷¹ The Fifth Circuit held that "no per se rule exists by which an administrative hearing body is disqualified from hearing internal university matters solely for the reason that members are employees of the board of regents and because some of them may have participated in the initial investigation of the incident in question and

⁶⁹Supra.

⁷⁰Lucas v. Chapman 430 F.2d 945, 948 (5th Cir. 1970).

⁷¹469 F.2d 829 (1973).

initiation of the cause under consideration."⁷² Therefore, the president's cabinet, composed of the president and two vice-presidents were not per se disqualified from conducting a hearing on the matter.

Recently, by a bare majority, the Supreme Court, in Arnett v. Kennedy⁷³ held that where there are adequate provisions for compensating the victims of unjustified dismissals, only a post-termination hearing is necessary.

The procedures leading to the dismissal of a tenured faculty member due to incompetence were upheld by a Pennsylvania court even though there was some question of whether the Mansfield State College had followed the precise procedures outlined in the faculty handbook, in Chung v. Park.⁷⁴ The court ruled that where the professor made a conscious choice of obtaining a "Due Process" hearing which had some procedural aspects which were different from those afforded in the normal tenure revocation proceedings, he waived any additional rights. Here the court was relying on hornbook law that contractual provisions can be waived, expressly or by implication.

⁷²Supra at 830.

⁷³416 U.S. 134 (1974).

⁷⁴377 F.Supp. 524 (1974).

A pre-termination hearing is one held prior to actual termination, not one held prior to a decision to terminate. The Chung court held that a post decision hearing in which the professor had the burden of proof was adequate to satisfy due process requirements. The college was able to come forth with evidence necessary to establish the professor's lack of competency, the professor was given full opportunity with counsel to refute all evidence presented, the professor was then dismissed.

Procedural Requirements During Financial Exigency

Judge Doyle's decision in Johnson v. Board of Regents of the University of Wisconsin System⁷⁵ clearly stated that faculty, including tenured faculty, have only limited constitutional rights when college financial troubles are the reason for their dismissal. However, institutions cannot use financial exigency as a means of gaining another objective unrelated to the finances of the institution, as was the case in AAUP v. Bloomfield College.⁷⁶

In addition to a dismissal for cause, a tenured faculty member's appointment can be terminated because of

⁷⁵377 F.Supp. 227 (1974).

⁷⁶129 N.J. Super. 249, 322 A.2d 846 (1974).

a demonstrably bona fide financial exigency. This provision was mentioned in the AAUP 1940 Statement of Principles on Academic Freedom and Tenure. Because of the increasing number of colleges declaring financial exigency as the reason for faculty dismissal, Committee A of the AAUP formulated a revised Regulation 4⁷⁷ designed to provide more specific procedural guidance in such cases.

Regulation 4 calls for a faculty body to participate in the decision that a condition of financial exigency exists or is imminent. Judge Doyle ruled that it was well within the powers of the state of Wisconsin, so far as the federal constitution is concerned, to assign to the chancellors of the state campuses the authority to make the initial decision to lay off specific tenured faculty members and to make the ultimate decision. "The Fourteenth Amendment does not require that tenured university faculty members be given an opportunity to participate in decision-making process resulting in termination or layoff of tenured faculty members based on enrollment or fiscal considerations, either at the stage of deciding which college or department within the university should bear a greater or lesser share in the fiscal sacrifice or at any earlier stage in the

⁷⁷"Termination of Faculty Appointments Because of Financial Exigency, Discontinuance of a Program or Department, or Medical Reasons," AAUP Bulletin 60 (December 1974): 411-13.

decision-making process."⁷⁸ The burden of proof rests with the administration of the college or university as to the existence and extent of the financial condition.⁷⁹

Regulation 4 states that "The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure."⁸⁰ The Johnson case weighed the interests of faculty members against the administrative concerns of the institution and held that the ultimate step of designating specific individuals to be terminated rests with the administration. In such a situation the tenured teacher is protected only from termination for constitutionally impermissible reasons or from a termination or lay-off which is wholly arbitrary or unreasonable. "The Fourteenth Amendment requires only those procedures which are necessary to provide the tenured teacher a fair opportunity to claim this 'substantive' protection."⁸¹

⁷⁸377 F.Supp. at 228.

⁷⁹Author's note: This is stated in Regulation 4 and is consistent with the holdings in the Bloomfield and Johnson cases.

⁸⁰Regulation 4, AAUP Bulletin 60, 412.

⁸¹377 F.Supp. at 239.

The minimal due process procedures required in the Johnson case include:

furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to lay-off;
 furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at;
 making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied; and
 providing each plaintiff the opportunity to respond.⁸²

Seven college instructors at Miami-Dade Community College were not renewed because of financial exigency. Here the court made a distinction between the rights of tenured and nontenured faculty by stating that the tenured instructor should have been permitted to establish entitlement to a pretermination hearing, the purpose of which would be to assure that his position was in fact "discontinued" within the meaning of his contract and, if he was instead the victim of a reduction in force, that the college trustees made their decision pursuant to their announced criteria. The tenured faculty member clearly enjoys a property interest of continued employment.⁸³

The University of Wisconsin did comply with Regulation 4 to the extent that they made every effort

⁸²377 F.Supp. at 240.

⁸³Collins v. Wolfson 498 F.2d 1100 (1974).

to place the faculty members in other suitable positions within the state system. Regulation 4 states that the place of the faculty member concerned will not be filled by a replacement within a period of three years, unless the released faculty member has been offered reinstatement and a reasonable time in which to accept or decline the position. The court accepted a two-year period in the Johnson case.

When a situation of financial exigency occurs it must be handled with the utmost care. The tenants and principles of a tenure system must be preserved and at the same time the administration must be free to act swiftly to meet the economic needs of the institution. A very careful preliminary assessment must be done of establishing the bona fides of a statement of financial exigency.

Section III: Summary

Procedural due process has been evolving since the time of the Magna Charta. Educational cases of historical significance to faculty procedural due process rights have been discussed in this chapter. The struggles of faculty members to implement tenure plans which would be adhered to by the board of regents of an institution can be chronicled in the early court cases involving faculty dismissals. The idea of a tenure plan was to

protect faculty from dismissal except for proper cause and after a hearing.

By the founding of the American Association of University Professors in 1915, academic freedom had still gained no legal recognition and faculty tenure was subject to the pleasure of the president and governing board of an institution. The AAUP has made great strides to define and make understood the concepts of academic freedom and academic tenure through their position papers, and especially with the 1940 Statement of Academic Freedom and Tenure and subsequent interpretive comments about it.

When a person has acquired the specific interest(s) encompassed within the Fourteenth Amendment's protection, it is fundamental that the person be afforded the opportunity to timely notice, time to respond and the opportunity of an adversarial hearing before the termination becomes effective. It must be noted, however, that the range of these interests is not infinite. The Roth case makes it clear that the fact alone that one suffers a loss because of governmental action does not give the injured party right to prior notice and a hearing. If the injured party can prove prior entitlement to a specific property or liberty interest, or if state law or administrative board ruling grants entitlement, then the plaintiff has grounds to prove entitlement to timely notice and a hearing prior to dismissal.

Tenured faculty do not have to carry the burden of proving an acquired interest because they, by virtue of their continuing contract, have a property interest in continuing employment and are entitled to notice and a hearing. Whereas, nontenured faculty have to prove the acquisition of interest in property or liberty or guarantees under state law or administrative board ruling.

Prior to the Roth decision, probably the most controversial issue of the procedural due process requirements in faculty dismissal cases was whether nontenured faculty had a right to a statement of reasons for the termination or nonrenewal. Roth was unable to prove a deprivation of a protected interest, and was, therefore, not entitled to a statement of reasons and a hearing. The Supreme Court stated that the matter should be resolved on the basis of state law, thus supporting the decisions of the Fourth, Sixth, Eighth, and Tenth Circuits. Many recent cases have held that the administration does not have to state the reasons for nonrenewal of a nontenured faculty contract. However, if that person can convince a court of law that there is reason to believe that constitutionally impermissible reasons were used in the decision not to renew the contract, the administration of the college or university will have to provide evidence supporting the reasons for dismissal or nonrenewal.

As with notice and written reasons, the tenured faculty member has a property interest in continued employment and thus has a right to a hearing prior to dismissal. A nontenured faculty member has the burden of going forward with the proof that there is an acquired specific protectable interest which gives an entitlement to a hearing by due process of law. Of the cases studied involving faculty dismissal or nonrenewal of contract, 45 percent of the decisions were in the plaintiffs' favor and the judges ruled that they were entitled to a hearing. This points to the need for college administrators to have a better understanding of the legal rights of faculty and for the specific due process requirements mandated by case law.

When a hearing is required, the timing is crucial. Generally such a hearing must precede final action upon the termination or nonrenewal of the contract. In an emergency situation, the Peacock court held that a post-termination hearing met the specific due process requirements. If a person is suspended pending an administrative hearing, it would be wise administrative policy to continue the person's salary and fringe benefits during the period of suspension. This gives the administration incentive to provide a hearing with all deliberate speed, and it is more difficult for the faculty member to prove that the suspension was personally damaging.

The minimal due process requirements for non-tenured faculty who wish to oppose a decision to dismiss or not renew a contract include the right to be advised of the cause or causes for termination in sufficient detail to respond to any errors, to be advised of the names and nature of the testimony of witness against the person, to be given reasonable time to prepare adequate defense, to be present at the hearing and to have the benefit of counsel, to cross-examine witnesses, to present and "summon" witnesses, to be provided with a full record of the proceedings if requested, and to be notified and provided with appeal procedures. A person is also entitled to prompt adjudication of such a matter.

Faculty, including tenured faculty, have only limited constitutional rights when the college financial situation is the reason for dismissal. Faculty need not be given the opportunity to participate in the decision-making process resulting in termination or layoff of tenured faculty members. The minimal procedures include a written statement of reasons, a description of the decision process, a reasonably adequate disclosure of the information and data upon which the decision-makers relied and an opportunity to respond. The college has the burden of proof that a condition of financial exigency actually exists or is imminent.

CHAPTER V

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The first section of this chapter summarizes the findings of the study and includes a survey of procedural and substantive due process requirements of tenured and nontenured faculty. A discussion of faculty substantive rights will include the following topical areas: liberty interests--freedom of speech, political activity and association--and property interests--expectancy of re-employment, and financial exigency. A review of the procedural due process protections to which faculty are entitled will include: notice, reasons, hearing, and the procedural requirements necessitated during dismissal due to financial exigency. Section II presents the conclusions of the study based on an analysis of the findings. Conclusions are separated into two categories as they relate to tenured and nontenured faculty: substantive and procedural due process. Finally, recommendations are made in Section III.

Section I: Summary of Findings

The threefold purpose of this study was to (1) ascertain the evolving procedural and substantive due process requirements in the nonretention of faculty in public four-year institutions of higher education in the United States; (2) to determine the extent of the differences in such requirements as they relate to proceedings involving tenured and nontenured faculty; and (3) to make recommendations to administrators in public four-year institutions of higher education regarding due process requirements and procedures.

A major emphasis of this study has been a cataloging of federal case law for each topical area examined from 1972 to 1974. A comprehensive analysis of case law and other related data have been used to derive legal principles pertinent to the major problem areas of study.

Substantive Due Process

Liberty interests. The Fifth and the Fourteenth Amendments to the U.S. Constitution guarantee that no person shall be deprived of life, liberty, or property without due process of law. A study of the substantive due process protections for faculty concerns the Constitutional interests of liberty and property. A relationship is emerging between academic freedom and

Constitutional law which can be traced through a study of case law related to the First, Fifth, and Fourteenth Amendments.

Loyalty oaths have been declared unconstitutional on many grounds including being vague and overbroad. The exclusive premise that such oaths violate freedom of speech has not voided a loyalty oath, however, an oath may not interfere with a teacher's First Amendment right of freedom of speech.¹ If a teacher belongs to an organization embracing both illegal and legal aims, that person may not be barred from employment if the illegal aims of the organization are not embraced by that person.² Oaths which affirm peoples' loyalty to state and federal constitutions have been upheld. State and local governments have a "right" to determine who will teach, since teaching is a "privilege" and not a Constitutional right.

Several cases were studied in which the courts noted that a teacher may criticize superiors, but it has been emphasized that the time, place, and manner of the criticism are critical factors.

The author's examination of cases related to a faculty member's right to exercise "freedom of speech" disclosed the following points:

¹Georgia Conference of the American Association of University Professors v. Board of Regents of the University System of Georgia 2046 F.Supp. 553 (1965).

²Elfbrandt v. Russell 384 U.S. 11 (1966).



1. Although recognized as indispensable to academic freedom, freedom of speech is not an absolute right.
2. Academic freedom preserves the classroom as a market place of ideas. It is not a license for uncontrolled expression at variance with the established curriculum (Clark, 1973).
3. A public institution of higher education, consistent with the First Amendment, may fail to renew the contract of a nontenured faculty member because of pedagogical differences (Hetrick, 1973). Teaching methods and teaching effectiveness are valid reasons for nonrenewal of a nontenured teacher's contract (Cannady, 1974).
4. The college administration has a right to require some conformity to desired teaching methods.
5. A faculty member may hold views other than those of the administration, however, freedom of speech cannot be used as a guise to assume the role of, or intrude upon an administrator's role of conducting the administration of the institution (Rozman, 1971).
6. The constitutionally protected right of a teacher to criticize the administration of an institution

is a limited right, which must be balanced against the need for orderly administration (Duke, 1973).

7. Nontenured faculty may make public statements on political matters or publically criticize the administration of a public institution (Pickering, 1968; Sindermann, 1972).

When nonrenewal action implicates a person's good name, reputation, honor or integrity the action not to rehire may proceed, but that person must be given notice and an opportunity to be heard (Wisconsin v. Constantineau). If the dismissal or nonrenewal charges impose a stigma which forecloses the freedom to take advantage of other employment opportunities, then the faculty member has a right to a hearing to clear one's "good name, reputation, honor and integrity" (Roth, 1972). However, the Supreme Court distinguished in Roth between ordinary and foreseeable hardship in obtaining another job from consequences for which the university might be directly responsible, such as barring from employment at another institution within the state system.

Reasons for nonrenewal or dismissal which damage or injure one's reputation triggers procedural due process. The courts differ as to interpretation of what constitutes damage to or injury to "reputation, honor, and integrity." The District Courts also differ in

their interpretation of whether a reason injures a person's honor, reputation or integrity thus triggering procedural due process hearing.

Property interests. Property in the legal sense extends beyond tangible or material goods to include an interest in continued employment if one has tenure or a contract. A clearly implied promise of continued employment also creates a property interest. The author's examination of cases related to faculty employment at public institutions disclosed the following points:

1. Once a property interest has been established, the faculty member is entitled to due process of law.
2. A tenured faculty member has a property interest in continued employment and, therefore, can only be dismissed after having been accorded full due process of law.
3. The absence of a written contract with an explicit tenure provision does not foreclose the possibility that a nontenured faculty member has a property interest in reemployment.

School policy (Sindermann), a teacher's handbook (Thomas), a school board's regulation (Johnson v. Fraley), and state statutes (Papadopoulos),

when considered with continuous satisfactory employment over a long period of time, have been sufficient to create a property interest.

4. Mere subjective expectancy of re-employment does not create a property interest in continued employment.
5. A property interest is invoked if there is a contract and a faculty member under that contract is dismissed during the contract period.
6. Employment longevity alone is not sufficient to create a property interest demanding satisfaction by constitutional due process. The length of time which is required to define longevity of employment, thus making it a factor to be considered with others in establishing a property interest, has yet to be determined by the courts.
7. A substantiated institutional claim of financial exigency supercedes the claims of both tenured and nontenured faculty of expectancy of re-employment.
8. The academic institution has the burden of proving that a situation of financial exigency exists for that college or university.

9. Tenured faculty are entitled to a pretermination hearing to determine if dismissal decisions resulting from financial exigency are made according to established university criteria (Collins v. Wolfson). Nontenured faculty may be dismissed due to financial exigency without an entitlement to a pretermination hearing.
10. Both tenured and nontenured faculty are entitled to a pretermination hearing if dismissed when persons of lessor seniority are retained to determine whether they were dismissed for arbitrary or capricious reasons (Cardinale, 1974).

Procedural Due Process

After a person has established an entitlement to due process, the specific procedural requirements must be determined. The fact that one suffers a loss because of state or governmental action does not alone give the injured party a right to prior notice and hearing (Roth, 1972). Tenured faculty are entitled to timely notice, a statement of reasons, and a hearing. Nontenured faculty are entitled to timely notice if required by state statute or if one has suffered injury as a result of deprivation of a previously acquired interest in property or liberty.

The author's examination of cases related to procedural due process disclosed the following points:

1. The decision not to reappoint a nontenured faculty member does not have to be accompanied by a reason (Watts, 1973; Clark, 1973; Zumwalt, 1973).
2. When a nontenured teacher is to be terminated for cause, and a property or liberty interest has been established, the minimum procedural due process requirements are:
 - notice, in sufficient detail, of reasons
 - knowledge of the names and the nature of the testimony of witnesses against the plaintiff
 - an opportunity to be heard before a tribunal that possesses some academic expertise and has an apparent impartiality toward the charges (Goldberg, 1970; Ferguson, 1970).
3. Where there are adequate provisions for compensating the victims of unjustified dismissals, only a post-termination hearing is necessary (Arnett, 1974).
4. Minimal due process procedures required when dismissals are due to financial exigency include furnishing each plaintiff with a written statement of the basis for the decision, a description of the manner in which it was determined,

disclosure of information and data upon which the decision-makers relied and an opportunity for the plaintiff to respond (Johnson v. Board of Regents, 1974).

5. When a hearing is required, the timing is crucial. A hearing should precede final action upon the termination or nonrenewal of the contract.
6. In an emergency situation, a post-termination hearing can meet the specific due process requirements (Peacock, 1974).

Section II: Conclusions

General

1. Academic due process continues to be defined.
2. Academic due process is not strictly a body of law.

Substantive Due Process

1. The relationship between academic freedom and constitutional law may be traced to the First, Fifth, and Fourteenth Amendments.
2. There is little difference between the rights of tenured and nontenured faculty when the Constitutional issues of personal freedoms are involved.

3. The Circuit Courts are in disagreement over many substantive due process issues that have yet to be deliberated by the Supreme Court.
4. The teacher's Constitutional rights versus the state's responsibility to operate institutions of higher education has been the focus of much of the litigation.
5. Courts attempt to approach the problem of due process by balancing the interests of the faculty member against the interests of the state.
6. Freedom of speech is not "absolute" in or out of the classroom.
7. The importance of Sweezy v. New Hampshire is that it was the first time that the Supreme Court said that academic freedom is protected by the First and Fourteenth Amendments to the Constitution.
8. In the cases involving the constitutional issues of freedom of speech, expression and political association, the dicta almost always distinguished between the faculty member as educator and as private citizen.
9. A faculty member has no more or less freedom than any other citizen outside the particular field of knowledge of one's specialty.

10. The courts appear to support the right of educators to keep their associations confidential unless their professional "fitness" as teachers is compromised.
11. The administration has the right to dictate the pedagogical style to be followed by the faculty.
12. The courts have supported administrators who have said that the clearest reason for dismissing faculty is professional incompetence.
13. The courts have not invalidated the dismissal of a teacher where the specific charge was in violation of academic freedom. Therefore, faculty have a professional responsibility of preserving professional integrity and liberty.

Procedural Due Process

1. Procedural due process has been the subject of greater attention in the courts than substantive due process and it is, therefore, in a more highly evolved state of refinement and definition.
2. A tenured faculty member is entitled to due process of law because of a property interest in continued employment. Whereas, a nontenured faculty member has the burden of proving that a property or liberty interest exists, before the faculty member is entitled to due process of law.

3. There is no general right to continued public employment; procedural due process requirements apply only in certain instances of discharge or nonrenewal.
4. The courts appear to rely upon and closely follow the procedural due process requirements as found in the AAUP statements.
5. Institutional by-laws, and the AAUP statement, may become part of a faculty member's contract.
6. In dismissal cases, there is a trend of extending the procedural rights of nontenured faculty.
7. When no tenure system exists, a teacher's employment rights are limited to those found in the contract, and such rights as can be implied from the policies and procedures of the institution.
8. Failure to incorporate either a tenure policy or an employment policy into a written plan may be detrimental to the academic freedom of faculty.
9. The cases of Roth and Sindermann are of historical significance because this was the first time that the Supreme Court considered the procedural due process rights of nontenured faculty.
10. Financial exigency must be defined, and, therefore, determined by the particular circumstances of the institution.

11. The case of Johnson v. Board of Regents of University of Wisconsin System is important as a guide to administrators who must dismiss faculty because of financial exigency.
12. In an emergency situation the courts apply a less strict standard to the procedures used by an administration in removing a nontenured or tenured faculty member.

Section III: Recommendations

Academic institutions should give careful consideration to all policies and procedures relating to faculty hiring, promotion, nonrenewal and dismissal. Provisions must be made for aggrieved faculty members to receive due process of law. The cases of Francis and Chung emphasize the need for college and university administrative officials to understand and comply with "the letter of the law" of university tenure policies.

1. Institutional policies and procedures (and faculty handbooks) should be studied by a lawyer for the university and the administration appraised of the implications of such policy.
2. Collective bargaining agreements between governing bodies and faculty units should embody fair dismissal procedures.

3. If a faculty member is suspended pending an administrative hearing, that person's salary and fringe benefits should continue during the period of suspension.
4. Every attempt should be made to inform faculty before they are hired, and again during their employment, of all procedures and policy relating to hiring, promotion, nonrenewal and dismissal.
5. Substantive causes for dismissal should be well defined in writing.
6. Evaluations should be made of probationary faculty and tenured faculty on a regular basis. During the probationary period, if promotion requires the accomplishment of certain factors, these should be clearly defined in writing.
7. There appears to be no clear consensus within the academic profession regarding what should constitute adequate cause for dismissal. Academe should strive to define this principle instead of allowing, by default, the courts to sketch a definition by means of a case-by-case evolution.

SELECTED BIBLIOGRAPHY

SELECTED BIBLIOGRAPHY

Primary Legal Sources

American Jurisprudence. Rochester: Lawyer's Co-operative Publishing Company.

Corpus Juris Secundum. Brooklyn: American Law Book Company.

National Reporter System. St. Paul: West Publishing Company.

United States Supreme Court Reports. Washington: Government Printing Office.

United States Supreme Court Reports--Lawyer's Edition. Rochester: Lawyer's Co-operative Publishing Company.

Books

Alexander, Kern, and Solomon, Erwin S. College and University Law. Charlottesville, Virginia: The Michie Company, 1972.

Black, Henry Campbell. Black's Law Dictionary. Revised 4th ed. St. Paul, Minn.: West Publishing Co., 1968.

Brubacher, John S. The Law and Higher Education: A Casebook. Vol. I--Students, Professors. Rutherford, N.J.: Fairleigh Dickinson University Press, 1971.

_____, and Rudy, Willis. Higher Education in Transition. New York: Harper & Row, Publishers, 1958.

Byse, Clark, and Joughin, Louis. Tenure in American Higher Education: Plans, Practices, and the Law. Ithaca, N.Y.: Cornell University Press, 1959.

Chambers, M. M. The Colleges and the Courts: Faculty and Staff Before the Bench. Danville, Ill.: The Interstate Printers & Publishers, Inc., 1973.

_____. The Colleges and the Courts 1936-1940: Recent Judicial Decisions Regarding Higher Education in the United States. Boston: D. B. Updike, The Merrymount Press, 1941.

_____. The Colleges and the Courts 1941-1945: Recent Judicial Decisions Regarding Higher Education in the United States. Boston: D. B. Updike, The Merrymount Press, 1946.

Cohen, Morris L. Legal Research in a Nutshell. 2d ed. St. Paul, Minn.: West Publishing Co., 1971.

Davis, Kenneth Culp. Discretionary Justice: A Preliminary Inquiry. Baton Rouge, Louisiana: Louisiana State University Press, 1969.

Elliott, Edward Charles, and Chambers, M. M. The Colleges and the Courts: Judicial Decisions Regarding Institutions of Higher Education in the United States. New York: The Merrymount Press, 1936.

Frontiers of School Law. Topeka, Kansas: The National Organization on Legal Problems of Education, 1973.

Hofstadter, Richard. Academic Freedom in the Age of the College. New York: Columbia University Press, 1964.

_____, and Metzger, Walter P. The Development of Academic Freedom in the United States. New York: Columbia University Press, fifth printing, 1965.

Johnson, George M. Education Law. East Lansing, Mich.: Michigan State University Press, 1969.

Joughin, Louis, ed. Academic Freedom and Tenure. A Handbook of The American Association of University Professors. Madison, Wisconsin: The University of Wisconsin Press, 1967.

Keast, William R. (Chairman), Macy, John W., Jr. (Co-Chairman), Commission on Academic Tenure in Higher Education. Faculty Tenure: A Report and Recommendations. San Francisco: Jossey Bass Publishers, 1973.

- Metzger, Walter P. Academic Freedom in the Age of the University. New York: Columbia University Press, fifth printing, 1964.
- Morris, Arval A. The Constitution and American Education. St. Paul, Minn.: West Publishing Co., 1974.
- Rudolph, Frederick. The American College and University. New York: Vintage Books, 1965.
- Smith, Bardwell L., and Associates. The Tenure Debate. San Francisco: Jossey-Bass, Inc., Publishers, 1973.
- Statsky, William P. Legal Research Writing and Analysis: Some Starting Points. St. Paul, Minn.: West Publishing Co., 1974.
- Sullivan, Maurice Michel. "Academic Freedom in Historical-Legal Context." Ph.D. dissertation, Miami University, 1971.
- Wilkie, William R. "Faculty Academic Freedom: A Legal Analysis." Ph.D. dissertation, Michigan State University, 1969.

Articles From Professional Journals

- "Academic Freedom and Tenure: Bloomfield College (New Jersey)." AAUP Bulletin 60 (March 1974): 50-66.
- "Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments." AAUP Bulletin 60 (June 1974): 269-72.
- "Academic Freedom and Tenure, Statement of Principles, 1940." Bulletin of the American Association of University Professors 27 (February 1941): 40-46.
- "Academic Freedom and Tenure, Statement of Principles, 1938." Bulletin of the American Association of University Professors 26 (1940): 49-54.
- "Academic Freedom and Tenure: The City University of New York (SEEK Center)." AAUP Bulletin 60 (March 1974): 67-81.
- "Academic Freedom and Tenure: Voohees College (South Carolina)." AAUP Bulletin 60 (March 1974): 82-89.

AAUP Policy Documents and Reports. 1973 edition. Washington, D.C.: The American Association of University Professors, February, 1973.

Brewster, Kingman, Jr. "On Tenure." AAUP Bulletin 58 (Winter 1972): 381-83.

Brown, Ralph S., Jr. "Rights and Responsibilities of Faculty." AAUP Bulletin 52 (June 1966): 131-40.

Byse, Clark. "Academic Freedom, Tenure, and the Law: A Comment on 'Worzella v. Board of Regents.'" AAUP Bulletin 46 (June 1960): 209-17.

Devaughn, J. Everette. "Termination and Due Process-- A Comment." Journal of Law & Education 2 (April 1973): 305-11.

"Developments in the Law: Academic Freedom." Harvard Law Review 81 (1968): 1045-1159.

"Developments of Association Policy: Procedural Standards or Nonrenewal of Faculty Appointments." AAUP Bulletin 57 (June 1971): 202-05.

"Due Process and Tenure in Institutions of Higher Education." Today's Education 62 (February 1973): 60-62.

"Due Process Restrictions on the Employment Power and the Teaching Profession." Nebraska Law Review 50 (1971): 655-75.

Evers, Irving C. "The Legal Rights of the Untenured Teacher." Nolpe School Law Journal 1 (Fall 1970): 103-12.

"Faculty Participation in the Selection and Retention of Administrators." AAUP Bulletin 60 (December 1974): 414-15.

Fellman, David. "Academic Freedom in American Law." Wisconsin Law Review (January 1961): 3-46.

Freedman, Haskell C. "The Legal Rights of Untenured Teachers." Nolpe School Law Journal 1 (Fall 1970): 93-102.

- Fuchs, Ralph F. "Academic Freedom--Its Basic Philosophy, Function, and History." In Academic Freedom The Scholar's Place in Modern Society, pp. 1-16. Edited by Hans Baacle and Robinson O. Everett. Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1964.
- Gottesman, Michael. "Due Process for Nontenured Teachers From the Teacher's Viewpoint." In Frontiers of School Law, pp. 5-14. Topeka, Kansas: The National Organization on Legal Problems of Education, 1973.
- Griffis, Donald W., and Wilson, John Richard. "Constitutional Rights and Remedies in the Non-Renewal of a Public School Teacher's Employment Contract." Baylor Law Review 25 (Fall 1973): 549-96.
- Hazard, William R. "Tenure Laws in Theory and Practice." Phi Delta Kappan 56 (March 1975): 451-54.
- Hopkins, David S. P. "Analysis of Faculty Appointment, Promotion, and Retirement Policies." Higher Education 3 (1974): 397-418.
- Jacobsen, Gene S.; Sperry, David J.; and Jensen, Boyd F. "The Dismissal and Non-Reemployment of Teachers." Journal of Law Education 1 (July 1972): 435-48.
- Joughin, Louis. "Academic Due Process." AAUP Bulletin 50 (March 1964): 19-35.
- _____. "Academic Due Process." In Academic Freedom The Scholar's Place in Modern Society, pp. 143-71. Edited by Hans W. Baacle and Robinson O. Everett. Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1964.
- Kallen, Laurence H. "The Roth Decision: Does the Nontenured Teacher Have a Constitutional Right to a Hearing Before Nonrenewal?" Illinois Bar Journal (May 1973): 464-69.
- Keck, Donald J. "Tenure: Who Needs It?" Phi Delta Kappan 54 (October 1972): 124-27.
- Kenny, William E. "Constitutional Law--Procedural Due Process--The Rights of a Non-tenured Teacher Upon Non-Renewal of His Contract at a State School." DePaul Law Review 22 (Spring 1973): 702-12.

- Kilgore, W. J. "Reviewing Tenure." AAUP Bulletin 59 (Autumn 1973): 339-345.
- Kutner, Luis. "Habeas Scholastica: An Ombudsman for Academic Due Process--A Proposal." University of Miami Law Review 23 (1968): 107-59.
- _____. "The Freedom of Academic Freedom: A Legal Dilemma." Chicago-Kent Law Review 48 (Fall-Winter 1971): 168-89.
- Lang, Theodore H. "Teacher Tenure as a Management Problem." Phi Delta Kappan 56 (March 1975): 459-62.
- Lowenfish, Lee. "Reflections on Not Being Fired, Just Not Rehired." Change Magazine 3 (Winter 1971-72): 52-54.
- McConnell, W. H. "The Fractious Academy: A Canadian Approach to Dispute Resolution." Journal of Law-Education 3 (April 1974): 233-50.
- Machlup, Fritz. "In Defense of Academic Tenure." AAUP Bulletin 50 (June 1964): 112-24.
- Malpass, Leslie F.; Montgomery, James R.; and Price, Barbara A. "Dividing Up the Tenure Pie." College and University Business 57 (August 1974): 33-35.
- Mason, Philip A. "Academic Teaching Freedom." Nolpe School Law Journal 1 (Fall 1970): 3-22.
- Moog, Florence. "A Dragon Called Tenure." Change Magazine 4 (November 1972): 10-11, 61.
- Morris, Arval A. "Academic Freedom and Loyalty Oaths." In Academic Freedom The Scholar's Place in Modern Society, pp. 57-84. Edited by Hans W. Baacle and Robinson O. Everett. Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1964.
- Murphy, William P. "Academic Freedom--An Emerging Constitutional Right." In Academic Freedom The Scholar's Place in Modern Society, pp. 17-56. Edited by Hans W. Baacle and Robinson O. Everett. Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1964.

- Murphy, William P. "Educational Freedom in the Courts." AAUP Bulletin 49 (December 1963): 309-27.
- Nisbet, Robert. "The Future of Tenure." Change Magazine 5 (April 1973): 27-33.
- O'Brien, Francis William. "Due Process for the Nontenured in Private Schools." Journal of Law-Education 3 (April 1974): 175-202.
- "On the Imposition of Tenure Quotas." AAUP Bulletin 59 (Winter 1973): 428-30.
- "1974 Reports on Cases of Late Notice." AAUP Bulletin 60 (December 1974): 421-23.
- "1973 Report of the Special Committee on Nontenured Faculty." AAUP Bulletin 59 (Summer 1973): 185-87.
- "1972 Recommended Institutional Regulations on Academic Freedom and Tenure." AAUP Bulletin 58 (Winter 1972): 428-33.
- "1968 Recommended Institutional Regulations on Academic Freedom and Tenure." AAUP Bulletin 54 (December 1968): 448-52.
- "1925 Conference Statement on Academic Freedom and Tenure." AAUP Bulletin 11 (1925): 99-101.
- Palmer, Walter H. "Due Process Termination of Untenured Teachers." Journal of Law-Education 1 (July 1972): 469-85.
- Pettigrew, Harry W. "'Constitutional Tenure:' Toward a Realization of Academic Freedom." Case Western Reserve Law Review 22 (April 1971): 475-514.
- "Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments." A Report of Committee A on Academic Freedom and Tenure. AAUP Bulletin 56 (March 1970): 21-24.
- "'Property' Under Due Process--Non-tenured Teachers' Right to Re-Employment." Southwestern Law Journal 27 (May 1973): 398-406.
- Reich, Charles A. "New Property." Yale Law Journal 73 (1964): 733-87.
- "Report of Committee A." AAUP Bulletin 4 (1918): 16-28.

- "Report of Committee A, 1963-1964." AAUP Bulletin 50 (June 1964): 125-35.
- "Report of Committee A, 1971-1972." AAUP Bulletin 58 (Summer 1972): 145-55.
- "Report of Committee A, 1972-1973." AAUP Bulletin 59 (Summer 1973): 150-61.
- "Report of the Special Committee on Nontenured Faculty." AAUP Bulletin 58 (Summer 1972): 156-59.
- "Report on Retirement and Academic Freedom." AAUP Bulletin 54 (December 1968): 425-26.
- Shannon, Thomas A. "Due Process for Nontenured Teachers From the Board's Viewpoint." In Frontiers of School Law, pp. 15-25. Topeka, Kansas: The National Organization on Legal Problems of Education, 1973.
- Simpson, William A. "Tenure: A Perspective of Past, Present, and Future." Educational Record (Winter 1975): 48-54.
- Smith, Norman B., and Gerbala, Patricia. "Job Security for Public Employees." Washington and Lee Law Review 31 (1974): 545-71.
- "Statement on Procedural Standards in Faculty Dismissal Proceedings." AAUP Bulletin 54 (December 1968): 439-44.
- "Statement on Procedural Standards in the Renewal or Non-renewal of Faculty Appointments." AAUP Bulletin 57 (June 1971): 206-10.
- "Substantive Due Process: The Extent of Public Employees' Protection From Arbitrary Dismissal." University of Pennsylvania Law Review 122 (1974): 1647-63.
- "Termination of Faculty Appointments Because of Financial Exigency, Discontinuance of a Program or Department, or Medical Reasons." AAUP Bulletin 60 (December 1974): 411-13.
- "The Bloomfield College Case--The Decision of the New Jersey Superior Court (AAUP et al. v. Bloomfield College et al.)." AAUP Bulletin 60 (September 1974): 320-30.

"The Polytechnic Institute of New York: A Report on a Case of Excessive Probation." AAUP Bulletin 60 (December 1974): 416-20.

"The Role of the Faculty in Budgetary and Salary Matters." A Report by Committee T. AAUP Bulletin 57 (Summer 1971): 187-90.

"The Role of the Faculty in Budgetary and Salary Matters." AAUP Bulletin 58 (June 1972): 170-72.

Thurstone, L. L. "The Thurstone Plan for Enforcing Principles of Freedom and Tenure." AAUP Bulletin 23 (May 1932): 361-63.

Van Alstyne, William. "Tenure: A Summary, Explanation, and 'Defense.'" AAUP Bulletin 57 (September 1971): 328-33.

_____. "The Demise of the Right-Privilege Distinction in Constitutional Law." Harvard Law Review 81 (1968): 1439-64.

_____. "The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann." AAUP Bulletin 58 (September 1972): 267-70.

West, Richard R. "Tenure Quotas and Financial Flexibility in Colleges and Universities." Educational Record (Spring 1974): 96-100.

Young, A. A. "Report of Committee A." AAUP Bulletin 2 (1916): 17.

Reports and Monographs

Blackburn, Robert T. Aspects of Job Security on the Changing Campus. Atlanta: Southern Regional Education Board, 1972, SREB Research Monograph No. 19.

El-Khawas, Elaine H., and Furniss, W. Todd. Faculty Tenure and Contract Systems: 1972 and 1974. Higher Education Panel Reports No. 22. Washington, D.C.: American Council on Education, December, 1974.

- Furniss, W. Todd. Steady-State Staffing in Tenure-Granting Institutions, and Related Papers. Washington, D.C.: American Council on Education, 1973.
- Leslie, Larry L., and Miller, Howard F., Jr. Higher Education and the Steady State. ERIC/Higher Education Research Report No. 4. Washington, D.C.: American Association for Higher Education, 1974.
- Mortimer, Kenneth P. "Research Data on Tenure and Governance Under Collective Bargaining." A speech delivered at the American Federation of Teachers Conference: Collective Bargaining Faculty Governance and Tenure, November 16, 1974, New York City.
- Shulman, Carol Hernstadt. Employment of Nontenured Faculty: Some Implications of "Roth" and "Sindermann." ERIC/Higher Education Research Report No. 8. Washington, D.C.: American Association for Higher Education, 1973.

Newspaper Articles

- Park, Dabney, Jr. "Tenure Shock." The Chronicle of Higher Education 4 (June 1973): 16.
- Semas, Phillip W. "Faculty Firings Soar as Slump Hits Enrollment." The Chronicle of Higher Education 28 (January 1974): 1, 3.
- _____. "Tenured Professors Have Only Limited Protection Against Emergency Layoffs, Federal Judge Rules." The Chronicle of Higher Education 24 (June 1974): 1, 2.
- "Southern Illinois Drops Its Suit Against Teachers." The Chronicle of Higher Education 10 (June 1974): 1-2.
- "Tenure: A Judge Rules in Favor of Professors at Bloomfield." The Chronicle of Higher Education 8 (July 1974): 2.
- "Tenure: An Iowa Court Says Financial Exigency Justifies Firing a Teacher." The Chronicle of Higher Education 5 (August 1974): 2.

"Tenure Dispute Tests 2 Roles of President." The Chronicle of Higher Education 28 (May 1974): 1-2.

"Utah Tenure Ruling Allowed to Stand." The Chronicle of Higher Education 24 (June 1974): 2.

Wall Street Journal, 16 April 1971, p. 1.

Watkins, Beverly T. "Academic Jobs: Stability in the '70's." The Chronicle of Higher Education 9 (December 1974): 3.

"Will Enrollments Nosedive?" The Chronicle of Higher Education 10 (February 1973): 7.

Court Cases

Adamian v. University of Nevada 359 F.Supp. 825 (D.Nev. 1973).

Adams v. Walker 492 F.2d 1003 (1974).

Adkins v. Children's Hospital 261 U.S. 525 (1923).

Adler v. Board of Education 342 U.S. 485 (1952).

American Association of University Professors v. Bloomfield College 129 N.J.Super. 249, 322 A.2d 846 (1974).

Aptheker v. Secretary of State 378 U.S. 500 (1964).

Arnett v. Kennedy 416 U.S. 134 (1974).

Association of New Jersey State College Faculties, Inc. v. Dungan 316 A.2d 425 (1974).

Auerbach v. Trustees of the California State Colleges 330 F.Supp. 808 (C.D.Cal. 1971).

Bagget v. Bullitt 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed. 2d 377 (1964).

Baldwin v. Hale 68 U.S. 223 (1863).

Balen v. Peralta Junior College District 111 Cal. Rptr. 343 (1974).

Barenblatt v. United States 360 U.S. 109 (1959).

- Becker v. Barry 300 N.Y.S. 1153, 165 Misc. 877 (1937).
- Beilan v. Board of Education 357 U.S. 399, 2 L.Ed.2d 1414, 78 S.Ct. 1317 (1958).
- Bell v. Burson 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586 (1971).
- Berry v. Hamblin 356 F.Supp. 306 (1973).
- Birnbaum v. Trussell 371 F.2d 672 (2d Cir. 1966).
- Blair v. Board of Regents of the State University and Community College System of Tennessee et al. 496 F.2d 322 (1974).
- Board of Education v. Cook 3 Kan. App. 269, 45 Pac. 119 (1896).
- Board of Education v. Mudge 21 Kan. 169 (1878).
- Board of Regents of Oklahoma Agricultural Colleges et al. v. Updegraff 205 Okla. 301, 237 P.2d 131 (1951).
- Board of Regents of State Colleges v. Roth 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).
- Board of Trustees of Arkansas A & M College v. Davis 396 F.2d 730 (U.S.C.A. Ark. 1968); affirming 270 F.Supp. 528 (1967); cert. denied, 393 U.S. 962, 89 S.Ct. 401, 21 L.Ed.2d 375 (1968).
- Bomar v. Keyes 162 F.2d 136 (2d Cir.), cert. denied, 332 U.S. 825 (1947).
- Bond v. County of Delaware 368 F.Supp. 618 (1973).
- Bowing v. Board of Trustees of Green River Community College 521 P.2d 220 (Wash. App. 1974).
- Bradford v. Tarrant County Junior College Dist. 356 F.Supp. 197 (DC ND Tex. 1973).
- Bradley v. New York University 124 N.Y.S.2d (Sup. Ct. 1953), affirmed 283 App. Div. 671, 127 N.Y.S.2d 845, mem. 307 N.Y. 620, 120 N.E.2d 828 (1954).
- Breen v. Larson College 137 Conn. 152, 75 A.2d 39 (1950).
- Bruno v. Detroit Institute of Technology 215 N.W.2d 745 (Mich. Ct. App. 1974).

Brush v. State Board of Higher Education (Ore) 422 P.2d 268 (1966).

Buhr v. Buffalo School District No. 39 364 F.Supp. 1225 (1973).

Burns v. Decker 212 N.W.2d 886 (Minn. 1973).

Butler v. Regents of the University 32 Wis. 8 (1894).

Cafeteria Workers v. McElroy 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1960).

Cannady v. Person County Board of Education 375 F.Supp. 689 (1974).

Cardinale v. Washington Technical Institute 500 F.2d 791 (1974).

Central Union Trust Co. v. Garvan 254 U.S. 554, 65 L.Ed. 403, 41 S.Ct. 214 (1921).

Chambers v. Hindersonville City Board of Education 364 F.2d 189 (4th Cir. 1966).

Chitwood et al. v. Feaster 468 F.2d 359 (4th Cir. 1972).

Chung v. Park 377 F.Supp. 524 (1974).

Chung v. Park 369 F.Supp. 959 (1974).

Clark v. Holmes 474 F.2d 928 (1972), cert. denied 93 S.Ct. 2148 (1973).

Cleveland Board of Education v. LaFleur 414 U.S. 632 (1974).

Cole, State Hospital Superintendent v. Richardson 405 U.S. 676, 92 S.Ct. 1332 (1972).

Collins v. Wolfson 498 F.2d 1100 (1974).

Connell v. Higginbotham (U.S.D.C., Fla.) 305 F.Supp. 445, 18 A.L.R.2d. 268 (1969), affirmed in part, reversed in part 403 U.S. 207, 29 L.Ed.2d 418, 91 S.Ct. 1772 (1971).

Cook County Teachers Union Local 1600, A.F.T. v. Byrd 456 F.2d 882 (7th Cir. 1972), cert. denied 409 U.S. 848, 34 L.Ed.2d 90, 93 S.Ct. 56 (1972).

Cookson v. Lewistown School District #1 351 F.Supp. 983 (1972).

Crabtree v. Brennan 466 F.2d 480 (6th Cir. 1972).

Cramp v. Board of Public Instruction 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961).

Cusumano v. Ratchford 373 F.Supp. 1128 (1974).

Darrow v. Briggs 261 Mo. 244 (1914).

Davis v. Barr 373 F.Supp. 740 (1973).

Davis v. University of Kansas City 129 F.Supp. 716 (1955).

Deval v. Board of Regents of the University of Arizona 6 Arizona Reports 259 (1899).

Donaldson v. O'Connor 493 F.2d 507 (1974).

Dougherty v. Walker 349 F.Supp. 629 (1972).

Downs v. Hoboken Board of Education 13 N.J.Misc. 853, 181 A. 688 (Sup. Ct. 1935).

Drown v. Portsmouth School District 435 F.2d 1182 (1970), affirmed 451 F.2d 1106 (1971), cert. denied 402 U.S. 972 (1971).

Duke v. North Texas State University 338 F.Supp. 990 (1971), reversed 469 F.2d 829 (5th Cir. 1973), cert. denied 412 U.S. 932, 37 L.Ed.2d 160, 93 S.Ct. 2760 (1973).

Ehreneich v. Londerholm 273 F.Supp. 178 (1967).

Elfbrandt v. Russell 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966).

Esteban v. Central Missouri State College 415 F.2d 1077 (C.A. 8th Cir. 1969).

Ewing v. Mytinger & Casselberry, Inc. 339 U.S. 594, 94 L.Ed. 1088, 70 S.Ct. 870 (1950).

Ferguson v. Thomas 430 F.2d 852 (5th Cir. 1970).

Fluker v. Alabama State Board of Education 441 F.2d 201 (1971).

Francis v. Ota 356 F.Supp. 1029 (1973).

Franz v. Board of Education N.D. Ill., No. 772 C. 151,
August 10, 1972 (unreported).

Frazier v. The Curators of the University of Missouri
495 F.2d 1149 (1974).

Freeman v. Gould Special School District 405 F.2d 1153
(8th Cir. 1969), cert. denied 396 U.S. 843,
90 S.Ct. 61, 24 L.Ed.2d 93 (1969).

Fuentes v. Shevin 407 U.S. 67 (1972).

Fuller v. DePaul University 293 Ill. App. 261, 12 N.E.2d
213 (1938).

Gallagher v. Smiley 270 F.Supp. 86 (1967).

Garner v. Board of Public Works 341 U.S. 716 (1951).

Geneva Towars Tenants Organization v. Federated Mortgage
Inv. 504 F.2d 483 (1974).

Georgia Conference of the American Association of Uni-
versity Professors v. Board of Regents of the
University System of Georgia 2046 F.Supp. 553
(1965).

Gerende v. Board of Supervisors 341 U.S. 56 (1951).

Gillian v. Board of Regents of Normal Schools 88 Wisconsin
7 (1894).

Gilmore v. James 274 F.Supp. 75 (DC Tex. 1967), affirmed
389 U.S. 572 (1968).

Glover v. Daniel 434 F.2d 617 (5th Cir. 1970).

Goldberg v. Kelley 397 U.S. 254, 25 L.Ed. 2d 287, 90
S.Ct. 1011 (1970).

Goldwasser v. Brown 417 F.2d 1169 (D.C. Cir. 1969).

Gordenstein v. The University of Delaware 381 F.Supp.
718 (1974).

Hartigan v. Board of Regents of West Virginia University
38 S.E. 698, 49 W.V. 14 (1901).

Head v. The University of Missouri 19 Wall (US) 526,
22 L.Ed. 160 (1873).

- Heckler v. Shepard (U.S.D.C., Idaho) 243 F.Supp. 841 (1965).
- Hetrick v. Martin (U.S.D.C., Ky.) 322 F.Supp. 545 (1971), affirmed 480 F.2d 705 (1973).
- Hirsch v. Green 368 F.Supp. 1061 (1973).
- Holliman v. Martin 330 F.Supp. 1 (1971).
- Hosack v. Smiley (U.S.D.C., Colo) 276 F.Supp. 876 (1967), affirmed 390 U.S. 744, 88 S.Ct. 1442, 20 L.Ed.2d 275 (1968).
- Hostrop v. Board of Junior College District 377 F.Supp. 977 (1972), reversed 471 F.2d 488 (1972), cert. denied 411 U.S. 967 (1973).
- Illinois State Employees Union, Council 34 v. Lewis 473 F.2d 561 (1972).
- Issacs v. Board of Trustees of Temple University U.S. Dist. Ct., E.D.Pa., C.A. No. 73-1992, Nov. 11, 1974.
- Jablon v. Trustees of California State Colleges 482 F.2d 997 (1973) cert. denied 414 U.S. 1163 (1974).
- Jaroch v. Board of Regents, University of Wisconsin System 372 F.Supp. 106 (1974).
- Jervey v. Martin 336 F.Supp. 1350 (1972).
- Johnson v. Board of Regents of University of Wisconsin System 377 F.Supp. 227 (1974).
- Johnson v. Branch 364 F.2d 177 (4th Cir. 1966), cert denied 385 U.S. 1003, 17 L.Ed.2d 542, 87 S.Ct. 706 (1967).
- Johnson v. Fraley 470 F.2d 179 (4th Cir. 1972).
- Johnson v. Harvey 382 F.Supp. 1043 (1974).
- Johnson v. Netterville, Jr. 488 F.2d 394 (1974).
- Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123, 95 L.Ed. 817, 71 S.Ct. 624 (1951).

Jones v. Battles 315 F.Supp. 601 (D.Conn. 1970).

Jones v. Board of Control 131 So.2d 713 (1961).

Jones v. Hopper 410 F.2d 1323 (10th Cir. 1969), cert.
denied 397 U.S. 991, 905 S.Ct. 1111, 25 L.Ed.2d
399 (1970).

Katz v. Board of Trustees of Gloucester Co. College
288 A.2d 43 (1972), reversed 310 A.2d 491 (1973).

Kay v. Board of Higher Education 173 Misc. 943, 18 N.Y.S.2d
821 (Sup. Ct. 1940).

Keyishian v. Board of Regents 385 U.S. 589, 17 L.Ed.2d
629, 87 S.Ct. 675 (1967).

Knight v. Board of Regents of University of State of
New York 269 F.Supp. 339, affirmed 390 U.S. 36
(1967).

Koch v. Board of Trustees of the University of Illinois
39 Ill. App.2d 51, 187 N.E.2d 340 (1962), cert.
denied 375 U.S. 989 (1963).

Kota v. Little 473 F.2d 1 (1973).

Thalberg v. Board of Trustees of University of Illinois,
Krehbiel v. Board of Education of School District No. 117,
Morgan County, Illinois 309 F.Supp. 630 (1969).

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

Larkin v. Withrow 368 F.Supp. 796 (E.D.Wis. 1973).

Levitt v. Board of Trustees of Nebraska State Colleges
376 F.Supp. 945 (1974).

Lewis v. Spencer 369 F.Supp. 1219 (1974).

Lindley v. Davis 117 Kan. 558, 231 P. 1026 (1925).

Lipp v. Board of Education of the City of Chicago 470
F.2d 802 (7th Cir. 1972).

Lombard v. Board of Education of City of New York 502
F.2d 631 (1974).

Lucas v. Chapman 430 F.2d 945 (5th Cir. 1970).

Lucia v. Duggan 303 F.Supp. 112 (D. Mass. 1969).

- Lukac v. Acocks 466 F.2d 577 (6th Cir. 1972).
- Maybe v. Reagan 376 F.Supp. 216 (1974).
- Miller v. School Dist. No. 167, Cook County Ill. 495 F.2d 658 (1974).
- Moore v. Board of Education 448 F.2d 709 (8th Cir. 1971).
- Moore v. Knowles 466 F.2d 531 (5th Cir. 1972).
- Moore v. Gaston County Board of Education 357 F.Supp. 1037 (1973).
- Murdock v. Phillips Academy 24 Mass. (7 Pick) 303 (1828).
- McAuliffe v. Mayor of New Bedford 155 Mass. 216, 29 N.E. 517 (1892).
- McConnell v. Anderson 451 F.2d 193 (1971), cert. denied 405 U.S. 1046 (1972).
- McCormick v. Thatcher (McCornick v. Pratt) 8 Utah 294, 30 P. 1091, 17 L.R.A. 243 (1892).
- McDowell v. Texas 465 F.2d 1342 (5th Cir. 1972).
- McEnteggart v. Cataldo 451 F.2d 1109 (1971).
- McFerren v. County Board of Education of Fayette County, Tennessee 455 F.2d 199 (6th Cir. 1971).
- McLaughlin v. Tilendis 398 F.2d 287 (7th Cir. 1968).
- Nostrand v. Little 362 U.S. 474 (1960).
- Ohlson v. Phillips (U.S.D.C., Colo.) 304 F.Supp. 1152 (1969), affirmed per curiam without opinion in 397 U.S. 317, 90 S.Ct. 1124 25 L.Ed.2d 337 (1970), rehearing denied 397 U.S. 1081 (1970).
- Olson v. Regents of the University of Minnesota 301 F.Supp. 1356 (1969).
- Olson v. Trustees of the California State Universities 351 F.Supp. 430 (1972).
- Orr v. Thorpe 427 F.2d 1129 (1970).
- Orr v. Trinter 318 F.Supp. 1041 (1970), 444 F.2d 128 (6th Cir. 1971), cert. denied 408 U.S. 943 (1972).

Ortwein v. Mackey 358 F.Supp. 705 (1973).

Papadopoulos v. Oregon State Board of Higher Education
511 P.2d 854 (Or. App. 1973).

Parker v. Board of Education 237 F.Supp. 222 (D.Md. 1965),
affirmed per curiam 348 F.2d 464 (4th Cir. 1965).

Peacock v. Board of Regents of University and State Col-
leges of Arizona 380 F.Supp. 1081 (1974).

Pedlosky v. Massachusetts Institute of Technology 224
N.E.2d 414 (1967).

Pelisek v. Trevor State Graded School District No. 7 of
the Town of Salem, Kenosha County, Wisconsin
371 F.Supp. 1064 (1974).

Pendrell v. Chatham College 370 F.Supp. 494 (W.D.Pa 1974).

Perkins v. The Regents of the University of California
353 F.Supp. 618 (1973).

Perrin v. Oregon State Board of Higher Education 515 P.2d
409 (1974).

Perry v. Sindermann 408 U.S. 593, 92 S.Ct. 2694, 33
L.Ed.2d 570 (1972).

Phillips v. Commissioner 283 U.S. 589, 75 L.Ed. 1289,
51 S.Ct. 608 (1931).

Pickering v. Board of Education 391 U.S. 563 (1968).

Pockman v. Leonard 39 Cal.2d 676, 249 P.2d 267 (1952).

Poddar v. Youngstown State University 480 F.2d 192 (1973).

Posin v. State Board of Higher Education 86 N.W.2d 31
(ND 1957).

Pred v. Board of Public Instruction of Dade County,
Florida 415 F.2d 851 (1969).

Rainey v. Jackson State College 435 F.2d 1031 (1971).

Rampey v. Allen 501 F.2d 1090 (1974).

Redman v. Department of Education, Alaska 519 P.2d 760
(1974).

Robinson v. Jefferson County Board of Education 485
F.2d 381 (5th Cir. 1973).

Rochin v. California 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.
183 (1952).

Rolfe v. County Board of Education of Lincoln County
Tennessee 282 F.Supp. 192 (E.D.Tenn. 1966),
affirmed 391 F.2d 77 (6th Cir. 1968).

Roseman v. Hassler 382 F.Supp. 1328 (1974).

Roth v. The Board of Regents of State Colleges 310 F.Supp.
972 (W.D. Wis. 1970), affirmed 446 F.2d 806 (7th
Cir. 1970), reversed 408 U.S. 564, 92 S.Ct. 2701,
33 L.Ed.2d 548 (1972).

Rozman v. Elliott 335 F.Supp. 1086, affirmed 467 F.2d
1145 (1971).

Scheelhaase v. Woodbury Central Community School District
349 F.Supp. 988 (N.D. Iowa 1972).

Schenck v. United States 249 U.S. 47 (1919).

Schlichting v. Bergstrom 511 P.2d 846 (1973).

Schware v. Board of Bar Examiners 353 U.S. 232 (1957).

Schwartz v. Thompson 497 F.2d 430 (1974).

Shelton v. Tucker 364 U.S. 479 (1960).

Sheppard v. West Virginia Board of Regents 378 F.Supp.
4 (1974).

Sherbert v. Verner 374 U.S. 398 (1963).

Shields v. Watrel 333 F.Supp. 260 (1971).

Shirck v. Thomas 486 F.2d 691 (1973).

Shumate v. Board of Education 478 F.2d 233 (4th Cir.
1973).

Simmonds v. Government Employees' Service Commission
375 F.Supp. 934 (1974).

Sindermann v. Perry U.S. District Court, Western District
of Texas, Midland-Odessa Division, No. MO-690CA34,
August 4, 1969 (Unreported), 430 F.2d 939, affirmed
408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

Skehan v. Board of Trustees of Bloomsburg State College
501 F.2d 31 (1974).

Skidmore v. Shamrock Independent School District 464 F.2d
605 (5th Cir. 1972).

Slippery Rock State College v. Penn. Human Relations Com-
mittee 314 A.2d 344 (Pa. Comolth 1974).

Slochower v. Board of Higher Education 350 U.S. 551, 76
S.Ct. 637, 100 L.Ed. 692 (1956).

Smith v. Board of Education 365 F.2d 770 (C.A. 8th Cir.
1966).

Smith v. Board of Regents, State Senior Colleges 426
F.2d 492 (1970).

Smith v. Losee 485 F.2d 334 (10th Cir. 1973).

Snyder v. Massachusetts 291 U.S. 97 (1934).

Soni v. Board of Trustees of University of Tennessee 376
F.Supp. 289 (1974).

Speiser v. Randall 357 U.S. 513 (1958).

Stantz v. Pence 517 P.2d 111 (1973).

Starsky v. Board of Trustees of California State Colleges
109 Cal. Rptr. 822 (Cal. App. 1973).

State ex rel. Hunsicker v. Board of Regents 209 Wis. 83,
244 N.W. 618 (1932).

State ex rel. Keeney v. Ayers 108 Mont. 547, 92 P.2d
306 (1939).

State ex rel. Richardson v. Board of Regents of Uni-
versity of Nevada et al. 70 Nev. 144, 261 P.2d
515 (1953), 70 Nev. 347, 269 P.2d 265 (1954).

Stewart v. Pearce et al. 484 F.2d 1031 (1973).

Steward v. San Mateo Jr. College 112 Cal. Rptr 272 (Cal.
App. 1974).

Stolberg v. Members of Board of Trustees for the State
Colleges of the State of Connecticut et al.
474 F.2d 485 (1973).

- Suarez v. Weaver 484 F.2d 678 (7th Cir. 1973).
- Sweezy v. New Hampshire 354 U.S. 234 (1957).
- Thaw v. Board of Public Instruction 432 F.2d 98 (5th Cir. 1970).
- Thomas v. Ward 374 F.Supp. 206 (M.D.N.C. 1974).
- Thorp v. Board of Trustees 6 N.J. 498, 79 A.2d 462 (1951).
- Tims v. Board of Education 452 F.2d 551 (8th Cir. 1971).
- Tinker v. Des Moines Independent Community School District 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).
- Toney v. Reagan 326 F.Supp. 1093 (1971), 407 F.2d 933 (1972); Rehearing denied Oct. 5, 1972, cert. denied Jan. 15, 1973, 93 S.Ct. 951 (1973).
- Torcaso v. Watkins 367 U.S. 488 (1961).
- Trister v. University of Mississippi 420 F.2d 499 (5th Cir. 1969).
- Trustees of Dartmouth College v. Woodward 17 U.S. 584 (1819).
- Tyngrett v. Washington 346 F.Supp. 1247 (D.D.C. 1972).
- United Public Workers v. Mitchell 330 U.S. 75 (1947).
- University of Alaska v. Chauvin 521 P.2d 1234 (1974).
- University of Mississippi v. Deister 76 So. 526, 115 Miss. 469 (1917).
- Viemeister v. Prospect Park Board of Education 5 N.J.Super. 215 (App. Div. 1949).
- Vogel v. County of Los Angeles 68 Cal.2d 18, 64 Cal. Rptr. 409, 434 P.2d 961 (1967).
- Wahba v. New York University 492 F.2d 96 (1974).
- Walker v. California State Board of Trustees 351 F.Supp. 997 (1972) affirmed 485 F.2d 683.
- Walker v. Wildwood Board of Education 120 N.J.L. 408 (Sup. Ct. 1938).

- Wall v. Stanley County Board of Education 378 F.2d 275
(4th Cir. 1967).
- Ward v. Kansas State Agricultural College Board of Regents 138 F. 372, 70 CCA 512 (1905).
- Ward v. Kentucky State University Board of Regents 360
F.Supp. 1179 (1973).
- Watts v. Board of Curators, University of Missouri 363
F.Supp. 883 (1973).
- Weiss v. Walsh 324 F.Supp. 75 (1971).
- Wellner v. Minnesota State Junior College Board 487
F.2d 153 (8th Cir. 1973).
- Whitehill v. Elkins 287 F.Supp. 61 (1968) on rem'd from
S.Ct. 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228
(1967).
- Whitney v. Board of Regents of University of Wisconsin
355 F.Supp. 321 (1973).
- Wieman v. Updegraff 344 U.S. 183 (1952).
- Wilderman v. Nelson 467 F.2d 1173 (8th Cir. 1972).
- Wisconsin v. Constantineau 400 U.S. 433, 27 L.Ed.2d 515,
91 S.Ct. 507 (1971).
- Worzella v. Board of Regents of Education 77 S.D. 447,
93 N.W.2d 411 (1958).
- Younos v. Shabat 336 F.Supp. 1137 (1971).
- Zimmerer v. Spencer 485 F.2d 176 (5th Cir. 1973).
- Zumwalt v. Trustees of the California State Colleges
107 Cal. Rptr. 573 (1973), reversed 109 Cal.
Rptr. 344 (1973).

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