1973

Property under Due Process - Non-Tenured Teachers' Right to Re-Employment

Nathan L. Hecht

"Property" Under Due Process— Non-Tenured Teachers' Right to Re-Employment

Robert Sindermann was a non-tenured teacher in a Texas state college system for ten years, the last four of which he spent at Odessa Junior College under a series of one-year contracts.[1] Mounting friction between the Board of Regents and Professor Sindermann[2] culminated in the Board's decision in May 1969 not to renew the professor's contract. Professor Sindermann was given no statement of the official reasons for the decision and no opportunity for a hearing to challenge them.[3] In an action filed in the United States District Court, Sindermann claimed that the Regents' decision infringed upon his first amendment right to free speech and that the denial of a hearing violated his fourteenth amendment right to due process. The district court rendered summary judgment in favor of the Regents.[4] The United States Court of Appeals for the Fifth Circuit reversed and remanded for a development of the facts at full trial, opining that regardless of his lack of tenure Sindermann's expectancy interest in continued employment entitled him to an opportunity for a hearing with certain minimum procedural accoutrements.[5]

David Roth was hired for his first teaching job by Wisconsin State University-Oshkosh.[6] He claimed his one-year contract was not renewed because of certain criticisms he had leveled at the university. In accordance with university rules governing non-tenured teachers, no official reasons were stated, nor was Roth given an opportunity for a hearing.[7] In an action filed in the United States District Court he alleged violations of his rights to free speech and procedural due process. The district court granted Roth summary judgment on the procedural question and ordered the Board of Regents to state their reasons for dismissal and provide Roth a hearing.[8] The United States Court of Appeals for the Seventh Circuit affirmed, finding the adverse effect non-retention was

[1] Odessa Junior College had no tenure system under Texas law. Law of June 18, 1967, ch. 745, [1967] Tex. Laws 2012 (formerly TEX. EDUC. CODE §§ 21.201-.216, now TEX. EDUC. CODE §§ 13.001-.116 (1972)).

[2] Professor Sindermann was elected president of the Texas Junior College Teachers Association in his last year with the college and in that capacity, on several occasions, he made unauthorized sorties from his professorial duties on campus to testify before the Texas Legislature. In addition, he became increasingly involved in public disputes with the college's Regents over existing policies. Notably, he openly advocated elevation of the college to four-year status in opposition to the Regents and went so far as to run a newspaper ad ridiculing the Regents' position.

[3] The Board did issue a press release just prior to its decision, describing the deteriorated relationship with Professor Sindermann and charging him with insubordination for flagrantly defying college officials' refusals to grant him permission to leave classes to testify before the Texas Legislature.

[4] The unreported conclusions of the district court were noted by the court of appeals: "I. Plaintiff has no cause of action against the Defendants since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system. . . . IV. Defendants have not violated any constitutional rights of the Plaintiff." Sindermann v. Perry, 430 F.2d 939, 942 n.7 (5th Cir. 1970).

[5] Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970).

[6] Act of Dec. 20, 1965, ch. 497, § 1, [1965] Wis. Laws 779 (amended 1969) provided that "[a]ll teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher."

[7] Board of Regents v. Roth, 408 U.S. 564, 567 n.4 (1972).

[8] Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970).

likely to have on Roth's career to outweigh any government interest, to the extent that "affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection."[9]

The United States Supreme Court granted certiorari in both cases.[10] *Perry v. Sindermann*, 408 U.S. 593 (1972), was *held, affirmed*: A lack of either contractual or tenurial right to re-employment is irrelevant to a claimed violation of the first amendment; and a teacher's claim of entitlement to continued employment based upon rules and mutual understandings comprising an unwritten "common law" of a university is a property interest more than mere "expectancy" and protected by due process under the fourteenth amendment. *Board of Regents v. Roth*, 408 U.S. 564 (1972), was *held, reversed and remanded*: A teacher whose probationary contract is not renewed by a university and whose freedom to seek other employment is not thereby impaired has no property or liberty interest protected by due process under the fourteenth amendment.

I. Due Process Protection

A. *Right Versus Privilege*

No state may deprive any person of his interest in life, liberty, or property without due process of law.[11] Potentially subject to broad interpretation,[12] this constitutional requirement that protected interests fall into one of three categories was further restricted by the rule, apparently a product of Holmesian jurisprudence,[13] that "[d]ue process of law is not applicable unless one is being deprived of something to which he has a right," as opposed to a mere privilege.[14] This distinction between "right" and "privilege" has not proved to be a viable basis for extension of due process protection.[15] The application

[9] Roth v. Board of Regents, 446 F.2d 806, 809 (7th Cir. 1971).

[10] Perry v. Sindermann, 403 U.S. 917 (1971); Board of Regents v. Roth, 404 U.S. 909 (1971).

[11] U.S. Const. amend. XIV, § 1.

[12] Interpretation of the fourteenth amendment, like the entire Constitution, is not limited to the original context of enactment. *See* Weems v. United States, 217 U.S. 349, 373 (1910).

[13] In McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892), Justice Holmes spoke for the Massachusetts Supreme Judicial Court: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." This and other observations by Justice Holmes are taken to have originated the right-privilege distinction. Anything provided gratuitously is a privilege. *See* Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

[14] Bailey v. Richardson, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951). *See also* Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 224 (1956):

> The typical thinking is that one has no 'right' to a government gratuity, that one who has no 'right' at stake should not be entitled to a hearing, that in the absence of a 'right' one should not even be entitled to judicial review of an administrative denial of the gratuity or privilege, that due process protects only 'life, liberty, or property' and not privileges, and that therefore courts are not called upon to require fair hearings when nothing more than privileges are at stake.

[15] "Partly because most benefits could be defined by a sympathetic and imaginative court as 'life, liberty, or property' and partly because the arbitrary or capricious denial of any benefit conferred by the government on similarly situated individuals smacks of a denial of equal protection, the power and persuasiveness of the privilege doctrine is waning . . . ." *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1077-78 (1968).

of such one-word labels is not determinative of the due process question, but is rather dependent upon an antecedent analysis of the situation presented. Only after the situation has been analyzed and the applicability of due process determined can the label "right" or "privilege" be applied. A declaration that an interest is a right automatically invokes due process protection; but underlying this declaration, and providing its foundation, is a prior evaluation of the interest itself. Since "right" means only an interest protected by due process, its use is a tautology: the protection of due process of law applies only to an interest protected by due process (in other words, a right).

Rather than abolish the distinction between right and privilege, the Court has used three means of circumventing it.[16] First, the ordinarily understood meanings of the words have been distorted to work the desired result.[17] Second, a separate interest has been found which, when joined with the privilege, merited the extension of due process protection.[18] Third, the distinction has been totally ignored.[19] After such tortured treatment, the Court finally rejected the right-privilege doctrine, though without overruling the case through which it became law.[20] Unfettered by either irrelevant tradition or impossible distinctions, the terms "property" and "liberty" are thus free to provide assurance that government will be fair.[21] Any deprivation without due process of an interest in either liberty[22] or property,[23] thus conceived, is prohibited by the fourteenth amendment.

B. *Procedural Requirements*

Only after a constitutional interest in life, liberty, or property has been established must the precise procedural safeguards required to protect that

[16] *See* Davis, *supra* note 14, at 225.

[17] Mail service and even second-class rates, privileges in common parlance, are constitutionally protected rights rather than privileges. Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946); United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 433 (1921) (Brandeis, J., dissenting).

[18] For example, freedom from a "badge of infamy" is a legal right which, when found together with the privilege of government employment, dictates the application of due process to both. Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952).

[19] In United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), the majority disposed of the case without mention of the distinction, refusing to counter the minority's charge that they had overlooked an important rule of law.

[20] Graham v. Richardson, 403 U.S. 365, 374 (1971): "But this Court has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *See also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

[21] Liberty is more than freedom from bodily restraint, and property is more than tangibles. "'Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'" Board of Regents v. Roth, 408 U.S. 564, 571 (1972), citing National Ins. Co. v. Tidewater Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

[22] "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). *See also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[23] "The Fourteenth Amendment's protection of 'property,' however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest,' . . . including statutory entitlements." Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

interest be determined.[24] "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' "[25] The "fundamental requisite of due process" is the right to be heard,[26] although this right, while basic, is far from absolute.[27] The existence of the right and any concomitant procedural requirements depends on a balancing of the individual's interest against that of the state.[28]

A balancing test is used to compare the extent of the injury to the individual relative to the interest of the state in the health, safety, and welfare of its citizens.[29] If, at the hand of government, the individual suffers a substantial[30] or grievous[31] loss, an infringement of a fundamental right,[32] or a loss due to arbitrary government action,[33] then a hearing is required.

II. Due Process and the New Property[34]

"[T]he emergence of government as a major source of wealth" has had a

---

[24] "Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). "[C]onsideration 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 the governmental action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

[25] Morrissey v. Brewer, 408 U.S. 471, 481 (1972), citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The requirement of "grievous loss" serves to qualify the property, liberty, or life interest involved. Since "property," for example, could be read to include almost any beneficial interest in any tangible thing or intangible activity, the requirement of "grievous loss" limits the property interest to a substantial one. The expansion of the meaning of "property" is thus partially restricted. Nevertheless, the meaning of "grievous loss" is not impervious to change, and correspondingly as it is broadened the extent of "property" is likewise broadened.

[26] Grannis v. Ordean, 234 U.S. 385, 394 (1914). *See also* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

[27] For example, cases involving national security pose an exception. *See* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921).

[28] Goldberg v. Kelly, 397 U.S. 254, 265 (1970); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

[29] "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons . . . must be given a meaningful opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

[30] "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." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

[31] Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

[32] A common example of a possible first amendment violation requiring due process protection is where a teacher or other government employee is discharged for association with the Communist Party or other "subversive organizations." *See* Connell v. Higgenbotham, 403 U.S. 207 (1971); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952).

[33] Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Vitarelli v. Seaton, 359 U.S. 535 (1959).

"[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U.S. 183, 192 (1952). *See also* Birnbaum v. Trussell, 371 F.2d 672, 678 (2d Cir. 1966). *But cf.* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 901 (1961) (Brennan, J., dissenting).

[34] "New property" was coined by Professor Charles A. Reich to refer to the extended range of interests that must come under fourteenth amendment protection due to increased government influence on society. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

profound effect upon this society and its laws.[35] Because people have come to depend upon many governmental benefits and services, the imposition of undue restrictions upon government largess has been held in many cases to be unconstitutional.[36]

Government employment, traditionally regarded as another form of such largess, has long been denied legal protection.[37] There is, of course, no right to continued government employment.[38] But "[t]o state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."[39] Discharge from a government job in a manner that brands the former employee with a "badge of infamy," precluding him from further government employment, may severely restrict his job market, thereby depriving him of his liberty to work.[40] Also, discharge from a government job may deprive the employee of his property interest in his employment and salary.[41] Therefore, discharge from a government job without the benefit to the employee of procedural safeguards, such as notice of reasons for the discharge, a hearing, and the opportunity to confront and cross-examine witnesses, may violate procedural due process.[42] If nothing more, due process protects against discharge which is violative of the employee's constitutional rights[43] or is patently arbitrary, capricious, and discriminatory.[44]

The problem of constitutional protection of government employment has been particularly acute in the field of higher education, due to administrators' attempts to control the philosophies and teachings of state educators and educators' lack of protectable interests in continued employment.[45] The Supreme

[35] *Id.*

[36] Graham v. Richardson, 403 U.S. 365 (1971) (welfare); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce action in pauperis); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare); United States v. Robel, 389 U.S. 258 (1967) (civilian job on defense facility); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) (license to practice law); Speiser v. Randall, 357 U.S. 513 (1958) (tax exemption); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (license to practice law); Hannegan v. Esquire, 327 U.S. 146 (1946) (second-class mail permit).

[37] "A public office is not property within the constitutional guaranty." 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 746 n.1 (8th ed. 1927) (citing cases).

[38] *See* note 13 *supra.*

[39] Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956).

[40] *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). *See also* Stanley v. Illinois, 405 U.S. 645 (1972); Greene v. McElroy, 360 U.S. 474 (1959); Peters v. Hobby, 349 U.S. 331, 347 (1955).

[41] Greene v. McElroy, 360 U.S. 474 (1959).

[42] Vitarelli v. Seaton, 359 U.S. 535 (1959); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

[43] Pickering v. Board of Educ., 391 U.S. 563, 574-75 (1968); United States v. Robel, 389 U.S. 258 (1967); Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961). *But cf.* American Communications Ass'n v. Douds, 339 U.S. 382 (1950); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

[44] "[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U.S. 183, 192 (1952). *See also* Birnbaum v. Trussell, 371 F.2d 672, 678 (2d Cir. 1966). *But cf.* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 901 (1961) (Brennan, J., dissenting).

[45] Dealing with the issue of evolution in Scopes v. State, 154 Tenn. 105, 289 S.W. 363, 365 (1927), one court went so far as to claim that "[i]n dealing with its own employees engaged upon its own work, the state is not hampered by . . . the Fourteenth Amendment to the Constitution of the United States."

Court has recognized the importance of academic freedom and on the basis of substantive due process has struck down attempts to condition employment on requirements violative of it.[46] The Court also extended the protection of substantive due process to the situation in which school administrators merely allowed a probationary teacher's one-year contract to lapse for stated reasons which violated the teacher's constitutional rights, regardless of the teacher's lack of contractual or tenurial right to re-employment.[47] But where administrators have allowed a teacher's contract to lapse without stating the official reasons, thus presenting no substantive due process issue, the Supreme Court has been silent and the courts of appeals have been in conflict regarding the requirements of procedural due process. The Sixth, Eighth, and Tenth Circuits have held that in the absence of contractual or tenurial rights the teacher has no interest protectable by procedural due process, and, therefore, the reasons for dismissal need not be stated nor a hearing granted.[48] The First, Fifth, and Seventh Circuits have held that the teacher's interest in re-employment is substantial, requiring procedural safeguards.[49]

III. The Boundaries of Procedural Due Process Protection

In *Perry v. Sindermann*[50] the Supreme Court found the possible presence of an interest protected by due process. Having been employed by the Texas state college system for ten years, Professor Sindermann had a form of job tenure under guidelines promulgated by the Coordinating Board of the Texas College and University System.[51] The court of appeals denominated Sindermann's possible interest in re-employment an "expectancy" requiring due process protection.[52] The Supreme Court expressly rejected this classification, stating that even though no property interest at all was needed to raise the issue of violation of freedom of speech,[53] a mere "expectancy" would not be protected by procedural due process.[54] Instead, the Court pointed to the possibility of an unwritten "common law" of a university based upon unofficial rules and guidelines and unwritten agreements and understandings.[55] It held that proof of such a common law, even in the absence of contractual and tenurial rights, while it would not entitle Sindermann to reinstatement, would constitute a property interest under the fourteenth amendment and thereby entitle him to notice of the reasons for his dismissal and a hearing at which he

[46] Whitehill v. Elkins, 389 U.S. 54 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[47] Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[48] Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969).

[49] Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970), *aff'd*, 408 U.S. 593 (1972).

[50] 408 U.S. 593 (1972).

[51] *Id.* at 600 n.6, 600-01.

[52] Sindermann v. Perry, 430 F.2d 939, 943-44 (5th Cir. 1970).

[53] *See* note 45 *supra.*

[54] 408 U.S. at 603.

[55] *Id.* at 602.

could challenge those reasons. Since the district court's summary judgment for the Regents denied Sindermann the chance to prove his property interest, the Court affirmed the judgment of the court of appeals remanding the case to the district court.

Board of Regents v. Roth,[56] decided the same day, presented the Court with a slightly different situation. Neither Wisconsin statute nor the rules promulgated by the Board of Regents provided any procedural protection to a teacher employed on probation whose one-year contract was merely allowed to lapse.[57] The Regents' reasons for refusing to renew Roth's contract were never stated, yet on the basis of the surrounding circumstances—Roth had engaged in campus disturbances and controversies concerning the university administration and had been openly critical of the Board of Regents—Roth alleged violations of his rights to free speech and due process. The district court applied the balancing test and was compelled to the conclusion "that under the due process clause of the Fourteenth Amendment the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason."[58] The Supreme Court, however, looked to the nature of Roth's interest, rather than its weight relative to the state's interest.[59] His contractual rights having lapsed, his tenurial rights nonexistent, his liberty of employment unimpaired, and his allegation of free speech violations unproved,[60] the Court could find no interest which could be classified as liberty or property under the fourteenth amendment. It thus reversed the summary judgment and remanded the case to the court of appeals for further proceedings.

Justices Brennan, Douglas, and Marshall dissented from the Court's disposition of *Perry* and its judgment in *Roth*. Both Sindermann and Roth, they felt, were entitled to summary judgments. In *Roth* Justice Douglas argued that first amendment freedoms are so important, especially in the academic community, that a charge that they have been violated in the nonrenewal of a government employment contract automatically requires an examination of the constitutionality of the reasons for the nonrenewal. "Without a statement of the reasons for the discharge and an opportunity to rebut those reasons—both of which were refused by petitioners—there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees."[61] For Justice Douglas, the sanctity of the first amendment and the possibility that it might be infringed required that the university provide Roth with a statement of the reasons for the nonrenewal and an opportunity for a hearing.[62] It is suggested that Justice Douglas' arguments are mis-

[56] 408 U.S. 564 (1972).

[57] Act of Dec. 20, 1965, ch. 497, § 1, [1965] Wis. Laws 779 (amended 1969); 408 U.S. 564, 567 n.4 (1972).

[58] 310 F. Supp. 972, 979 (W.D. Wis. 1970).

[59] 408 U.S. at 570-71.

[60] The district court's summary judgment on the procedural issue precluded trial on the first amendment issue. The Court did not deny him the right to raise that issue because of his lack of contract or tenure, but expressly limited review to the procedural question. 408 U.S. at 569. The Court held in *Perry* that the substantive issue could be raised regardless of the lack of contract or tenure. 408 U.S. at 596-97.

[61] 408 U.S. at 585.

[62] *Id.*

placed. The issue before the Court was whether there existed an interest protected by due process, and not whether Roth's freedom of speech had been infringed.[63]

Justice Marshall found the fourteenth amendment concepts of "liberty" and "property" unduly restricted by the majority decision.

> In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the 'property' right that I believe is protected by the Fourteenth Amendment and that cannot be denied 'without due process of law.' And it is also liberty—liberty to work—which is the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment.[64]

In fact, Roth demonstrated no infringement upon his liberty to seek other employment, and none was found. Moreover, it would seem that Justice Marshall's definition of "property" does not comport with the ordinary meaning of the word. The complete lack of contractual, tenurial, or other rightful interest prevents the existence of property protected by due process.

Under *Perry* and *Roth* the scope of property interests under the fourteenth amendment has been enlarged to include a non-tenured teacher's interest in contract renewal if it is the practice of the state school to renew such contracts.[65] Such an interest is not a mere expectancy but a claim of right. But because of the necessity of remanding *Perry*, the elements of proof of Sindermann's interest, the establishment of a university common law and the demonstration of a breach thereof, remain undetermined. At least the possibility of such an interest exists where the teacher, like Sindermann, has taught for a sufficiently lengthy period. It is also clear from *Roth* that a teacher who has taught for only one year, with the express understanding that renewal would be solely at the Regents' discretion, cannot make a claim of right to re-employment. The bounds of the "new property" have been narrowed.

IV. Conclusion

Perry and *Roth* adjudicated procedural issues only; indiscreet grants of summary judgment by the respective district courts prevented the Supreme Court's consideration of the substantive first amendment claims. While the substance vacuum was unfortunate in that it prevented the Court from tying procedural requirements to specific violations of constitutionally protected rights, it did point to the inadequacies of judicial review of termination of government employment contracts absent an official statement of the reasons therefor.

Concluding the majority opinion in *Roth*, Justice Stewart wrote: "Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities. For it is a written Constitution that we apply. Our role is confined

---

[63] *See* note 60 *supra.*

[64] 408 U.S. at 588-89.

[65] In his concurring opinion in *Perry* Chief Justice Burger emphasized that the fourteenth amendment issues in *Perry* and *Roth* depended upon state law. 408 U.S. at 603.