COMMENT
*BOARD OF REGENTS OF STATE COLLEGES V. ROTH**: PROCEDURAL DUE PROCESS AND THE RIGHTS OF NONTENURED TEACHERS

I. INTRODUCTION

Within the scheme of contemporary education, the probationary teacher[1] emerges as a figure meriting special legal inquiry. A variety of protections, statutory,[2] quasi-legal[3] or contractual in origin may be available to the probationary teacher in order to insure a minimum degree of employment security. However, few states have enacted statutes protecting the nontenured status,[4] and it is a rare contract that

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* 408 U.S. 564 (1972).

[1] The probationary teacher is a nontenured faculty member hired by contract. The terms of the agreement usually limit the period of appointment to the academic year. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 566 n.1 (1972). After a fixed time of satisfactory service and good behavior the probationary teacher receives tenure status and, subsequent to its acquisition, cannot be discharged except for cause. See, e.g., Wis. Stat. Ann. § 37.31 (Supp. 1973), making employment permanent after appointment for a sixth consecutive year in the state university system and requiring a written statement of cause, investigation, hearing and an administrative determination in writing before a tenured teacher can be discharged. The primary purpose of the probationary term is to invest the school administration with sufficient latitude to prune its faculty of unsatisfactory teachers without being subjected to the more difficult burden of showing cause. During the period of evaluation and review the school authorities may release the probationary teacher at the expiration of any contractual term, but the nontenured teacher is sometimes protected against dismissal in the course of the academic year either by contractual provision or statute. 408 U.S. at 567.

[2] Although most state education laws distinguish between the probationary and tenure status, at least two states have enacted provisions which apply to all teachers, regardless of length of service. See Del. Code Ann. tit. 14, § 1410 (Supp. 1970); Wash. Rev. Code Ann. § 28A.67.070 (1970).

[3] The standards promulgated by accrediting associations and professional organizations may be persuasive in guiding the actions of the school administrator. Beyond their use as probative evidence of professional thinking on the tenure question, standards are often incorporated into an institution's regulations and by-laws. See, e.g., Report of Committee A on Academic Freedom and Tenure, "Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," 56 A.A.U.P. Bulletin 21 (Spring 1970). The standards of the American Association of University Professors have been widely adopted.

[4] Most states have enacted tenure statutes that provide substantive and procedural safeguards only for teachers having successfully completed their term of probation. E.g., Cal. Educ. Code § 13304 (West 1969); N.J. Stat. Ann. § 18A:28-5 (1968); N.Y. Educ. Law § 2573 (Mckinney Supp. 1971); Pa. Stat. Ann. tit. 24, *R* 11-1121 (1962); Wis. Stat. Ann. § 37.31 (Supp. 1973).

In Tony v. Reagan, 326 F. Supp. 1093 (N.D. Cal. 1971), aff'd, 467 F.2d 953 (9th Cir. 1972), the court found it unnecessary to reach the issue of procedural due process since a state administrative provision, Executive Order No. 112, under which a faculty member could raise employment-related grievances, provided reasonable procedures by which a probationary teacher could challenge his nonrenewal. 326 F. Supp. at 1099. But see Pinto v. Wynstra, 22 App. Div. 2d 914, 255 N.Y.S.2d 536 (2d Dep't. 1964), in which the court refused to allow petitioner to avail herself of Article 16 of the General Municipal Law, establishing a grievance procedure for public employees, in light of the statutory policy embodied in §§ 2573, 3012, 3013 of the Education Law permitting the discharge of a probationary teacher without cause and without a hearing.

provides for procedural rights in the event of dismissal.[5] Thus, stripped of these protections, the probationary teacher whose contract is not renewed must look to the Constitution for relief.

While private enterprise may act unfettered by the constraints of the fourteenth amendment, the government must conduct its affairs within prescribed constitutional limits.[6] Courts have, nonetheless, evinced considerable reluctance to apply this proposition, without qualification, to all areas of state activity.[7] In particular, public service is one of many areas in which a judicially constructed barrier enables only "rights" to pass through the constitutional filter while deflecting those interests deemed "privileges."[8] Public employees have repeatedly invoked the due process clause of the fourteenth amendment[9] in an effort to achieve substantive protection against discharge and to secure attendant procedural rights.[10] Such litigation has spawned a conflicting body of case law with results ranging from the denial of any procedural protection at all[11] to the granting of the full panoply of pretermination safeguards.[12] The United States Supreme Court[13] in *Board of Regents of State Colleges v. Roth*[14]

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5 The neophyte teacher usually does not accept his contract as the result of a bargaining process; the contract is often a form document with blanks filled in according to the particular type and term of appointment. Applicable statutes are incorporated by reference. See, e.g., 408 U.S. at 566 n.1.

6 The fourteenth amendment applies only to state action. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Civil Rights Cases, 109 U.S. 3 (1883). See generally Abernathy, "Expansion of the State Action Concept under the Fourteenth Amendment," 43 Cornell L. Q. 375 (1959).

7 See text accompanying notes 99-102 infra.

8 For a discussion of interests traditionally subject to the right-privilege distinction and the extent of judicial development in these areas, see 1 K. Davis, Administrative Law Treatise, ch. 7 (1958, Supp. 1970) [hereinafter Davis, Treatise].

9 "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. Const. amend. XIV, § 1.

10 Recourse to federal court is available under 42 U.S.C. § 1983 (1970):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

11 Orr v. Trintner, 444 F.2d 128 (6th Cir. 1971), cert. denied, 408 U.S. 943 (1972); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201 (5th Cir. 1971); Thaw v. Board of Pub. Instruction, 432 F.2d 98 (5th Cir. 1970); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), cert. denied, 396 U.S. 843 (1969), noted in 44 N.Y.U.L. Rev. 836 (1969); Henry v. Coahoma County Bd. of Educ., 353 F.2d 648 (5th Cir. 1965); Parker v. Board of Educ., 348 F.2d 464 (4th Cir. 1965), cert. denied, 382 U.S. 1030 (1966); Johnson v. Fraley, 327 F. Supp. 471 (W.D. Va. 1971); Schultz v. Palmberg, 317 F. Supp. 659 (D. Wyo. 1970).

12 Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967); Endicott v. Van Petten, 330 F. Supp. 878 (D. Kan. 1971); Auerbach v. Trustees of Cal. State Colleges, 330 F. Supp. 808 (C.D. Cal. 1971); Chase v. Fall Mountain Regional School Dist., 330 F. Supp. 388 (D.N.H. 1971); Holliman v. Martin, 330 F. Supp. 1 (W.D. Va. 1971); Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984 (W.D. Wis. 1970), noted in 1971 Wis. L. Rev. 354. The court in Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971), noted in 85 Harv. L. Rev. 1327 (1972), held that the only procedural safeguard due a nontenured teacher in the event of nonretention was a statement of reasons but no hearing. Id. at 1185, 1188. Accord, Springston v. King, 340 F. Supp. 314 (W.D. Va. 1972).

13 The Court had previously denied certiorari in a number of cases involving nontenured teachers. Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir. 1968), cert. denied, 396 U.S. 843 (1969); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967); Henry v. Coahoma County Bd. of Educ., 353 F.2d 648 (5th Cir. 1965), cert. denied, 384 U.S. 962 (1966); Parker v. Board of Educ., 348 F.2d 648 (5th Cir. 1965, cert. denied, 382 U.S. 1030 (1966); DeCanio v. School Comm. of Boston, 358 Mass. 116, 260 N.E.2d 676 (Mass. Sup.Jud.Ct. 1970), cert. denied sub nom., Fenton v. School Comm. of Boston, 401 U.S. 929 (1971).

14 408 U.S. 564 (1972).

held that the benefits of the due process clause do not inure to the probationary teacher since he does not suffer a deprivation of life, liberty, or property[15] when his contract is not renewed.[16]

Roth had just completed his first year of teaching as an assistant professor at Wisconsin State University-Oshkosh,[17] when he was informed, pursuant to the rules promulgated by the Board of Regents, that his contract would not be renewed. Although the rules provide for an intramural hearing and investigation in case of dismissal during the school term, the probationary teacher whose contract is simply not renewed has no rights whatsoever under university regulations.[18] Roth succeeded in obtaining a partial summary judgment in federal district court,[19] which was affirmed by the court of appeals,[20] directing the university to provide a statement of reasons and a hearing on its decision not to rehire him for the following year.

Roth had claimed that the decision not to rehire him was constitutionally infirm on first and fourteenth amendment grounds. It was his contention that the university's action was in reprisal for his public criticism of school officials. However, the partial summary judgment was on the procedural issue alone, and the circuit court affirmed on that basis. Although no substantive first amemdment question was before the Supreme Court, Justice Stewart nevertheless made it clear that Roth's interest in retaining employment could not be categorized as a right deriving from freedom of speech.[21]

II. A TWO-TIER ANALYSIS

The *Roth* majority[22] acknowledged the traditional balancing process[23] necessary to determine the extent of procedural rights required, but emphasized the limited range of protectible interests under the fourteenth amendment. According to Justice Stewart's analysis, the initial determination is whether nonretention constitutes a deprivation of liberty or property. If no such denial exists, the conclusion that the interest in public employment falls outside the purview of the due process clause inexorably follows. Thus, Stewart's analysis essentially incorporates the balancing process as its second stage, with the first stage addressing the probationary teacher's right to reemployment as a cognizable liberty or property interest under the fourteenth amendment.[24]

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15 Since there is no question regarding deprivation of life, reference to due process guarantees will hereinafter be limited to liberty and property.

16 408 U.S. at 578.

17 Roth's appointment was for the academic year beginning September 1968. Under the statute in force at the time, tenure was acquired after four years of continuous service. Wis. Stat. Ann. § 37.31(1) (1967). The time period for probationary teachers in the state university system has since been extended to five years. Wis. Stat. Ann. § 37.31(1) (Supp. 1973).

18 408 U.S. at 567-68 n.4.

19 Roth v. Board of Regents of State Colleges, 310 F. Supp. 972 (W.D. Wis. 1970). See note 146 infra.

20 Roth v. Board of Regents of State Colleges, 446 F.2d 806 (7th Cir. 1971).

21 "Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest." 408 U.S. at 575 n.14.

22 Justice Stewart delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Blackmun and Rehnquist joined. Justices Douglas, Brennan and Marshall filed dissenting opinions. Justice Powell took no part in the decision of the case.

23 The model statement of the balancing test appears in Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 866 (1961) [hereinafter *Cafeteria & Restaurant Workers*]: "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." Id. at 895.

24 408 U.S. at 570-71.

A. The First Tier — Deprivation of Liberty or Property

1. Liberty

An expansive view of liberty has underscored a flexible application of the due process clause.[25] Without attempting to reduce the concept to concrete definition, the Court nevertheless found that nonrenewal of Roth's teaching contract was not included within the confines of liberty under the fourteenth amendment. Conceding that "[t]here might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated,"[26] Justice Stewart pointed out that university officials had taken no affirmative action which might publicly question Roth's integrity and diminish his qualifications in the eyes of other employers. The Court was likewise unable to conclude that, as a result of the university's action, the teacher suffered a stigma or other disability that might foreclose future employment opportunities.[27] Citing cases involving a lawyer's right to practice his profession,[28] Justice Stewart found no analogy with the nonretention of a probationary teacher.[29]

2. Property

Although no liberty interest may be implicated by his discharge, the probationary teacher can still invoke a right to procedural due process if the university's action has precipitated a deprivation of property. In dealing with liberty the Court had been disinclined to fix legal boundaries, restricting its analysis to a finding that Roth was

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> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without 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 at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 399 (1922). See generally Note, The Growth of Procedural Due Process Into a New Substance: An Expanding Protection for Personal Liberty and "Specialized Type of Property . . . in Our Economic System," 66 Nw. U.L. Rev. 502 (1971).

26 408 U.S. at 573. The plaintiff in Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965), was expressly denied public employment because he had engaged in homosexual activity. In reversing a district court judgment approving the action of the Civil Service Commission, the circuit court stressed that the reasons given for refusing plaintiff's application would jeopardize his ability to find other employment. Id. at 184-85. See Meredith v. Allen County War Memorial Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968) (physician denied reappointment on grounds of general uncooperativeness); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) (physician removed from position in city hospital under charges of racial prejudice); Chase v. Fall Mountain Regional School Dist., 330 F. Supp. 388 (D.N.H. 1971) (nontenured high school teacher dismissed on grounds of sexual promiscuity).

27 408 U.S. at 573-74. A repeated distinction between Greene v. McElroy, 360 U.S. 474 (1959) and *Cafeteria & Restaurant Workers* is that in the earlier case, revocation of an aeronautical engineer's security clearance was tantamount to foreclosing employment opportunities in his chosen field, whereas the petitioner in *Cafeteria & Restaurant Workers* had the opportunity to secure equivalent employment elsewhere. But see Holliman v. Martin, 330 F. Supp. 1 (W.D. Va. 1971), in which the district court focused not on the individual's right to a particular job, but rather the personal liberty to pursue employment. Id. at 7.

28 Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners 353 U.S. 232 (1957). Cf. Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926) (accountant's right to practice before the Board of Tax Examiners).

29 "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." 408 U.S. at 575.

not denied a liberty protected by the fourteenth amendment. The majority's approach to the property branch of the procedural due process question stands in pointed contrast. Here, the Court carefully constructed a limited definition of the term, finding that Roth's asserted property interest did not fall within its contours.

The Court's essential proposition was that an individual's property interests are defined and prescribed by "rules or understandings that stem from an independent source."[30] In support, it offered cases turning on eligibility statutes,[31] tenure provisions,[32] contract terms[33] or a clearly implied promise of continued employment.[34] The Court noted that, absent a statute, administrative regulation, contractual provision or university understanding which guards the probationary status, the renewal of a nontenured teacher's contract is a benefit that can be granted or withheld at the discretion of the school authorities. In this way the already limited definition of property interest was further qualified, discreetly avoiding a conflict with the line of cases conferring procedural safeguards even though an ascertainable "rule or understanding" is conspicuously lacking.[35] The collateral constitutional rights[36] involved in those cases are to be distinguished from the benefits to which the Court adverted. Thus, where fundamental rights are implicated, constitutional protections attach regardless of statute, contract or understanding. Clearly, the probationary status cannot be used to dilute individual liberties guaranteed by the Constitution. However, since constitutional safeguards do not generally extend to government granted benefits, the Court maintained that these can only be protected by an extra-constitutional, legally enforceable source.[37]

An inclusive definition of property could not be formulated without squarely confronting the theory of "expectancy".[38] At once limiting and expanding the rights of nontenured teachers, the expectation analysis has been a source of confusion and inconsistency, and, depending on the Court's predisposition, has been utilized as both a sword and a shield.[39] The *Roth* Court proffered a narrow interpretation of the probationary teacher's expectation of reemployment by tethering it to its definitional guidepost of a property right. Hence, an expectancy of continued employment is not

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30 Id. at 577.

31 Goldberg v. Kelly, 397 U.S. 254 (1971).

32 Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

33 Wieman v. Updegraff, 344 U.S. 183 (1952).

34 Connell v. Higginbotham, 403 U.S. 207 (1972).

35 See text accompanying notes 114-122 infra.

36 Hereinafter, collateral constitutional rights will refer to first and fourteenth amendment liberties other than freedom from arbitrary state action.

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> Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577.

> A person's interest in a benefit 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.

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

38 The concept of an expectation of reemployment was first raised in Bomar v. Keyes, 162 F.2d 136 (2d Cir.), cert. denied, 332 U.S. 825 (1947). Reversing a summary dismissal of a nontenured teacher's complaint, Judge Learned Hand asserted that the action of the school board "may have been the termination of an *expectancy of continued employment*, and that is an injury to an interest which the law will protect against an invasion by acts themselves unlawful, such as the denial of a federal privilege." 162 F.2d at 139 (emphasis added).

39 Compare Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971), with Schultz v. Palmberg, 317 F. Supp. 659 (D. Wyo. 1970).

demonstrated by an abstract need or unilateral desire; instead, it must be grounded in a legitimate claim of entitlement which, according to the original definition of property interests, must necessarily derive from a rule of law or explicit understanding.[40]

The majority's analysis of property interests under the fourteenth amendment conceivably leaves room for a finding of procedural rights secured by an enforceable understanding between the nontenured teacher and the university. A companion case to *Roth*, *Perry v. Sinderman*,[41] embraced such an approach in holding that a college's de facto tenure program precluded the teacher's nonrenewal without procedural safeguards.[42] The majority in *Perry* indicated that an unwritten "common law" of tenure may be inferred from university practices and attendant circumstances.[43] The Fifth Circuit has employed a similar analysis in finding an expectancy of reemployment for the nontenured teacher under the "prevailing practices" of the institution[44] and a "continuing relationship through the use of renewals of short-term contracts."[45] However, in light of the *Roth* Court's insistence that property interests are created from "existing rules or understandings that stem from an independent source such as state law,"[46] Justice Stewart, for one, might not accept continuous contract renewals, without more, as sufficient evidence of an expectancy of reemployment.[47]

Such a conclusion is supported by Justice Stewart's attempt to explicate the "policy" strand of *Roth* in *Perry v. Sindermann*. The *Perry* Court agreed with the teacher's claim that his property interest, "though not secured by a formal contractual tenure provision, was secured by a no less *binding* understanding *fostered* by the college administration."[48] Hence, an expectancy of continued employment is delimited by the two prerequisites found in *Perry*.

First, the understanding must be enforceable in a court of law. Relying on the concept of "implied" contract, discerned in light of the attendant circumstances and conduct of the parties involved, the court will invoke the probationary teacher's right to procedural guarantees where an enforceable reliance interest has been created.[49]

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[40] 408 U.S. at 577. "We disagree ... insofar as ... a mere subjective 'expectancy' is protected by procedural due process ...." Perry v. Sindermann, 408 U.S. 593, 603 (1972). This was the approach to property interests taken by the court in Orr v. Trintner, 444 F.2d 128 (6th Cir. 1971), cert. denied, 408 U.S. 943 (1972): "Personal desire and expectation ... are not the equivalent of expectancy of reemployment in contemplation of law." Id. at 133. Accord, Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), cert. denied, 396 U.S. 843 (1969).

[41] 408 U.S. 593 (1972).

[42] Odessa College had no tenure system as such, but the official Faculty Guide indicated that a teacher has permanent tenure so long as he maintains a satisfactory performance and a cooperative attitude. Id. at 600. In addition, guidelines promulgated by the Coordinating Board of the Texas College and University System conferred tenure on an individual employed in the state college and university system for seven years or more. Id. at 600-01 n.6. The teachers in *Perry* had been so employed for a period of ten years.

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> A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in reemployment. For example ... the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.'

408 U.S. 593, 601-02 (1972).

[44] Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

[45] Lucas v. Chapman, 430 F.2d 945, 947 (5th Cir. 1970).

[46] 408 U.S. at 577.

[47] Justice Stewart contended that a unilateral expectation does not suffice, but rather there must be a mutual understanding of continued employment. 408 U.S. 593, 601 (1972). The requirement of "mutuality" may be determinative in a close case where the school denies the teacher's assertion of an expectancy of reemployment.

[48] Id. at 599-600 (emphasis added).

However, a contract is implied by interpreting the promisor's words and conduct in relation to past usage.[50] *Perry* indicated that such a relationship can only evolve after the teacher has served at the school for a term of years.[51] There must be a period of time during which institutional conduct giving rise to an implied promise of reemployment can fully develop.

Second, it may not be enough for the university to be a passive partner to the understanding. Rather than mere acquiescence in a teacher's unilateral expectation, the institution must have encouraged or promoted his understanding by document, word or deed. Under this analysis, *Perry* presented an easy case since available written evidence clearly indicated the college's intention to confer some form of tenure upon its entire faculty.[52]

After *Roth* there remains the possibility of a liberal construction of "policy or understanding" as a subjective nexus between the teacher and his employer apart from particular written documents.[53] Nevertheless, given the *Roth* Court's predilection for finite limits,[54] Justice Stewart might find it difficult to extend the parameters of this branch of his property analysis in such a way. Admittedly, the contours are not clear, for the point where "abstract desire" ends and "policy or practice" begins may often be indiscernible. Indeed, innumerable factual variants can transform a simple case into an unmanageable situation, ultimately requiring a policy decision by the Court.[55]

B. The Second Tier — The Balancing Test

The constitutional directive of procedural due process demands neither a hearing nor a statement of reasons in every case. Insuring a "process" rather than a specific substantive guarantee, procedural rights necessarily differ according to the nature of

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[49] Referring to the law of contracts, Justice Stewart cited Corbin's treatment of implied contracts. 3A A. Corbin on Contracts §§ 561-572A (1960). 408 U.S. at 602.

[50] 3A A. Corbin, supra note 49, at § 562.

[51] The teacher in *Perry* served in the state college system from 1959 to 1969. 408 U.S. at 594. See discussion and cases relating to length of service in note 55 infra.

[52] See note 42 supra.

[53] See text accompanying notes 41-47 supra.

[54] "[T]he range of interests protected by procedural due process is not infinite." 408 U.S. at 570.

[55] In Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970), the court held that the nonrenewal of a probationary teacher's one year contract could not be accomplished without a showing of cause. The standards of practice adopted by the college gave rise to a legally enforceable expectation of reemployment. Id. at 856. Shortly thereafter the same court found *Ferguson* controlling in Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970), where a nontenured instructor's "long employment in a continuing relationship through the use of renewals of short-term contracts" was sufficient to give him the necessary expectancy of reemployment that constituted a protectible interst. Id. at 947. The *Lucas* court was apparently willing to give greater solicitude to an instructor of eleven years experience than one whose contract was not renewed after his first year of employment. Compare Karstetter v. Evans, 350 F. Supp. 209 (N.D. Tex. 1971) with Bates v. Hinds, 334 F. Supp. 528 (N.D. Tex. 1971). Absent institutional practices such as those found in *Ferguson*, substantial length of service may be a necessary but not a sufficient condition prerequisite to a finding of an implied understanding. Skidmore v. Shamrock Independent School Dist., 464 F.2d 605 (1972). In that case, the teacher denied reemployment was not wholly without remedy, for she "had deliberately failed to pursue" statutory review procedures. Id. at 606. See Wilson v. Pleasant Hill School Dist. R-III, 465 F.2d 1366 (8th Cir. 1972).

Can it be argued that a university's course of conduct in renewing a probationary teacher's one year contract implicates the institution in a mutual understanding of reemployment? How many years of consecutive renewals are sufficient to constitute a "continuing relationship" of the kind that emerged in *Lucas*? And is the statistical incidence of nonrenewal a salient factor in the determination of an expectancy? If the impact of nonretention is measured by the consequences to the individual instructor, the detriment is harsher if few probationary teachers are released than if many suffer the common denominator of nonrenewal. In *Roth*, there were only four nonrenewals out of 442 nontenured instructors. 310 F. Supp. 972, 974 (W.D. Wis. 1970).

the interests at stake. The due process clause, therefore, does not assure the application of a predetermined procedure, but instead triggers a flexible formula that varies in proportion to an increase or diminution of either side of the equation.[56]

Balancing the nature of the government function involved with that of the private interest affected does not always yield the petitioner's procedural objectives.[57] Protecting military security,[58] preserving the authority to act summarily,[59] and maintaining its discretion in hiring practices[60] are some of the possible factors that weigh on the side of the public employer. In the case of the probationary teacher, tenure considerations must be carefully examined. Since the purpose of tenure is to provide a degree of employment security for faculty members who have successfully completed a trial period, a constitutional grant of rights to the nontenured teacher which the tenured instructor acquires by statute would render the elevated tenure status nugatory.[61] Obliterating the distinction between tenured and probationary faculty would emasculate the university's substantial interest in creating the probationary classification. The legitimate objective of maintaining a high quality teaching staff is certainly facilitated by a protracted period of evaluation and review.[62] A variety of subtle factors may affect the judgment of a particular individual's teaching abilities.[63] Recognizing these undefined qualifications necessary for success in the teaching profession, courts have been hesitant to overturn the decisions of school administrative bodies.[64]

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> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished – these are some of the considerations that must enter into the judicial judgment.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

57 Davis, Treatise § 7.12.

58 Green v. McElroy, 360 U.S. 474 (1959).

59 Meredith v. Allen County War Memorial Hosp., 397 F.2d 33, 36 (6th Cir. 1968); Hunter v. City of Ann Arbor, 325 F. Supp. 847, 854 (E.D. Mich. 1971).

60 In Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971), the court suggested that a hearing requirement might encourage overcautious hiring practices, leaving the school with a teaching force of "homogenized mediocrities."

61 But see Roth v. Board of Regents of State Colleges, 310 F. Supp. 972, 979 (W.D. Wis. 1970), where the court sought to preserve the distinction between tenured and probationary instructors by adjusting the elements of proof. See note 64 infra.

62 Comment, School Board's Non-Renewal of Untenured Teacher's Contract Requires Statement of Reasons but Not Hearing, 85 Harv. L. Rev. 1327, 1329-30 (1972).

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> Such evaluations require judgments about many subjective factors which are difficult to document with precision, such as the ability of the teacher to inspire students, his mastery of and progress in his subject, and his capacity to work effectively with colleagues, supervisors, and parents.

Drown v. Portsmouth School Dist., 435 F.2d 1182, 1184 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971). See Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841, 871 n.84.

64 Thus, in the district court disposition of *Roth*, the following caveat was offered: although the majority decided in favor of both a statement of reasons and a hearing, "the court will be bound to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons." 310 F. Supp. 972, 979 (W.D. Wis. 1970). In adding this qualification, the court was attempting to preserve the integrity of the tenure status by maintaining a different standard for discharge of probationary teachers than nontenured instructors.

The district court also refused to grant summary judgment on Roth's alternative contention that the decision for nonrenewal was made without ascertainable standards. The court implied that such a fixed code would not serve the interests of the university in exercising considerable latitude over its hiring practices. Id. at 983.

The equation, of course, is not one-sided. Procedural due process is an essential element of a constitutional system that incorporates safeguards against government infringement of individual liberties.[65] De novo review in federal courts cannot exculpate the state's wrongful conduct, nor does it remedy the interim effects of such action.[66] In addition to the effective protection of the individual from the unconstitutional acts of the state,[67] antecedent procedures also serve administrative[68] and political[69] functions. Dispelling false rumors and inaccurate charges,[70] explaining misinterpreted or excused conduct,[71] advising the instructor of the charges against him so he can develop legal arguments preparatory to a lawsuit,[72] providing for a teacher's personal reevaluation of his abilities and career prospects[73] and encouraging the possibility of an informal settlement[74] are additional benefits that a pretermination hearing and detailed statement of reasons would procure for the nontenured instructor.

Finally, the recurring concern for creating an atmosphere of open discourse and free interchange of ideas in institutions of higher education favors full procedural guarantees for teachers, tenured or otherwise. The protection of academic freedom[75] has been cited as a special and appropriate issue for the attention of the court.[76] As

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65 Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971), noted in 25 Sw. L.J. 622 (1971). See generally Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193 (1956).

66 Mr. Justice White in Stanley v. Illinois, 405 U.S. 645 (1972), refused to credit "the general proposition that a wrong may be done if it can be undone." Id. at 647. Accord, Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972). See also Bell v. Burson, 402 U.S. 535 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goldberg v. Kelly, 397 U.S. 254 (1971). Professor Kenneth Culp Davis states that:

> The theoretical right of [de novo] review is often illusory, as it is when the amount involved is small, when the hardship or cost of appealing to a court is relatively great, when the court is strongly influenced by the agency's view, or when despite the theoretical scope of review the court limits its inquiry to reasonableness. Furthermore, de novo review is often unsound in that it requires courts to perform functions for which they are poorly qualified.

Davis, Treatise § 7.10 at 451. In this latter regard, see note 68 infra.

67 See text accompanying notes 114-132 infra for a discussion of the necessity of procedural mechanisms to insure the efficacy of substantive rights.

68 A reviewing court must often rely on the expertise of administrative bodies. In such situations, courts will encounter great difficulties in conducting a trial de novo that reflects a learned assessment of the issues. See Drown v. Portsmouth School Dist., 435 F.2d 1182, 1187 n.11 (1st Cir. (1970), cert. denied, 402 U.S. 972 (1971), in which the court revealed skepticism as to whether there could be meaningful review, even within the administrative process, of a school board's decision not to rehire a teacher. The difficulty is assessing rehiring decisions was also pointed out in the circuit court's treatment of Roth v. Board of Regents of State Colleges, 446 F.2d 806, 812 n.3 (7th Cir. 1971) (Duffy, C.J., dissenting). Cf. Shirck v. Thomas, 447 F.2d 1025, 1028 (1972) (dissenting opinion), vacated in light of *Roth*, 408 U.S. 940 (1972).

69 In Boddie v. Connecticut, 401 U.S. 371 (1971), Mr. Justice Harlan indicated that the "social enforcement mechanism" of an intramural hearing might be necessary to counterbalance the state's "monopoly over techniques for binding conflict resolution." Id. at 375.

70 Drown v. Portsmouth School Dist., 435 F.2d 1182, 1184-85 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971); Birnbaum v. Trussell, 371 F.2d 672, 679 (2d Cir. 1966).

71 Harrington v. Taft, 339 F. Supp. 670, 674 (D.R.I. 1972); Olson v. Regents of Univ. of Minn., 301 F. Supp. 1356, 1361 (D. Minn. 1969).

72 Olson v. Regents of Univ. of Minn., 301 F. Supp. 1356, 1361 (D. Minn. 1969).

73 Drown v. Portsmouth School Dist., 435 F.2d 1182, 1184-85 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971); Harrington v. Taft, 339 F. Supp. 670, 674 (D.R.I. 1972).

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

75 Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring); Adler v. Board of Educ., 342 U.S. 485 (1952); Frakt, Non-Tenure Teachers and the Constitution, 18 Kan. L. Rev. 27, (1969). See generally Developments in the Law — Academic Freedom, 81 Harv. L. Rev. 1045 (1968).

76 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Lucia v. Duggan, 303 F. Supp. 112, 119 (D. Mass. 1969); Note, Non-tenured Teachers and Due Process: The Right to a Hearing and Statement of Reasons, 29 Wash. & Lee L. Rev. 100, 105 (1972).

such, an innovative intellectual environment is incompatible with the refusal of a university administration to disclose its reasons for failing to renew an instructor's contract and equally inconsistent with the rendering of decisions by administrative fiat, unsubstantiated by pertinent evidence.[77]

III. THE COURT'S FAILURE TO REACH A DUE PROCESS BALANCE

The *Roth* majority's emphasis on a statutory or contractual base for a deprivation of property claim,[78] its limitation of the policy factor to a cognizable reliance interest fostered by the university[79] and the general thrust of its argument in refusing to recognize an expectancy that cannot be supported by tangible evidence of writing or conduct[80] discount the economic realities of the teaching profession.[81] The teacher has invested years in professional preparation for a career that largely depends upon the willingness of public bodies to employ him.[82] A sudden and unexplained discharge from employment seriously affects the instructor who has established a home, raised a family and settled in a particular community. The same adversities befall the neophyte teacher in the event of nonrenewal, but at least the limited probationary status puts him on notice that he is undergoing periodic review. Nevertheless, especially during the outset of his career, the instructor has an evident interest in maintaining an unmarked record. An unexplained dismissal in his first job may place the teacher in the frustrating position of exonerating himself to prospective employers for faults that cannot truthfully be attributed to him.

The majority's definition of property under the fourteenth amendment was meant to exclude the more liberal concept of expectancy that has surfaced in recent cases.[83] However, Justice Stewart declined to formulate a definition for liberty,

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77 See Comment, Due Process Restrictions on the Employment Power and the Teaching Profession, 50 Neb. L. Rev. 655, 669 (1971).

78 See text accompanying notes 30-37 supra.

79 See text accompanying note 48 supra.

80 See text accompanying notes 49-55 supra.

81 Cf. Reich, The New Property, 73 Yale L.J. 733, 738, 785 (1964), for the view that an individual's status is determined by his occupation. The "new property" would thus consider his source of livelihood as a vested right that must be protected by an enclave of privacy free from government intrusion.

Certain interests may exist which do not easily fit into the liberty or property pigeonhole, but nevertheless warrant due process protection. In his analysis of *Cafeteria & Restaurant Workers*, Professor Davis states:

> The majority opinion in the Cafeteria Workers case clearly denies that a particular interest either is or is not 'life, liberty, or property' within the meaning of the due process clause. The interest involved, the Court said, was 'closely analogous' to the ' interest of a government employee in retaining his job' and the Court acknowledged ... that such an interest is protected by the due process clause.

Davis, Treatise § 7.12 at 336 (Supp. 1970).

82 Drown v. Portsmouth School Dist., 435 F.2d 1182, 1184 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971); Freeman v. Gould Special Dist., 405 F.2d 1153, 1166 (8th Cir.), cert. denied, 396 U.S. 843 (1969). Cf. Harrington v. Taft, 339 F. Supp. 670 (D.R.I. 1972); Hunter v. City of Ann Arbor, 325 F. Supp. 847 (E.D. Mich. 1971). But one court's interpretation of *Roth* denied a public employee any procedural rights even where his municipal employer held a monopoly on the type of work in which he was engaged. Jones v. Kelly, 347 F. Supp. 1260, 1263 (E.D. Va. 1972).

83 "Almost every teacher, arguably at least, has such an expectancy, and we think a teacher has an interest in employment protected by the due process clause independent of the existence of this quasi-contractual right." Drown v. Portsmouth School Dist., 435 F.2d 1182, 1184 n.3 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971). See Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

holding simply that Roth's allegation was not circumscribed by the scope of that term. Nevertheless, the consequences of nonrenewal on an instructor's career may be quite damaging, albeit short of foreclosing all professional teaching opportunities.

The impact of the university's decision not to retain Roth for another academic year lies in what it failed to do. The school did not provide Roth with an opportunity to confront his accusers in an administrative proceeding, nor did it forward to him a statement of reasons for his nonretention. Because this sudden termination is patently inconsistent with the proposition that Roth served as an exemplary teacher during the past academic year, it may create an unwarranted presumption of incompetency.[84] The probationary teacher's interest in his professional reputation[85] is just as substantial as that of his tenured colleagues. Thus, the inaction of the public employer, involving a nonrenewal unaccompanied by explanation, may be equally devastating to a teacher's career prospects as is a statement of unsatisfactory performance.[86]

The foregoing discussion has highlighted the array of injuries which could be suffered by the probationary teacher in the event of discharge. Nonretention arguably inflicts some degree of injury on the teacher[87] which can be constitutionally translated into a deprevation of liberty or property. Within the context of the teaching profession, it cannot be gainsaid that in any given case some harm has devolved upon the teacher resulting from the school's decision not to renew his contract. In fact, the Court conceded that "[u]ndeniably, [Roth's] re-employment prospects were of major concern to him — concern that we surely cannot say was insignificant."[88] However, the majority's analysis does not focus on the critical due process issue, namely the claimant's assertion of a protectible interest under the fourteenth amendment, but is instead deflected to the novel question of whether the claimant has asserted a substantial interest sufficient to invoke the procedural safeguards of the due process clause.

The fourteenth amendment does not specify the amount of deprivation necessary to invoke its procedural safeguards. Although it can be balanced away when confronted with overriding governmental interests,[89] due process is not a quantifiable entity that can be dismissed as negligible. It is instead a concept freighted with constitutional quality that must be given due consideration whatever the severity involved.[90]

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84 Heckler v. Shepard, 243 F. Supp. 847 (D. Idaho 1965). See Frakt, Non-tenure Teachers and the Constitution, 18 Kan. L. Rev. 27, 39 (1969).

85 Lucia v. Duggan, 303 F. Supp. 112, 117-18 (D. Mass. 1969). Accord, Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966).

86 Of course, a statement enumerating instances of professional deficiency would damage a teacher's reputation. However, where no explanation of nonrenewal is provided, the teacher may or may not be incompetent. In such an instance the lurking danger of false assumptions is a realistic threat to future employment.

87 "It is simply a fact of life that a school teacher who is terminated for any reason or for 'no reason whatsoever' is going to face many practical difficulties in finding other employment or pursuing his chosen calling." Endicott v. Van Petten, 330 F. Supp. 878, 883 (D. Kan. 1971).

And in Holliman v. Martin, 330 F. Supp. 1 (W.D. Va. 1971), the court stated that "[d]ischarge or release from one such employer certainly has an adverse effect upon the future availability of economic opportunities for the teacher because of the limited number of possible employers." Id. at 10. In this regard, see text accompanying note 82 supra and the cases cited therein.

88 408 U.S. at 570.

89 E.g., *Cafeteria & Restaurant Workers*, 367 U.S. at 886.

90 In Fuentes v. Shevin, 407 U.S. 67, 88-90 (1972), the Court explicitly rejected the contention that only a deprivation of a necessity of life is sufficient to invoke procedural due process. Writing for a 4-3 plurality, Justice Stewart stated that "[w]hile the . . . consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." Id. at 86. The first tier of Stewart's analysis in *Roth*, therefore, does not focus on the degree of hardship suffered by the teacher whose services have been terminated, but rather on the legal issue of reemployment by the government as a property right. The *Roth* Court evinced an unequivocally negative attitude toward this critical issue.

The flexible balancing process articulated in *Cafeteria & Restaurant Workers, Local 473 v. McElroy*[91] was designed as an operational tool to guarantee procedural due process whenever any denial of liberty or property is found.[92] Instead of requiring the full panoply of due process procedures in every case where a deprivation has been shown, the balancing test adjusts countervailing interests.[93] The resolution of these competing factors is an equilibrium solution which affords only as much procedural protection as is warranted by the elements from which the proper balance must be struck.[94]

In *Roth*, the Court obviated the need for any balancing process by structuring a standard of deprivation that requires a "substantial" showing of injury. Without indicating the threshold of harm beyond which the teacher's injury becomes a protectible interest, Justice Stewart concluded that Roth had failed to demonstrate a sufficient deprevation.[95] Although nonretention may cause irreparable injury to a teacher's career short of foreclosing all employment opportunities in his profession,[96] such consequence fails to meet the *Roth* standard.

Were the teacher to suffer a state-imposed disability that foreclosed the possibility of future employment, at least in the state university system, the Court might have arrived at a different result. But by reading into the due process clause a constitutional requirement of "substantial" denial and by failing to promulgate a

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[91] See note 23 supra.

[92] The quality of rights protected by due process may not be limited to liberty or property interests in the traditional meanings of those terms. See note 81 supra.

In contrast to the *Roth* majority's restrictive interpretation of those rights protected by due process, see Norlander v. Schleck, 345 F. Supp. 595 (D. Minn. 1972), in which the court relied on the recent cases protecting individual property interests to buttress its conclusion that "personal and human" rights are also deserving of constitutional due process:

> The query is properly addressed whether personal and human rights . . . to be able to subsist and to make a living are not equally important and also do not rise to the same heights as a conditionally bought stove and stereophonic phonograph [Fuentes v. Shevin, 407 U.S. 67 (1972)], a sum owed a small loan company on a promissory note [Lynch v. Household Finance Corp., 405 U.S. 538 (1972)], a garnished sum of money [Sniadach v. Family Finance Co., 395 U.S. 337 (1969)], the right to continued welfare payments [Goldberg v. Kelly, 397 U.S. 254 (1971)], etc.

Id. at 599.

[93] Courts have readily denied procedural due process where an overriding government interest is present, e.g., *Cafeteria & Restaurant Workers*, 367 U.S. at 886. One court's application of the balancing test led to a determination that only a detailed statement of reasons, but no hearing, was constitutionally mandated. Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971). Accord, Springston v. King, 340 F. Supp. 314 (W.D. Va. 1972).

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> The character of the hearing to which a person may be constitutionally entitled may depend upon the importance of what he stands to lose, of course, but his constitutional right to procedural due process entitles him to a quality of hearing at least minimally proportioned to the gravity of what he otherwise stands to lose through administrative fiat.

Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1452 (1968).

[95] Justice Stewart appeared to indicate that Roth's only shortcoming was the failure to support his case with tangible evidence of the difficulties he encountered subsequent to discharge: "There is no suggestion of how nonretention might affect [Roth's] future employment prospects." 408 U.S. at 574 n.13. "[T]he record contains no support for these assumptions [that the adverse effect of nonretention constitutes a due process violation]." Id. Justice Stewart obfuscated the standard of proof, however, by stating at the same time that "[m]ere proof, for example, that [Roth's] record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty'." Id.

[96] Lafferty v. Carter, 310 F. Supp. 465 (W.D. Wis. 1970); Olson v. Regents of Univ. of Minn., 301 F. Supp. 1356 (D. Minn. 1969).

standard regarding the nature and sufficiency of proof, the *Roth* statement places the nontenured teacher in an onerous predicament. The balancing test of *Cafeteria & Restaurant Workers* was meant to provide continuity in situations which might run the gamut from "mere proof" of harm to "substantial" evidence of a deprivation of liberty or property. In all such situations, the concerns of the probationary teacher must compete with the countervailing interests of the university. Under the *Roth* Court's formulation, however, the threshold of the balancing test has been judicially extended and constitutionally sanctioned to some indefinite point short of the "total foreclosure" extreme.

The Court effectively precluded a judicial determination of procedural rights due the non-tenured teacher who has suffered damage to his career but is unable to satisfy the *Roth* burden of proof, whatever that standard may be. While nonretention is not always "a blemish that turns into a permanent scar,"[97] the Court need not stretch its sensitivity far to take judicial notice of the adversity suffered by a college teacher whose contract has not been renewed.[98] It is submitted that a court can justify a finding of deprivation of liberty or property in such a situation and resolve the issue of procedural measures via the balancing route, without treading upon the amorphous evidentiary grounds generated by *Roth*.

B. A "Limited Rejection" of the Privilege Doctrine

The characterization of public employment as a privilege[99] has in the past been used to avoid the application of certain protections that attach only when a constitutional right has been impinged. However, the right-privilege distinction has subsequently fallen into disrepute as a viable means of determining when constitutional safeguards apply,[100] and the use of labels to carve out whole areas of state action immune from constitutional review has been substantially rejected.[101] Nevertheless,

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97 408 U.S. at 585 (Douglas, J., dissenting).

98 Even in a case that struck the balance against the nontenured teacher, the court was cognizant of some injury resulting from nonretention:

> It is true, of course, that any dismissal or termination of employment by an employer for personal reasons limits to some extent the opportunity of the employee to obtain other employment, because some prospective employers may prefer employees whose services have never been terminated by their previous employers.

Parker v. Board of Educ., 237 F. Supp. 222, 228 (D. Md. 1965), aff'd, 348 F.2d 464 (4th Cir. 1965), cert. denied, 382 U.S. 1030 (1966).

99 The seminal case supporting the right-privilege distinction is Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff'd per curiam by an equally divided Court, 341 U.S. 918 (1951). See the opinion of Mr. Justice Holmes in Mc Auliffe v. Mayor of New Bedford: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policemen." 155 Mass. 216, 220, 29 N.E. 517 (1892).

100 Keyishian v. Board of Regents, 385 U.S. 589 (1967); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

101 Davis, Treatise § 7.13. See generally Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193 (1956); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

> [T]hat under appropriate circumstances one's interest in his government job, his publicly financed home, his food stamp meals, or his state university educational opportunities may indeed be constitutional rights in the positive law sense ought no longer be denied. That these interests may be regulated compatibly with other competing interests need not be denied either, any more than it can be denied that interests in private property may be regulated by zoning ordinances, sanitation codes, building permits, or anti-discrimination laws. Any per se constitutional distinction which would exclude government regulation of status in the public sector from constitutional review would, to steal a phrase from Mr. Justice Holmes, reflect neither logic nor experience in the law.

Id. at 1463-64.

the *Roth* Court was unprepared to grant the probationary teacher procedural rights even though the actions of the Board of Regents constituted an express manifestation of state action. The Court's rejection of the "wooden distinction"[102] between rights and privileges belies a more fundamental concern that government, in its capacity as employer, be subject to different constitutional standards than government *qua* government.

Reasonable government regulations and policies related to a legitimate public interest may be promulgated and enforced even though they impinge on the absolute exercise of certain constitutional rights.[103] Thus, in *Pickering v. Board of Education*,[104] where the publication of a letter criticizing the school's past revenue raising practices was held insufficient to justify a teacher's dismissal, the Court recognized that if the letter constituted a breach of confidence, included work-related grievances or otherwise contained statements inimical to the proper functioning of the school, the result might have been different.[105] *Pickering*, therefore, might lawfully proscribe a publicly critical letter written by a teacher whereas the same letter composed by a private citizen would be fully protected by the first amendment's guarantee of free speech.

Plainly, then, where state action is implicated, the public employee may not be eligible for the same range of procedural safeguards enjoyed by his civilian counterpart. However, the rationale for this different treatment is not that the government bestows a benefit that can be revoked at will, but rather that the state's role as employer entails additional interests which may at times outweigh those of the individual. The reasonableness of government measures designed to promote legitimate ends is essentially gauged by a balancing process. Standing alone, any given regulation may appear innocuous enough, but when counterpoised with those liberties it affects, its constitutionality may be brought into question.

It is only by the countervailing force of the substantial interests which the government may acquire by its status as employer that an individual's constitutional rights may be subordinated. In all other respects, constitutional liberties remain intact; they cannot be disturbed by convenient labels, nor can they be displaced by the existence of tenure statutes.[106] Although no court has discerned a preexisting right to public employment,[107] once such employment has been obtained a subsequent

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102 408 U.S. at 571.

103 Grayned v. City of Rockford, 408 U.S. 104 (1972); Schenck v. United States, 249 U.S. 47 (1919).

104 391 U.S. 563 (1968).

105 Id. at 569-70. Cf. *Cafeteria & Restaurant Workers*, 367 U.S. at 886, where due process rights were subordinate to the compelling interest in national security. Accord, Henry v. Coahoma County Bd. of Educ., 353 F.2d 648 (5th Cir. 1965), cert. denied, 384 U.S. 962 (1966); Council v. Donovan, 40 Misc.2d 744, 244 N.Y.S.2d 199 (Sup.Ct. 1963).

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> Even if it were granted that no constitutional right to employment could be established, this concession would not imply that, by virtue of public employment, an individual might be deprived of his other constitutional rights. The universe of responsible relationships is not divisible into privileges and rights.

Dotson, The Emerging Doctrine of Privilege in Public Employment, 15 Pub. Admin. Rev. 77, 87 (1955).

107 E.g., Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956); Pred v. Board of Pub. Instruction, 415 F.2d 851, 856 (5th Cir. 1969), aff'd on rehearing, 465 F.2d 1398 (5th Cir. 1972). But see Mr. Justice Marshall's dissent in *Roth*: "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." 408 U.S. at 588. To the extent that Justice Marshall argued for procedural fairness and equality of treatment, this view is not inapposite to the proposition that no right to public employment exists. See Norlander v. Schleck, 345 F. Supp. 595 (D. Minn. 1972). Marshall, however, would go further and affirmatively place the burden of proof upon the government employer.

dismissal or nonretention[108] on constitutionally impermissible grounds is prohibited.[109]

By discrediting the validity of the privilege doctrine and thereby acknowledging the relevance of constitutional provisions to the probationary teacher, the *Roth* majority follows the trend of recent cases.[110] But while the Court recognized that the inquiry does not end with a determination that no right to public employment exists,[111] it obviated the need for balancing by grounding its analysis in a stringent interpretation of liberty and property interests. Finding that the nontenured instructor enjoys no protectible interest under the due process clause, Justice Stewart foreclosed any consideration of the probationary teacher's significant interest in effectively challenging the nonrenewal decision and counteracting its effect on his career.

In the final analysis, the Court's disdain for the right-privilege distinction is suspect, for it demands that the individual's interest be rooted in a statute, contractual provision, university policy or explicit understanding.[112] Since relief pursuant to such legally enforceable bases can be attained in a court of law anyway, the Court's rejection of the right-privilege distinction is semantic only; it does nothing for the rights of the nontenured, who, lacking the required relationship, may oppose the privilege doctrine only by constitutional challenge. Rather than denying the efficacy of the right-privilege distinction, the Court has retained its vitality, at least in the area of public employment, by substituting in its stead the concept of legal entitlement.[113] A legal entitlement/nonlegal entitlement dichotomy effectively preserves the same results that obtained during the predominance of the privilege doctrine.

The Court has achieved the undesirable effects of the right-privilege distinction by limiting the expectancy formulation to legally enforceable interests. Just as that misconceived doctrine barred public employees from asserting constitutional rights, a reflexive application of the *Roth* formula may lead to similarly oppressive results.

C. The Disparity Between Substance and Procedure

The contractual relationship between the state and its citizens may not operate in derogation of constitutional liberties.[114] No public employee can be penalized for

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[108] Regarding the applicability of constitutional protections, there is no practical difference between termination of employment during a given contract term or nonrenewal for a subsequent period. Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969), aff'd on rehearing, 465, F.2d 1398 (5th Cir. 1972); McLaughlin v. Tilendes, 398 F.2d 287 (7th Cir. 1968). See McDowell v. State of Tex., 465 F.2d 1342 (5th Cir. 1971), aff'd on rehearing, 465 F.2d 1349 (5th Cir. 1972)(en banc), in which the discharge of a government employee without a hearing was upheld on the basis of *Roth*. Furthermore, constitutional rights may attach even where the decision of the school authorities does not amount to discharge or nonretention. Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970) (teacher denied promotion because of his union activities). But see Gossin v. Huskey, 348 F. Supp. 689 (E.D. Mo. 1972), decided in light of *Roth*.

[109] Even when the state confers a gratuity, its conduct is still proscribed by the constraints of the Constitution. This is somewhat analogous to the "duty of affirmative action" in tort law. W. Prosser, The Law of Torts, 343-48 (4th ed. 1971). Professor Dotson suggests the distinction between a right to and a right in public employment. Dotson, supra note 106, at 87.

[110] See the cases cited by Justice Stewart in Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[111] 408 U.S. at 571 n.9; Birnbaum v. Trussell, 371 F.2d 672, 678 (2d Cir. 1966).

[112] The Court maintained that a claim of entitlement to reemployment must be supported by rules or understandings enforceable at law. 408 U.S. at 577.

[113] Professor Davis indicates that the term "right" is usually used by the courts to describe a legally protected interest. Davis, Treatise § 7.12 at 343 (Supp. 1970).

[114] The Scopes Monkey Trial was a *cause celebre* in which a public school teacher was found guilty of violating a state statute banning the teaching of anything inconsistent with Biblical doctrine. Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927). Affixing to government contracts or largesse conditions which demand the relinquishment of constitutionally guaranteed liberties has

lawful exercise of his freedom of speech[115] and association,[116] his privilege against self-incrimination,[117] or his religious beliefs.[118] Termination of public employment cannot be motivated by a discriminatory animus,[119] and the state must conduct its hiring and dismissal policies within the confines of the fourteenth amendment guarantees of due process[120] and equal protection.[121] Cognizant of the need for procedural measures to insure the efficacy of these guaranteed liberties, courts have applied procedural due process whenever a nontenured employe alleges a violation of his collateral constitutional rights.[122]

In addition, freedom from arbitrary state action is a constitutional right secured to the public employee by the due process clause.[123] The state cannot inflict the consequences of caprice and irrationality on its citizens, regardless of whom they are working for at any particular time.[124] An allegation of arbitrary treatment, as well as a claim of infringing collateral constitutional rights, constitutes a federal cause of action. Nevertheless, the *Roth* Court would deny the probationary teacher procedural remedies when the claim is solely one of arbitrary nonretention.

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been rejected in subsequent cases. A necessary corollary prohibits the state from retaliating against an individual for the exercise of his rights. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullit, 377 U.S. 360 (1964); Sherbert v. Verner, 374 U.S. 398 (1962); Shelton v. Tucker, 364 U.S. 479 (1960); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952).

115 Pickering v. Board of Educ., 391 U.S. 563 (1968); Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970). But see text accompanying notes 103-105 supra.

116 Shelton v. Tucker, 364 U.S. 479 (1960); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).

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

118 Sherbert v. Verner, 374 U.S. 398 (1962).

119 McFerren v. County Bd. of Educ., 455 F.2d 199 (6th Cir. 1972); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967).

120 Keyishian v. Board of Regents, 385 U.S. 589 (1967); Greene v. McElroy, 360 U.S. 474 (1959).

121 Hatton v. County Bd. of Educ., 422 F.2d 457 (6th Cir. 1970).

122 Drown v. Portsmouth School Dist., 451 F.2d 1106, 1109 (1st Cir. 1971). See cases cited in notes 114-121 supra.

123 Mr. Justice Cardozo characterized the protection of the individual from arbitrary state action as the very essence of due process. Ohio Bell Tel. Co. v. Public Util. Comm'n., 301 U.S. 292, 302 (1967). For language supporting the public employee's right to be free from the arbitrary acts of his employer, see *Cafeteria & Restaurant Workers*, 367 U.S. at 897-98; Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956); Lucas v. Chapman, 430 F.2d 945, 947 (5th Cir. 1970); Birnbaum v. Trussell, 371 F.2d 672, 678 (2d Cir. 1966); Hayes v. Cape Henlopen School Dist., 341 F. Supp. 823, 836 (D. Del. 1972); Rozman v. Elliot, 335 F. Supp. 1086, 1088 (D. Neb. 1971); Auerbach v. Trustees of Cal. State Colleges, 330 F. Supp. 808, 811 (C.D. Cal. 1971); Holliman v. Martin, 330 F. Supp. 1, 11 (W.D. Va. 1971); Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984, 991 (W.D. Wis. 1970); Heckler v. Shepard, 243 F. Supp. 841, 846 (D. Idaho 1965); Note, Fairness of a Hearing Before a School Board on Nonrenewal of a Teacher's Contract, 1971 Wis. L. Rev. 354; Comment, Dismissal of Public School Teacher Without Prior Notification of Charges and a Hearing Which Affords the Opportunity to Present Evidence Constitutes Deprivation of Due Process, 22 Ala. L. Rev. 349, 352-53 (1970); Comment, School Board's Non-Renewal of Untenured Teacher's Contract Requires Statement of Reasons but Not Hearing, 85 Harv. L. Rev. 1327, 1328 (1972). Contra, Thaw v. Board of Pub. Instruction, 432 F.2d 98, 100 (5th Cir. 1970); Freeman v. Gould Special School Dist., 405 F.2d 1153, 1157, 1159 (8th Cir.), cert. denied, 396 U.S. 843 (1969) (but see Judge Lay's vigorous dissent in which he defends "the personal liberty to pursue one's employment without arbitrary vilification and reckless exclusion by the state", 405 F.2d at 1165).

124

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

Wieman v. Updegraff, 344 U.S. 183, 190 (1952). Accord, Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956); Bruns v. Pomerleau, 319 F. Supp. 58, 64 (D. Md. 1970).

That arbitrary and capricious state action is a redressable infraction requiring procedural support is buttressed by a consideration of the risk normally associated with public employment.[125] While termination or nonrenewal of a probationary teacher's contract may be expected for a variety of ancillary reasons — for example, financial cutbacks, upgrading the quality of the faculty and academic reorganization — such a decision ordinarily reflects an unsatisfactory performance. The instructor who adequately discharges his teaching duties looks toward continued employment as the boon for his efforts. Because of this contemplation of fair treatment[126] and the alleged purpose of the probationary term as an "objective" evaluation period, each teacher should be allowed to compete for tenure on an equal basis with other probationary faculty.[127]

In a federal action, the nontenured teacher must satisfy the burden of proving that the school's decision was either (1) in retaliation for the lawful exercise of collateral constitutional rights; (2) was unrelated to a legitimate interest; or (3) had no basis in fact. Where no reasons for nonrenewal are given, yet the instructor can offer a plausible claim of constitutional impropriety based on collateral constitutional rights,[128] the court will remand the case to the school with directions for appropriate administrative proceedings. Alternatively, the court may grant the substantive remedy of reinstatement or remuneration if the teacher succeeds in persuading it that the university's acts were arbitrary and capricious. Accordingly, if it can be shown that the reasons for nonrenewal are trivial, have no support in uncontroverted fact and are divorced from educational objectives or the working relationships within the school, it follows that the decision to release rests on constitutionally impermissible grounds.[129]

125

> In an entirely complementary fashion, where government induces a private person to commit himself and to establish a dependency subject only to a given number of express and implied risks which the individual assumes, a subsequent decision to terminate him on other bases disadvantages him beyond this loss of his job as such; indeed it leaves him far worse off than had he not been induced to accept government employment in the first instance.

Van Alstyne, supra note 63, at 862.

126 In Norlander v. Schleck, 345 F. Supp. 595 (D. Minn. 1972), an applicant for a clerk-typist position was denied placement on the eligibility list for municipal employees based on her alleged "unsatisfactory references." The court found the city's reason inadequate in light of the applicant's right to "fair consideration" along with other candidates.

> [T]he view that a "right" must be infringed before a remedy can be fashioned has been steadily eroded; the focus of inquiry has shifted from identification of individual rights to an examination of the reasonableness of governmental action.

Note, Dismissal of Federal Employees — the Emerging Judicial Role, 66 Colum. L. Rev. 719, 734 (1966).

127 Comment, School Board's Non-Renewal of Untenured Teacher's Contract Requires Statement of Reasons but Not Hearing, 85 Harv. L. Rev. 1327, 1329 (1972). For the suggestion that procedural due process is necessary to protect against a denial of the substantive right of equal protection, see Van Alstyne, supra note 63, at 867.

128 In Pickering v. Board of Educ., 391 U.S. 563 (1968), it was easy for the Court to link the teacher's dismissal to a letter criticizing the school administration which he had recently written to a local newspaper and find the school acted in retaliation to the teacher's exercise of his free speech right. See text accompanying notes 114-122 supra.

129 Drown v. Portsmouth School Dist., 451 F.2d 1106, 1108 (1st Cir. 1971); Johnson v. Branch, 364 F.2d 177, 178 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967); Fisher v. Snyder, 346 F. Supp. 396, 400 (D. Neb. 1972); Holliman v. Martin, 330 F. Supp. 1, 10 (W.D. Va. 1971); Comment, Public School Teachers Claiming Arbitrary Dismissal by School Board Held to Have Presented No Federal Due Process Issue, 44 N.Y.U. L. Rev. 836, 841 (1969). In McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970), the district court held that the University of Minnesota failed to show that homosexuality would impair an otherwise qualified applicant's functioning as a librarian at that institution. However, the circuit court reversed, finding no arbitrary action by the school authorities in view of the applicant's demand "to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer." 451 F.2d 193, 196 (8th Cir. 1971).

The real difficulty surfaces when no reasons are given, yet the probationary teacher has no basis for challenging his nonrenewal as a reprisal for the exercise of collateral constitutional rights. Without antecedent procedural safeguards, the instructor's substantive constitutional right of freedom from arbitrary action is illusory.[130] A federal action is fruitless, for the teacher's claim would be frustrated by the insuperable burden of proving reasons for nonrenewal arbitrary when he is unaware what those reasons are. The policy considerations which compel pretermination proceedings[131] when the teacher claims a violation of collateral constitutional rights seem equally applicable where the same teacher alleges arbitrary action.

Although the *Roth* Court does not deny that freedom from arbitrary governmental action is a protectible interest under the due process clause, its resolution of the procedural due process issue undermines the efficacy of that substantive right. By eschewing the application of procedural due process in *Roth*, the Court threatens the substantive right against arbitrary state action.[132]

When reasons are given for his nonrenewal, the nontenured teacher can seek federal relief under 42 U.S.C. § 1983 by claiming his employer's action was in retaliation for the exercise of collateral constitutional rights or was arbitrary and capricious. When no reasons are offered, the teacher can still achieve redress in the form of a court order directing the university to conduct an administrative hearing and/or provide him with reasons when the cause of action is infringement of collateral constitutional rights. When the allegation is arbitrary action, however, the instructor is no longer entitled to procedural safeguards, nor is success in federal court feasible when he is unaware of the reasons he is challenging.

Thus, the matrix of constitutional protections is rendered incomplete by the effect of *Roth*. In all instances but one, namely, where the instructor feels his nonretention has been arbitrary yet has been given no reasons, the constitutional rights of the probationary teacher remain intact. But by failing to protect the teacher in this crucial situation, the Court dilutes the effective exercise of a substantive constitutional liberty by creating an inconsistent gap between substance and procedure. Without explicitly prohibiting the nontenured instructor from bringing an action under 42 U.S.C. § 1983 on grounds of arbitrariness, the Court is emasculating that substantive right by rejecting its concomitant procedural guarantees.

IV. EFFECTS AND IMPLICATIONS OF *ROTH*

The *Roth* decision does not bode well for the nontenured instructor. Even where the state as employer has minimal interests in withholding a detailed statement of reasons and refusing an intramural hearing, the teacher is nevertheless not entitled to procedural safeguards. The Court's failure to discern a protectible interest precludes any considerations of procedural measures.

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130 "It would seem a rather hollow gesture ... to hold that while a teacher cannot be terminated for the exercise of a constitutional right, he can be terminated for no reason whatsoever." Endicott v. Van Petten, 330 F. Supp. 878, 882 (D. Kan. 1971).

131 See text accompanying notes 65-77 supra. In addition, the hazards of litigation might very well deter the teacher from bringing suit at all; the dilatory nature of judicial proceedings, the likelihood of an inadequate remedy, the expense of pursuing legal action, and the prejudicial implications on his record if he fails to sustain the charges are considerations the instructor must weigh before entering a judicial forum. Van Alstyne, Supra note 63, at 859-60.

132 See Van Alstyne, The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann, 59 A.A.U.P. Bulletin 267, 268 (Autumn 1972).

Roth plainly sanctions and encourages the practice of nonrenewal without explanation.[133] By publishing reasons, thereby risking a lawsuit and possible order for a pretermination hearing, university officials walk a constitutional tightrope. The temptation will be great to take the least dangerous path by adopting a policy of unassailable silence. In addition, although the teacher is entitled to procedural safeguards where collateral constitutional rights are implicated,[134] the university administrator's exercise of unfettered discretion may indeed tread on an equally important constitutional liberty.[135] So long as nonrenewal does not appear to be a reprisal for the exercise of such rights as freedom of speech and association, employment may be terminated without explanation. As a result school authorities can use the veil of *Roth* to mask a constitutionally impermissible decision not to renew a probationary teacher's contract. So long as the administration keeps the unconstitutional reasons for nonrenewal vaulted within its ivory towers, the teacher will not be able to seek an effective remedy in a federal forum. The fact that his substantive constitutional rights have been violated will never be dealt with.

In light of *Perry v. Sindermann*,[136] where the Court found a legally enforceable expectation of reemployment within the context of Odessa Junior College's de facto tenure policy, there remain instances in which a probationary teacher is afforded procedural rights in the event of nonretention. But one commentator submits that the result is an ill-defined "terra incognita" that subsumes both the neophyte instructor and the experienced faculty member, both of whom suffer comparable injuries if unprotected by an explicit university policy or mutual understanding.[137] Responding to this ambiguity, institutional policy may become increasingly polarized:

> [The university can] avoid the "hazard" of even minimum constitutional procedures by strategically withdrawing any official encouragement of professional security for the faculty and retreating behind the ironplate or seried, short-term terminal contracts, thus to reserve a prerogative of procedural arbitrariness; or . . . [it can] systematize instead a policy of positive incentives with a willingness to provide some explanation and opportunity for reconsideration when requested.[138]

Prompted by their interest in retaining unfettered control over hiring practices and preserving the distinction between tenured and probationary faculty, school administrators may proceed forthwith to seal the *Perry* loophole in the *Roth* analysis.

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133 One commentator criticizes Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), cert. denied, 396 U.S. 843 (1969), a case employing the same methodology and reaching an identical result as *Roth*, for giving "a virtual license to a local administrator to be irrational." Frakt, Non-tenure Teachers and the Constitution, 18 Kan. L. Rev. 27, 44 (1969).

134 Even where the teacher alleges infringement of first amendment freedoms, he still bears the burden of proving that the decision not to renew his contract was prompted by his exercise of a constitutional right. The difficulty of satisfying this burden of proof may create a chilling effect on the free exercise of first amendment freedoms. Drown v. Portsmouth School Dist., 435 F.2d 1182, 1184 (1st Cir. 1970), cert. denied, 402 U.S. 972 (1971); Harrington v. Taft, 339 F. Supp. 670, 674 (D. R.I. 1972); Comment, Public School Teachers Claiming Arbitrary Dismissal by School Board Held to Have Presented No Federal Due Process Issue, 44 N.Y.U.L. Rev. 836, 841-42 (1969). Cf. Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); Baggett v. Bullitt, 377 U.S. 360, 372 (1964). Despite the substantial government interest in military security, Mr. Justice Brennan, dissenting in *Cafeteria & Restaurant Workers*, contended that protecting the public employee against arbitrary action but withholding an explanation was an "internal contradiction" since this would eliminate any opportunity to show that the true reason was constitutionally suspect. 367 U.S. at 901. Accord, Board of Regents of State Colleges v. Roth, 408 U.S. at 585 (Douglas, J., dissenting).

135 See text accompanying notes 123-127 supra, for a discussion of freedom from arbitrary state action as a constitutional right.

136 408 U.S. 593 (1972).

137 Van Alstyne, The Supreme Court Speaks to the Untenured, supra note 132.

138 Id. at 270.

By reversing a partial summary judgment[139] granted by the district court,[140] the *Roth* majority found that the probationary teacher could not prevail when the facts were viewed in the light most favorable to the university. In fact, if Roth presented substantial evidence, upon remand, of a deprivation of liberty or property, the court could proceed to a determination of the form of procedural measures required.[141] However, the degree of evidence necessary to perfect such a claim is far from clear. To be sure, numerous factual variants may conceivably affect the determination.[142] An array of personal indicia such as wealth, age, health, education and objective criteria, such as the prevailing job market and the proportion of teachers discharged at that particular institution, would have to be duly considered by the Court.[143] This is a problem the judiciary would do well to avoid.[144]

The need for a positive constitutional directive has not been met by the *Roth* decision. As a result, the presence of slight factual discrepancies may precipitate a conflicting body of case law. Courts following *Roth* may decline to become involved in a morass of evidentiary problems. Instead, they might assume the less difficult, albeit more rigid, posture of denying procedural measures to the nontenured teacher unless a stigma to his reputation or a total foreclosure of employment opportunities has been categorically demonstrated.[145] In the end, by declining the opportunity to articulate a procedural due process standard for the class of university instructors,[146] the Court is perpetuating the background of disharmony that characterized state and federal forums.

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139 A partial summary judgment is permitted by Fed. R. Civ. P. 54(b). When the court reverses a partial summary judgment, it determines that a genuine issue of material fact exists and the movant is therefore not entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

140 310 F. Supp. 972 (W.D. Wis. 1970).

141 The majority, however, was unable to find such evidence in the record: "[E]ven assuming *arguendo* that such a 'substantial adverse effect' under these circumstances would constitute a state-imposed restriction on liberty, the record reveals no support for these assumptions." 408 U.S. at 574 n.13.

142 See note 55 supra.

143 E.g., Olson v. Regents of Univ. of Minn., 301 F. Supp. 1356 (D. Minn. 1969), in which a university employee's advanced age (59 years) and length of service (14 years) persuaded the court to invoke its equitable powers to order reinstatement because of the school's failure to provide advance notice of termination.

144

> [A] constitutional description of procedural due process in which the requirement for each item of procedural regularity critically depends upon a piecemeal review of a vast assortment of adjudicative facts actually established in each individual case fundamentally detracts from the common need to know what the Constitution requires and from the common desire that the Constitution speak with greater majesty.

Van Alstyne, supra note 63, at 878.

145 In Wilson v. Pleasant Hill School Dist. R-III, 465 F.2d 1366 (8th Cir. 1972), even though the probationary teacher "had been hired every year for six years and had received no complaints about his performance," the court upheld the nonretention solely on the strength of *Roth*. Id. at 1368. Nevertheless, there is no indication as to how much proof is sufficient to persuade the court of a due process denial.

146 The concerns of university instructors, high school teachers, and municipal employees may arguably differ. So, too, do the interests of the government employer. Thus, the procedural requisites in each case will vary according to the countervailing factors in the appropriate balancing equation.

V. CONCLUSION

Implicit in our legal order is a sense of fairness which must proceed apace with the rising incidence of government involvement in the affairs of its citizens. As individual endeavors become more and more dependent upon the state, functions once deemed benefits are now considered necessities. If government is to affect directly such personal activities as employment and subsistence, a rule of fairness must assume constitutional dimension. It is increasingly important that candor not give way to secrecy and that fairness not succumb to fiat.

Failure to classify a particular interest as liberty or property consistent with traditional usage should not *a fortiori* obviate its inclusion within the ambit of procedural due process. A constitutional response to the pervasive activities of the state demands that the Court extend traditional definitions or recognize that, irrespective of labels, certain interests warrant procedural as well as substantive protections. An approach that allows government to run roughshod over highly personalized concerns, not the least of which is the capacity to pursue one's chosen occupation, manifests a profound dilution in constitutional vitality.

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