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Constitutional Law: Due Process, the Nontenured College Professor, and De Facto Tenure

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Time has witnessed a rapid decline of the *caveat emptor* doctrine as to the sale of new houses.[50] It is gratifying to view the instant case as an addition to that trend and perhaps as a precursor of an even more modern approach to the multi-dwelling units that have become so immensely popular in Florida. The modern approach becomes increasingly vital to avoid shoddy and improper work in a modern building era.[51]

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CONSTITUTIONAL LAW: DUE PROCESS, THE NONTENURED COLLEGE PROFESSOR AND DE FACTO TENURE

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

Robert Sindermann, respondent, had been employed as a teacher in the Texas university system for ten years, the last four years at Odessa Junior College under a series of one-year written contracts.[1] During his last year at the college respondent criticized policies of the college's board of regents.[2] The regents voted not to renew respondent's contract for the 1969-1970 school year and issued a press release accusing respondent of insubordination. No statement of reasons for the nonretention of respondent was provided, and the regents refused to grant a formal hearing. Respondent, alleging that the regents had infringed his rights to free speech and procedural due process, filed suit in the federal district court to obtain a statement of reasons and a formal hearing. The district court granted summary judgment for the regents, concluding that the college had no tenure system and that respondent's contract had naturally terminated.[3] The Fifth Circuit Court of Appeals reversed,[4] holding that despite lack of tenure nonrenewal of a teacher's contract would violate the fourteenth amendment if it were based on an infringement of the right of free speech.[5] On certiorari, the Supreme Court affirmed and HELD,

50. Humber v. Morton, 426 S.W.2d 554, 558 (Tex. 1968).

51. 7 S. WILLISTON, CONTRACTS §926A (3d ed. 1963).

1. The college had no formal tenure system.

2. Respondent became active in the Texas Junior College Teachers' Association and, during the 1968-1969 academic year, controversy arose between him and the regents. Respondent testified before committees of the Texas Legislature and placed a newspaper advertisement criticizing the regents for their refusal to elevate the college to a four-year program.

3. The findings and conclusions of the district court are not officially reported.

4. 430 F.2d 939 (5th Cir. 1970), *cert. granted,* 403 U.S. 917 (1971).

5. The court further found that if respondent could show he had an "expectancy" of reemployment, the failure to grant an opportunity for a hearing would violate procedural due process. *Id.* at 943-44.

respondent's lack of tenure did not foreclose his claim of a violation of free speech.[6] The Court found that if respondent could prove the college had a de facto tenure policy he would be entitled to a hearing and notice of grounds for his nonretention.[7]

The nontenured public school teacher has few substantive or procedural rights in the renewal or nonrenewal of his employment contract.[8] Although most states provide that the teacher be notified of the decision not to renew his contract,[9] they do not require that the notification include specific reasons for the decision.[10] This lack of statutory protection creates broad powers in the board of education and school administration described by one court as "an absolute power of dismissing [an] employee, with or without cause."[11]

Though unfettered power to dismiss teachers would make administration of public school systems a much easier task, such power is throttled by the Constitution. For example, substantive due process prevents a school board or other state agency from dismissing a qualified teacher because he exercises his right to free association,[12] or because of his race or religion,[13] or for his exercise of constitutionally protected speech.[14] Such a dismissal would allow the government to "produce a result which [it] could not command directly."[15] Absent constitutionally impermissible grounds, however, the discretion of educational administrators to dismiss probationary teachers is indeed broad.[16]

Although there is no requirement that public school systems adopt a tenure system, many states have found it beneficial in attracting and retaining

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6. 408 U.S. 593 (1972).

7. *Id.* at 603. The Court found that such a de facto tenure policy could give respondent a "property" interest. The subjective "expectancy" criteria adopted by the Fifth Circuit was rejected. *Id.*

8. "[A]ny year [the board] can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain." Shelton v. Tucker, 364 U.S. 479, 486 (1960).

9. *E.g.*, ILL. REV. STAT. ch. 122, §24-11 (1971).

10. *E.g.*, ALASKA STAT. §14.20.175 (1970) (reasons furnished upon request of teacher). One state requires a hearing for the nonretained teacher before an impartial third party; however, the board of education is the final arbiter in the decision of whether sufficient cause for nonretention exists. *See* CAL. EDUC. CODE §13443 (West Supp. 1971).

11. Jones v. Hopper, 410 F.2d 1323, 1328 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

12. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964).

13. *See, e.g.*, Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969); Franklin v. County School Bd., 360 F.2d 325 (4th Cir. 1966).

14. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968).

15. Speiser v. Randall, 357 U.S. 513, 526 (1958). This principle has been applied to cases concerning unemployment benefits, Sherbert v. Verner, 374 U.S. 398 (1963); tax exemptions, Speiser v. Randall, 357 U.S. 513 (1958); welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970); and denial of public employment, Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952).

16. *See generally* Frankt, *Non-tenure Teachers and the Constitution*, 18 KAN. L. REV. 27 (1969).

teachers. Only a few have chosen not to afford tenure protection to teachers.[17] Probationary periods of from two years[18] to as many as five years[19] are common where tenure systems exist. Once a teacher has been granted tenure, procedural due process clearly dictates that he may not be dismissed without a formal hearing and a statement of reasons for the proposed dismissal.[20]

Since statutes generally do not require specific reasons be given to nonretained probationary teachers, many teachers receive only a formal notice of the nonrenewal decision. From this context extensive litigation regarding probationary teachers has sprung. Lack of a formal statement of reasons for his nonretention forces the teacher to rely on informal communications with his superiors or forces him to surmise his own shortcomings. Consequently, the nonretained teacher often lacks the information required to defend his performance or to correct his inadequacies. A teacher in this position may also have difficulty describing the circumstances of his dismissal to potential employers.

Consequently, many nonretained public school teachers have resorted to the courts to uncover the reasons for their dismissal and to secure hearings to argue their right to a new contract.[21] The decisions in these cases have been inconsistent. Some courts have taken a technical approach to the language of one-year teaching contracts.[22] Others have sought to balance the school board's need for freedom of action against the teacher's right to know.[23] Still others have refused to interfere unless the decision to dismiss a teacher was obviously arbitrary or capricious.[24]

One court held a written statement of reasons was required to be furnished all dismissed teachers.[25] That court, however, could not justify imposition of the burden of requiring hearings in each nonretention case.[26]

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17. Among them are Arkansas, Georgia, Mississippi, North Carolina, South Carolina, South Dakota, and Vermont.

18. *E.g.*, ALASKA STAT. §14.20.150 (1962); IDAHO CODE ANN. §33-1212 (1963).

19. *E.g.*, FLA. STAT. §231.36 (3) (a)2 (1971) (three-year probationary period); IND. ANN. STAT. §28-4511 (1970) (five-year probationary period); WIS. STAT. ANN. §37.31 (1)a (Supp. 1972) (five-year probationary period).

20. *See* Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

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

22. Since these contracts are normally written without an explicit right to renewal, once the contract period has expired the courts have found no contractual right upon which the teacher can base a cause of action. *See, e.g.*, Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 91 (1970); Parker v. Board of Educ., 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 *U.S.* 1030 (1966).

23. *See, e.g.*, Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

24. *See, e.g.*, Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

25. Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971). The court found the burden of providing reasons to nonretained teachers to be small. *Id.* at 1185.

26. *Id.* at 1187.

Three circuits distinguished the rights of a nontenured teacher with an "expectancy" of reemployment.[27] A teacher with an "expectancy" was held to be due the same procedural considerations as a tenured teacher. In the instant case this expectancy claim weighed heavily in the court of appeals reversal of the summary judgment awarded the regents.[28]

Predictably, a more receptive treatment has been afforded teachers who claimed their dismissal was for constitutionally impermissible reasons. The Seventh Circuit, confronting such a claim in *Roth v. Board of Regents*[29] held that due to the adverse effects resulting from dismissal, a teacher was entitled to a statement of reasons and a hearing on the merits of the decision not to retain him.[30] The Supreme Court in reversing that decision held that the fourteenth amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured teacher's contract unless he can show that the nonrenewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment despite the lack of tenure or a formal contract.[31]

In the instant case the respondent based his claim of a de facto tenure program at Odessa College on an unusual provision in the college's official *Faculty Guide*.[32] The respondent also relied upon a policy paper of the Coordinating Board of the Texas College and University System.[33] Although the respondent's contract did not set forth express tenure provisions, the Court reasoned that such a provision might be implied.[34] The Court suggested that an "unwritten common law" might exist in a particular university that would provide the equivalent of tenure to certain employees.[35] A finding of such a tenure status for the respondent would guarantee him the procedural safeguards announced in *Roth*.[36]

The Court's holdings in the instant case and in *Roth* answer the fundamental question of whether a nonretained probationary teacher has a con-

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27. Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971); Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

28. 430 F.2d at 943-44.

29. Roth v. Board of Regents, 446 F.2d 806 (7th Cir.), *cert. granted*, 404 U.S. 909 (1971).

30. *Id.* at 809.

31. Board of Regents v. Roth, 408 U.S. 564 (1972). The Court found no liberty or property interest had been proved to have been infringed that would support the lower court's granting of summary judgment for the teacher. *Id.* at 579.

32. "*Teacher Tenure*: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors and as long as he is happy in his work." 408 U.S. at 600.

33. A synopsis of this policy paper is set forth in 408 U.S. 600-01 n.6. Generally, the paper encouraged the adoption of a tenure system and advocated a maximum period of seven years probation for full-time instructors. *Id.*

34. 408 U.S. at 601-02.

35. *Id.* at 602.

36. 408 U.S. at 572.

stitutional right to due process protection. The holdings, however, still leave important questions unanswered. Since there is no requirement for reasons to be supplied the nonretained teacher, the teacher who suspects an infringement of a constitutionally protected right is left with the same illusory administrative remedy as before. He must appeal to the board that dismissed him for an objective statement of its reasons or challenge the dismissal in court. Since the administrative remedy is often ineffective, and the recourse to the courts expensive, some commentators have advocated an impartial third party be appointed to preclude the present problem of having the same board that effects the dismissal decision also review the appeal of that decision.[37]

Further, the Court's reliance on such concepts as implied provisions of teaching contracts and unwritten university common laws[38] should lead to difficult questions of fact in future cases. The type of policy that might be found to be de facto tenure is certainly unclear. The de facto tenure approach of the instant case would, therefore, appear to be no better than the subjective "expectancy" test adopted by three circuits and rejected by the Court in the instant case.[39]

Implicit in the Court's holding is the recognition that the Constitution demands no higher standard of the government as an employer than that standard required of a private employer. Though it would seem to be a small burden for school administrators to provide reasons for nonretention of a probationary teacher, the Constitution demands no such action. The Court wisely left this to the legislatures. At least one court has recognized that imposing a hearing requirement prior to dismissal could lead to the school board's retention of a marginal teacher rather than incurring the expense of a dismissal proceeding.[40] Administrators must be free to exercise good faith discretion in the employment or dismissal of public school teachers. The Court's holding in the instant case should allow school administrators to separate the good from the bad in today's well-populated teacher market.

W. RUSSELL SNYDER

37. *See* Pettigrew, *Constitutional Tenure: Toward a Realization of Academic Freedom*, 22 CASE W. RES. L. REV. 475 (1971); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841.

38. 408 U.S. at 601-02.

39. *Id.* at 603.

40. Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir.), *cert. denied*, 402 U.S. 972 (1971). "[T]he very existence of the right of a non-tenured teacher to such a hearing would have two side effects, equally unfortunate. . . . [T]he school board is more likely to tolerate incompetent teachers. . . . [and] administrators would . . . follow a counsel of over-caution in their hiring practices. The innovative teacher would have a more difficult time finding employment . . . . [a]nd the schools would be left with a teaching force of homogenized mediocrities." *Id.* at 1186.