10-1971

Perry v. Sinderman

Lewis F. Powell Jr.

1/18/72

Perry v. Sindermann 70-36 (No Bench Memo.

Failure to renew ctt. of a non-tenured professor (full prof.) in a non-tenured College. Year to year ctt.

See my memo. dictated on Day of Trial

Shaper (for Trustees of Odessa College) (5th Cir. to College)

Sindermann (Resp) had annual ctt. It was not renewed. No hearing.

Sindermann could have asked for hearing but he filed suit simultaneously with request for hearing. This left College no choice.

Trial Ct. decided case on summary judgment — without a hearing.

CC 5 reversed DC & ordered DC to hold a hearing.

Shaper argued that no issues of fact existed.

Resp. left College — contrary to Head of Dept — to be absent to testify before Legislative Committee. Shaper says issue is not what he did, but fact that he was absent from duty post. Can't administer a College if faculty members are free to leave without permission.

Shafer (cont.)

He contends that even there were "invalid" reasons for not re-hiring, there are also valid reasons.

Resp. sought permission to leave, was denied permission, & went anyway

Resp. contends that if there are some "impermissible" reasons ~~[illegible]~~ asserted, there must be a hearing

x x x x x

Douglas: Issue is whether Summary Judgment was proper. He thinks not, & that there should be a hearing in D.C.

x x x x

Gottesman (for Resp.)

If a college refuses to hire in first place because it does not like the applicant's political activities, then would ~~be~~ violate const. rights:

Cases (cited in brief) established that a non-tenured prof. can't be terminated (non-renewal) for exercise of 1st Amend. Rts.

No. 70-36 Perry v. Sinderman Argued 1/18/72

Odessa College case (Texas) where Resp. was a nontenured faculty member, with year to year contracts, had been agitating - by testimony and otherwise - for conversion of Odessa into a four year college. He had sought permission to appear before legislative committees, but had been denied permission to leave college. He went anyway, and obviously was a controversial faculty member.

When the Board notified him that his contract would not be renewed, he instituted suit immediately (Section 1983, I suppose), claiming denial of his constitutional right not to be penalized for exercising First Amendment freedoms. He also claimed denial of due process in the failure of the college to give him a hearing.

On a summary judgment motion, District Court dismissed Sinderman's case.

On appeal, CCA 5 reversed (unanimous decision), and remanded the case for a hearing on the merits. The Court held:

1. That plaintiff's rights were "constitutional rather than contractual" citing Pred v. Board of Public Instruction (5th Cir.).

2. That a hearing on the merits is necessary to determine whether such rights have been infringed - the facts being "in total dispute".

3. As to denial of "procedural due process", the Court held that even thought not tenured, Sinderman might have an "expectancy of remployment." If the facts so indicate, he was entitled - as a matter of due process - to notice and hearing, and:

> "The hearing must include the right to produce witnesses and evidence and the right to confront and cross examine

> witnesses produced by the opposition. . . . (There must be) a meaningful opportunity to develop a record which can, if necessary, later form a substantial part of a court proceeding. . . ."

My Tentative Views Following Argument:

(i) The District Court erred in granting summary judgment, and we should affirm the Circuit Court's remand for an evidentiary hearing.

(ii) But we should not affirm the holding of the Court with respect to a right to a Goldberg v. Wright type of hearing. This is the principal issue involved in Roth. Perhaps we should defer a decision in Sinderman until the due process issue is decided in Roth. We could then remand Sinderman to be decided in light of our Roth decision.

See the briefs amicus in the Roth case (Jenner, Lee Rankin, and others) for reasons why I disagree with the due process conclusion that non-tenured teachers have a constitutional right to a hearing.

L.F.P., Jr.

LWB 1/24/72

Court	*Voted on*....., 19...		
Argued ..1/18/72....., 19...	*Assigned* ....., 19...	No.	70-36
Submitted ....., 19...	*Announced* ....., 19...		

L 7/

PERRY

vs.

SINDERMAN

1/24/72

Note: I raised question of my possible disqualification. All Justices agreed there is no disqualification.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Rehnquist, J.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 27, 1972

Dear Potter:

In No. 70-36 - Perry v. Sindermann,

please join me in your opinion.

W. O. D.

Mr. Justice Stewart

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1972

No. 70-36 -- Perry v. Sindermann

Dear Potter:

I have your proposed opinion affirming the court of appeals.

My records show 9 votes to reverse, with Bill Douglas and Bill Brennan adding "with modifications."

I have not had a chance to analyze your treatment, but I want to 'flag' this aspect, given that we are all working under the usual June pressure.

Regards,

WEB

Mr. Justice Stewart

Copies to Conference

P.S. I have not yet analyzed your proposed opinion, No. 71-162 -- Regents v. Roth, but a cursory examination suggests that unilateral "expectations" are perhaps being given a status never before acknowledged. The whole purpose of a probationary period could be undermined if the "incompetents" made it a practice -- as is commonly done -- of picking a "First Amendment quarrel" with the college president or dean in the second half of the probationary year. For me, at least, this needs some careful examination because of its impact on contract concepts.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 6, 1972

Re: No. 70-36 - Perry v. Sindermann
No. 71-162 - Board of Regents v. Roth

Dear Chief,

This is in response to your note of today about these cases, which were argued together and considered together in our Conference discussion.

My understanding of the views expressed at the Conference was that all of us, with the possible exception of Bill Rehnquist, agreed that a state university could not refuse to rehire a faculty member (or, indeed, any other employee) if the basis of that refusal were the faculty member's exercise of the right to free speech guaranteed by the First and Fourteenth Amendments. My further understanding of the Conference discussion was that a majority of us agreed that a state university faculty member has no constitutional right to reemployment when his contracted for period of employment has ended. Furthermore, he has no due process right to a hearing if he is not reemployed, unless he can show that he has somehow been deprived of liberty or property. He would, therefore, have such a right if the university had impaired his liberty by (1) personally stigmatizing him, or (2) foreclosing substantial employment opportunities elsewhere. He would also have a right to a hearing if the university had deprived him of property because, in fact, by reason of the actual "policies and practices of the institution," he was entitled to continued employment, in the absence of "cause" to terminate it.

It was upon this understanding that the opinions in these two cases were written, after you assigned them to me. This led to a reversal of the Court of Appeals' judgment in favor of the respondent teacher in Roth. It led to a disagreement with much of the Court of Appeals' rationale in Perry, and a remand to the District Court.

I continue to adhere to the views reflected in the two opinions I have circulated, believing that they no more than reflect many previous decisions of the Court. It may be, however, that I have misunderstood the views of the other Justices. As I understand Bill Douglas' dissenting opinion in Roth, he thinks that a teacher, as contrasted with other governmental employees, has a First Amendment right to reemployment simpliciter. With that I cannot and do not agree. It is my impression that another member of the Court has the tentative view that there is a "property" right in any governmental job vacancy. With that I also wholly disagree.

The proposed opinions in this case were circulated two weeks ago, on May 23. At our Conference on May 29 I suggested that I might have misapprehended the views of a majority of the Conference in these cases, and that if I had, the opinions should be reassigned to somebody else. I renew that suggestion now.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

P.S. - I do not think the Due Process Clause entitles a person to a hearing simply because his "unilateral" expectations have been defeated. As promptly as possible, I shall recirculate the opinions with language modifications designed to eliminate any misapprehension on that score.

Changes Throughout

Write Potter-ask pp 8 + 9

L.F.B

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

4th DRAFT

Circulated: _____

Recirculated: JUN 20 1972

SUPREME COURT OF THE UNITED STATES

No. 70–36

Charles R. Perry et al., Petitioners, *v.* Robert P. Sindermann, etc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Reviewed 6/20 – This is more troublesome than Roth. It seems to me to go beyond Roth – not just on basis of facts – but in ~~explicitly~~ articulating due process rights based on understandings or implied contractual rights.

Finally, in May 1969, the respondent's one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. The Regents issued a press release setting forth allegations of the respondent's insubordination.[1] But they provided him no official statement of the reasons for the nonrenewal of his contract. And they allowed him no opportunity for a hearing to challenge the basis of the nonrenewal.

The respondent then brought this action in a federal district court. He alleged primarily that the Regents' decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech. He also alleged that their failure to provide him an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process. The petitioners—members of the Board of Regents and the president of the college—denied that their decision was made in retaliation for the respondent's public criticism and argued that they had no obligation to provide a hearing.[2] On the basis of these bare pleadings and three brief affidavits filed by the respondent,[3] the District Court granted summary judgment for the petitioners. It concluded that the respondent had "no cause of action against the [petitioners] since his contract of em-

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[1] The press release stated, for example, that the respondent had defied his superiors by attending legislative committee meetings when college officials had specifically refused to permit him to leave his classes for that purpose.

[2] The petitioners claimed, in their motion for summary judgment, that the decision not to retain the respondent was really based on his insubordinate conduct. See n. 1, *supra*.

[3] The petitioners, for whom summary judgment was granted, submitted no affadavits whatever. The respondent's affadavits were very short and essentially repeated the general allegations of his complaint.

ployment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system." [4]

The Court of Appeals reversed the judgment of the District Court. *Sindermann* v. *Perry,* 430 F. 2d 939. First, it held that, despite the respondent's lack of tenure, the nonrenewal of his contract would violate the Fourteenth Amendment if it in fact was based on his protected free speech. Since the actual reason for the Regents' decision was "in total dispute" in the pleadings, the court remanded the case for a full hearing on this contested issue of fact. *Id.,* at 942–943. Second, the Court of Appeals held that, despite the respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show that he had an "expectancy" of re-employment. It, therefore, ordered that this issue of fact also be aired upon remand. *Id.,* at 943–944. We granted a writ of certiorari, 403 U. S. 917, and we have considered this case along with *Board of Regents* v. *Roth, ante.*

I

The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.

For at least a quarter century, this Court has made clear that even though a person has no "right" to a governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutional rights—especially, his right

[4] The findings and conclusions of the District Court—only several lines long—are not officially reported.

to freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those rights would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall*, *supra*, unemployment benefits, *Sherbert* v. *Verner*, 374 U. S. 398, 404–405, and welfare payments, *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6; *Graham* v. *Richardson*, 403 U. S. 365, 374. But, most often, we have applied the principle to denials of public employment. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *Wieman* v. *Updegraff*, 344 U. S. 183, 192; *Shelton* v. *Tucker*, 364 U. S. 479, 485–486; *Torasco* v. *Watkins*, 367 U. S. 488, 495–496; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 288; *Baggett* v. *Bullitt*, 377 U. S. 360; *Elfbrandt* v. *Russell*, 384 U. S. 17; *Keyshian* v. *Board of Regents*, 385 U. S. 589, 605–606; *Whitehill* v. *Elkins*, 389 U. S. 54; *United States* v. *Robel*, 389 U. S. 258; *Pickering* v. *Board of Education*, 391 U. S. 563, 568; *Board of Regents* v. *Roth*, *ante*, at ——. We have applied the principle whether the denial of public employment took the form of a dismissal, *e. g.*, *Pickering* v. *Board of Education*, *supra*, or nonretention, *e. g.*, *Shelton* v. *Tucker*, *supra*, of a present employee.

Thus the respondent's lack of a contractual or tenure "right" to re-employment for the 1969–1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exer-

cise of First and Fourteenth Amendment rights. *Shelton* v. *Tucker, supra; Keyshian* v. *Board of Regents, supra.* We reaffirm those holdings here.

In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the Board of Regents' action was invalid.

But we agree with the Court of Appeals that there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis—as a reprisal for the exercise of constitutionally protected rights." 430 F. 2d, at 943. The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public criticism was within the First and Fourteenth Amendment's protection of freedom of speech. Plainly, these allegations present a *bona fide* constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering* v. *Board of Education, supra.*

For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper.

II

The respondent's lack of formal contractual or tenure security in continued employment at Odessa Junior Col-

lege, though irrelevant to his free speech claim, is highly relevant to his procedural due process claim. But it may not be entirely dispositive.

We have held today in *Board of Regents* v. *Roth, ante,* that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow 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. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth,* the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty.[5] Nor did it amount to a showing of a loss of property.

But the respondent's allegations—which we must construe most favorably to the respondent at this stage of the litigation—do raise an issue as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, the respondent alleged that the college had a *de facto* tenure program, and that he had tenure under

[5] The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. 430 F. 2d, at 944. We have rejected this approach in *Board of Regents* v. *Roth, ante,* at —— n. 13.

that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years:

> "*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."

Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.[6]

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[6] The relevant portion of the guidelines, adopted as "Policy Paper 1" by the Coordinating Board on October 16, 1967, reads:

"A. Tenure

"Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

"A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:

"(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total

Thus the respondent offered to prove that a teacher, with his long period of service, at this particular State College had no less a "property" interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him.

We have made clear in *Roth, ante,* at ——, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" is a constitutional concept. It denotes a range of interests that are secured by "existing rules or understandings." *Id.,* at ——. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*

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 re-employment. By analogy, the law of contracts long has employed a process by which agreements,

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probationary period in the academic profession is extended beyond the normal maxmium of seven years).

. . . . . .

"(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities."

The respondent alleges that, because he has been employed as a "full-time instructor" or professor within the Texas College and University System for 10 years, he should have "tenure" under these provisions.

though not formalized in writing, may be "implied." 3 Corbin on Contracts, §§ 561–572A. Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

A teacher, like the respondent, without formal tenure, might be able to show from the words and conduct of his superiors, from other surrounding circumstances and from past usage—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See Byse & Joughin, Tenure in American Higher Education 17–28.

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement "under the policies and practices of the institution." 430 F. 2d, at 943. Proof of such a property interest would not, of course, entitle

him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.

Therefore, while we do not wholly agree with the opinion of the Court of Appeals, its judgment remanding this this case to the District Court is

Affirmed.

Change Throughout

Write Potter a note

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: _____

Recirculated: JUN 20 1972

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–162

The Board of Regents of State Colleges et al., Petitioners, *v.* David F. Roth, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

[1] The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: "*David F. Roth* is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) *Oshkosh* as (Rank:) *Assistant Professor* of (Department:) *Political Science* this (Date:) *first* day of (Month:) *September* (Year:) *1968.*" The notice went on to specifiy that the respondent's "appointment basis" was for the "academic year." And it provided that "[r]egulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." See n. 2, *infra*.

6/20/72
Renewed - I like his opinion & can join it & conclude - as I now incline to think - that I am not disqualified

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a "permanent" employee only after several years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing beyond his one-year appointment.[2] There are no statutory or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of University officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to certain procedures.[3] A nontenured teacher, similarly, is protected to some extent *during* his one-year term. Rules promulgated by the Board of Regents

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[2] Wisconsin Statutes 1967, c. 37.31 (1), in force at the time, provided in pertinent part that:

"All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior, after 4 years of continuous service in the state university system as a teacher."

[3] Wisconsin Statutes 1967, c. 37.31, in force at the time, provided in pertinent part that:

"No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision."

provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February first "concerning retention or non-retention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case." [4]

In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969–1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

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[4] The Rules, promulgated by the Board of Regents in 1967, provide:

"RULE I—February 1st is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date."

"RULE II—During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.

"RULE III—'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenured faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only.

"RULE IV—When a non-tenured faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case."

The respondent then brought this action in a federal district court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech.[5] Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F. Supp. 972. The Court of Appeals affirmed this partial summary judgment. 446 F. 2d 806. We granted certiorari. 404 U. S. 909. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[6] We hold that he did not.

[5] While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the nonretention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. "In the present case," it stated, "it appears that a determination as to the actual bases of [the] decision must await amplification of the facts at trial. . . . Summary judgment is inappropriate." 310 F. Supp., at 982.

[6] The courts that have had to decide whether a nontenured public employee has a right to a statement of reasons or a hearing upon nonrenewal of his contract have come to varying conclusions. Some have held that neither procedural safeguard is required. *E. g., Orr* v. *Trinter,* 444 F. 2d 128 (CA6); *Jones* v. *Hopper,* 410 F. 2d 1323 (CA10); *Freeman* v. *Gould Special School District,* 405 F. 2d 1153

I

The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated the right to some kind of prior hearing is paramount.[7] But the range of interests protected by procedural due process is not infinite.

The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at the Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F. Supp., at 977–979. Undeniably, the respondent's re-employment prospects were of major concern to him—concern that we surely cannot say was insignificant. And a weighing process has long been a part of any determination of the *form* of hearing required in particular situations

(CA8). At least one court has held that there is a right to a statement of reasons but not a hearing. *Drown* v. *Portsmouth School District,* 435 F. 2d 1182 (CA1). And another has held that both requirements depend on whether the employee has an "expectency" of continued employment. *Ferguson* v. *Thomas,* 430 F. 2d 852, 856 (CA5).

[7] Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut,* 401 U. S. 371, 379. "While '[m]any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations [and this is not one] due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." *Bell* v. *Burson,* 402 U. S. 535, 542. For

by procedural due process.[8] But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. See *Morrissey* v. *Brewer*, — U. S. —, —. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

"Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 646 (Frankfurter, J., dissenting). For that reason the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights.[9] The Court has

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the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, *e. g.*, *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Phillips* v. *Commissioner*, 283 U. S. 589, 597; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594.

[8] "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U. S. 371, 378. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254, 263; *Hannah* v. *Larche*, 363 U. S. 420. The constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process. See n. 7, *supra*.

[9] In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a "privilege," not a "right," and that procedural due process guarantees therefore were inapplicable. *Bailey* v. *Richardson*, 182 F. 2d 46, aff'd by an equally divided Court, 341 U. S. 918. The basis

also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.[10] By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[11]

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

II

"While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment] 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 occupa-

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of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson*, 403 U. S. 365, 374. See, *e. g.*, *Morrissey* v. *Brewer*, — U. S. —, —; *Bell* v. *Burson*, 402 U. S. 535, 539; *Goldberg* v. *Kelly*, 397 U. S. 254, 262; *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6; *Pickering* v. *Board of Education*, 391 U. S. 563, 568; *Sherbert* v. *Verner*, 374 U. S. 398, 404.

[10] See, *e. g.*, *Connell* v. *Higgenbotham*, 403 U. S. 207, 208; *Bell* v. *Burson*, 402 U. S. 535; *Goldberg* v. *Kelly*, 397 U. S. 254.

[11] "Although the Court has not assumed to define 'liberty' [in the Fifth Amendment's Due Process Clause] with any great precision, that term is not confined to mere freedom from bodily restraint." *Bolling* v. *Sharpe*, 347 U. S. 497, 499. See, *e. g.*, *Stanley* v. *Illinois*, — U. S. —; *Armstrong* v. *Manzo*, 380 U. S. 545.

tions of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U. S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, *e. g.*, *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500; *Stanley* v. *Illinois*, — U. S. —.

There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau*, 400 U. S. 433, 437. *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *United States* v. *Lovett*, 328 U. S. 303, 316–317; *Peters* v. *Hobby*, 349 U. S. 331, 352 (concurring opinion). See *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials.[12] In the present

[12] The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

case, however, there is no suggestion whatever that the respondent's interest in his "good name, reputation, honor or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other formal disability that foreclosed a range of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in State universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it is no small injury . . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra*, at 185 (Jackson, J., concurring). See *Truax* v. *Raich*, 239 U. S. 33, 41. The Court has held that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] due process," *Schware* v. *Board of Bar Examiners*, 353 U. S. 353 U. S. 232, 238, and, specifically, in a manner that denied the right to a full prior hearing. *Willner* v. *Committee on Character*, 373 U. S. 96, 103. See *Cafeteria Workers* v. *McElroy, supra*, at 898. In the present case, however, this principle does not come into play.[13]

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[13] The District Court made an *assumption* "that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." 310 F. Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that "the substantial adverse effect non-retention is likely to have upon career interests of an individual professor" amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guaranties. 446 F. 2d, at 809. But the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make

To be sure, the respondent has alleged that the nonrenewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. Because the District Court stayed proceedings on this issue, the respondent has yet to prove that the decision not to rehire him was, in fact, based on his free speech activities.[14]

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him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty." Cf. *Schware* v. *Board of Bar Examiners*, *supra*.

[14] See n. 5, *infra*. The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here "as a *prophylactic* against non-retention decisions improperly motivated by exercise of protected rights." 446 F. 2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made "with a background of controversy and unwelcome expressions of opinion." *Ibid*.

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. *Carroll* v. *Princess Anne*, 393 U. S. 175. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines and so forth. *A Quantity of Books* v. *Kansas*, 378 U. S. 205; *Marcus* v. *Search Warrant*, 367 U. S. 717. See *Freedman* v. *Maryland*, 380 U. S. 51; *Bantam Books* v. *Sullivan*, 372 U. S. 58. See generally Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518.

In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. The interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest. A governmentally employed

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one University. 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. *Cafeteria Workers* v. *McElroy*, *supra*, at 895–896.

III

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.

Thus the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg* v. *Kelly*, 397 U. S. 254.[15] See *Fleming* v. *Nestor*, 363 U. S. 603, 611. Simi-

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teacher's interest in being allowed to say what he wants to say in or out of his classes is a free speech interest, but his interest simply in continuing to hold the job is not.

[15] *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had "published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the States, and the District of Columbia, as well as certified public accountants duly qualified under the law of any State or the District, are made eligible. . . . The rules further provided that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission." *Id.*, at 119. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim

larly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower* v. *Board of Education,* 350 U. S. 551, and college professors and staff members dismissed during the terms of their contracts, *Wieman* v. *Updegraff,* 344 U. S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without a hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell* v. *Higgenbotham,* 403 U. S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings—rules or understandings that secure certain benefits

must have more than an expectation — there must be a legitimate claim of entitlement

to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." *Id.,* at 123.

and that support claims of entitlement to those benefits. Thus the welfare recipients in *Goldberg* v. *Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at the Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it.[16] In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

[16] To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by the Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a "common law" of re-employment, see *Perry* v. *Sindermann*, *post*, at ——, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

IV

Our analysis of the respondent's constitutional rights in this case does not in any way indicate a view that provision of an opportunity for a hearing and a statement of reasons for nonretention would be inappropriate or unwise in public colleges and universities. Indeed, these basic procedural safeguards might be most salutary.[17]

But it is a written Constitution that we apply. We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[17] See, *e. g.*, Report of Committee A on Academic Freedom and Tenure, "Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," 56 AAUP Bulletin 21 (Spring 1970).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-36, Perry v. Sindermann
No. 71-162, Board of Regents v. Roth

The changes indicated on the enclosed pages are in response to suggestions from Bill Rehnquist. The changes will be made in the next prints.

P.S.

June 21, 1972

Re: No. 70-36 Perry v. Sinderman
No. 71-162 Board of Regents v. Roth

Dear Potter:

Your excellent opinions have been strengthened, I think, by the changes circulated on yesterday.

I may talk to you further, and to the Conference, as to whether I should participate in these cases. But whether I do or not, it occurred to me in reading them over last night that you might take a look at these suggestions:

1. In Roth (p. 14), I would prefer not to commend expressly the "provision of an opportunity for a hearing" with respect to every teacher and professor situated as was Roth. My recollection is that an amicus brief from the City of New York indicated that there are thousands of non-tenured teachers in the city educational system, with substantial "turnovers" each year. I would think a statement of reasons for non-retention would be appropriate, but once a school or college adopted the practice - however voluntarily - of holding a hearing this in itself might become such an "expectation" as to create rights.

In short, I would omit reference to the desirability of affording an opportunity for a hearing.

2. In Sinderman, it seems to me that you go beyond Roth in the description of the type of "property" interest that might give

rise to due process rights. Compare pages 8 and 9 of Perry with what seems to me to be the more restrictive language in Roth.

I appreciate, of course, that the facts in the two cases vary significantly. Sinderman had been on the faculty for a number of years, and the paragraph in the Faculty Guide was certainly relevant. Yet, the general articulation of the "property interest" concept seems to me to go beyond the facts.

For example, on page 8, last sentence in the first full paragraph refers to "rules or understandings". I would think the latter term, without qualification, would unduly expose the college. You might consider changing it to "rules or mutually explicit understandings".

I have another suggestion which I will deliver to you, as it is a little difficult to explain without prolonging this memorandum.

* * * * *

The foregoing, of course, are merely for your consideration. I have not given these cases the care and attention which you obviously have.

Sincerely,

Mr. Justice Stewart

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1972

70-36 - Perry v. Sindermann

Dear Chief,

In order to make perfectly clear that the opinion in Sindermann does not undertake to create "a federal common law of implied contracts," I plan to add the following footnote at the end of the first full paragraph on page 9 of the opinion:

> —/ We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings. . . ." Board of Regents v. Roth, ante, at 12. And the ultimately governing "rules" in a case such as this one are the rules of state law. It may be that the law of Texas is clear that a teacher in the respondent's position has no contractual or other claim to job tenure. If that is the case -- if the petitioners can show on remand that state law specifically rejects any claim of any kind of "property" interest in these circumstances -- then the respondent's claim would be defeated.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 21, 1972

MEMORANDUM TO THE CONFERENCE:

No. 70-36 -- Perry v. Sindermann
No. 71-162 -- Board of Regents v. Roth

Dear Potter:

I agree with most of your new drafts in Perry and Roth, but I have problems with the definition of the "property" interest that is protected by procedural due process. Although your opinions citeCorbin, you effectively direct the creation of a federal common law of implied contracts. It seems to me, though, that the issue whether teachers -- and all other state employees -- have a property interest in re-employment, which should be protected by procedural due process, should be determined under state contract law. This, of course, would include the law of implied contracts. In other areas (e.g., welfare rights in Goldberg v. Kelly, drivers' licenses in Bell v. Burson, and liberty on parole in Morrissey v. Brewer), the Court has effectively created the substantive right in providing the procedural right but not on a contract base. It has ignored the absence of a substantive right under state law. But, in the situation of state employment, it seems to me that the substantive right should be defined by state contract law. Here the state is acting as employer, an area in which discretionary action is generally recognized as legitimate. States enter into contracts with employees as a result of arms-length negotiation. And there is an existing body of state law governing the rights and duties of such relationships. In this context, I see no justification for the creation of a federal common law of implied contract right to re-employment and I question whether we have sufficiently explored the ramification of Perry in particular.

I hope to get out a memo today on this.

Regards,

WEB

Mr. Justice Stewart

Copies to Conference

Sinderman

pg. 9 - Suggested substitute for first sentence of first paragraph

A teacher, like respondent who has held his position for a number of years, might be able to show from the circumstances of this service - and from other relevant facts - that he has a legitimate claim of entitlement to job tenure.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-36, Perry v. Sindermann
No. 71-162, Bd. of Regents v. Roth

The changes indicated on the enclosed pages of these opinions are in response to Lewis Powell's suggestions. These changes will be incorporated in the next prints.

P.S.

P.S.

Thus the respondent offered to prove that a teacher, with his long period of service, at this particular State College had no less a "property" interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him.

We have made clear in *Roth, ante,* at ——, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" is a constitutional concept. It denotes a range of interests that are secured by "existing rules or understandings." *Id.,* at ——. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*

mutually explicit

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 re-employment. By analogy, the law of contracts long has employed a process by which agreements,

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probationary period in the academic profession is extended beyond the normal maxmium of seven years).

. . . . .

"(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities."

The respondent alleges that, because he has been employed as a "full-time instructor" or professor within the Texas College and University System for 10 years, he should have "tenure" under these provisions.

though not formalized in writing, may be "implied." 3 Corbin on Contracts, §§ 561–572A. Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

A teacher, like the respondent, ~~without formal tenure might be able to show—from the words and conduct of his superiors, from other surrounding circumstances and from past usage—that he has a legitimate claim of entitlement to job tenure.~~ Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See Byse & Joughin, Tenure in American Higher Education 17–28.

who has held his position for a number of years, might be able to show from the circumstances of this service -- and from other relevant facts -- that he has a a legitimate claim of entitlement to job tenure.

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due proce ;, but the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement "under the policies and practices of the institution." 430 F. 2d, at 943. Proof of such a property interest would not, of course, entitle

IV

~~Our analysis of the respondent's constitutional rights in this case does not in any way indicate a view that provision of an opportunity for a hearing and a statement of reasons for nonretention would be inappropriate or unwise in public colleges and universities. Indeed, these basic procedural safeguards might be most salutary.~~[17]

~~But it is a written Constitution that we apply~~. We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities. 17/ For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

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[17] See, *e. g.*, Report of Committee A on Academic Freedom and Tenure, "Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," 56 AAUP Bulletin 21 (Spring 1970).

case, however, there is no suggestion whatever that the respondent's interest in his "good name, reputation, honor or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other formal disability that foreclosed a range of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in State universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it is no small injury . . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 185 (Jackson, J., concurring). See *Truax* v. *Raich,* 239 U. S. 33, 41. The Court has held that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] due process," *Schware* v. *Board of Bar Examiners,* 353 U. S. 353 U. S. 232, 238, and, specifically, in a manner that denied the right to a full prior hearing. *Willner* v. *Committee on Character,* 373 U. S. 96, 103. See *Cafeteria Workers* v. *McElroy, supra,* at 898. In the present case, however, this principle does not come into play.[13]

[13] The District Court made an *assumption* "that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." 310 F. Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that "the substantial adverse effect non-retention is likely to have upon career interests of an individual professor" amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guaranties. 446 F. 2d, at 809. But the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make

But even assuming arguendo that such a "substantial adverse effect" under these circumstances would constitute a State imposed restriction on liberty, the record contains no support for these assumptions.

larly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower* v. *Board of Education,* 350 U. S. 551, and college professors and staff members dismissed during the terms of their contracts, *Wieman* v. *Updegraff,* 344 U. S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without a hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell* v. *Higgenbotham,* 403 U. S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings—rules or understandings that secure certain benefits that stem from an independent source such as State law.

to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." *Id.,* at 123.

though not formalized in writing, may be "implied." 3 Corbin on Contracts, §§ 561–572A. Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

A teacher, like the respondent, without formal tenure might be able to show—from the words and conduct of his superiors, from other surrounding circumstances and from past usage—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See Byse & Joughin, Tenure in American Higher Education 17–28.*

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement "under the policies and practices of the institution." 430 F. 2d, at 943. Proof of such a property interest would not, of course, entitle

* We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "[p]roperty 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 . . . ." Board of Regents v. Roth, ante, at 12. If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

Supreme Court of the United States
Washington, D. C. 20543

June 21, 1972

CHAMBERS OF
THE CHIEF JUSTICE

No. 70-36 -- Perry v. Sindermann
No. 71-162 - Board of Regents v. Roth

Dear Potter:

I find that while the current draft circulated yesterday eliminates some problems, that other basic problems remain.

In effect, the Court would recognize a federal common law of contracts of teachers (and presumably all other public employees) enforceable in federal courts.

Historically the law of contract is a state concern and I have difficulty in carving teachers out as an exception. Added to that, the treatment of "expectations" opens up a whole new area of uncharted concepts, that I find inappropriate for federal jurisdiction. If the concept of "expectations" was circumscribed, as perhaps your opinion contemplates, by traditional ideas of implied contracts, this would be less troublesome, but even there I have problems with our defining basis contract concepts.

I can accept the idea that due process calls for an administrative hearing at the college level on a claim that non-renewal is a consequence of exercising First Amendment rights, if the further remedy were confined to state courts in the first instance. But I cannot read the 14th Amendment and implementing statutes as vesting jurisdiction on Federal Courts to pass on every non-renewal of a probationary teacher, policeman, fireman, etc.

An added difficulty for me is the suggestion that a teacher cannot be restricted as to what he or she says. I accept this as to speech outside the school, but surely a teacher of chemistry or biology is not free to lecture a class on his views of Rhodesia, South Africa and disarmament or relations with Russia and China.

Teachers are hired for specific purposes and for me they can be confined to expression on that subject unless they do it on their own time.

I suspect that my concern arises partly because I have difficulty seeing the outer boundaries of the proposed solution. I have an uneasy feeling that something like reverse Erie implications are lurking in the proposed approach and I do not want to "federalize" relationships traditionally governed by state law in state courts.

I do not know if anyone contemplates writing on this, but I will canvass this subject as soon as anyone else indicates troubles along the lines I have expressed.

Regards,

WEB

Mr. Justice Stewart

Copies to Conference

P.S. Your memorandum arrived after the above was written. It may help but it does not reach the other point, note 14, last sentence, at p. 11, that "in or out of his classes" he can say what he wants. I cannot imagine you mean there is a free speech right to promote or oppose candidates or issues in a chemistry class. If a teacher wants to make a speech in the park, he is, of course, free, but not in classes where he has a specific mission.

In haste,

W. E. B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 22, 1972

Re: No. 70-36 - Perry v. Sindermann
No. 71-162 - Bd. of Regents v. Roth

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 23, 1972

Re: No. 71-162 - Board of Regents
v. Roth

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1972

Re: No. 70-36 Perry v. Sindermann
No. 71-162 Board of Regents v. Roth

Dear Potter:

This will confirm, for the information of the Conference, our conversation shortly after your opinions were first circulated.

In view of the pendency in the Western District of Virginia of the Radford College case (in which I was chief counsel for the Commonwealth of Virginia), I would prefer to remain out of these cases - now that I have seen these opinions. While the factual situation in Radford was different (involving a salary increase rather than employment or re-employment), I think it is quite likely that counsel for both sides will find some language in your opinions which they will rely upon in argument.

If my vote is needed to decide these cases, I would like to discuss my position with the Conference. I may add, in the interest of a full disclosure, that if I were to vote I would join your opinions with the changes incorporated as of June 21.

Sincerely,

L. Lewis

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 23, 1972

Re: No. 70-36 - Perry v. Sindermann

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1972

Re: No. 70-36 - Perry v. Sindermann

Dear Potter:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Stewart

cc: The Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
			1/25/72		dissent			
	join PS 5/28/72			join PS 6/23/72	6/22/72	join PS 6/24/72		Join PS 6/22/72
					70-36 Perry v. Sindermann			