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Public School Teachers and the Limits of Due Process Protection

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PUBLIC SCHOOL TEACHERS AND THE LIMITS OF DUE PROCESS PROTECTION

It would be difficult to overemphasize the importance of the concept of "due process of law" as embodied in the fifth and fourteenth amendments to the Constitution. Its applicability to a given case is dependent upon the involvement of either the "liberty" or "property" of the person seeking to invoke its protection. The specific nature of an interest which will be termed liberty or property has not, however, always been clear. In a series of recent decisions,[1] the United States Supreme Court has adopted an analysis which places greater emphasis upon the specific nature of the interest affected as either liberty or property. The outcome of this approach may be to increase the importance of a litigant's ability to characterize his endangered interests as within the liberty or property concepts.

Two cases, *Board of Regents v. Roth*[2] and *Perry v. Sindermann*,[3] highlight both the problem and the analytical framework adopted by the Court in dealing with it. They involve an area that has recently been much litigated.[4] *Roth* and *Perry* both concern teachers at public institutions (Wisconsin State University at Oshkosh and Odessa Junior College of Texas, respectively) whose expired contracts were not renewed. Both cases raised the issue of whether the teachers had a procedural right under the fourteenth amendment to a statement of the reasons for non-renewal and an opportunity for a hearing. The Court's opinions in *Perry* and *Roth* deal explicitly with the issue in terms of whether the teachers' interests in having their contract renewed came within the protected liberty or property concepts. While the teachers' allegations and arguments raised questions which could more properly be placed under the concept of liberties, the Court chose to treat the interests primarily as property rights. The factual distinction between denial of procedural due process in *Roth* and the Court's granting it in *Perry* did not turn upon allegations of deprivation of specific Bill of Rights guarantees or of the right to pursue an

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[1] Perry v. Sindermann, 408 U.S. 593 (1972); Bd. of Regents v. Roth, 408 U.S. 564 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972).

[2] 408 U.S. 564 (1972).

[3] 408 U.S. 593 (1972).

[4] *See, e.g.*, Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970); Pred v. Bd. of Pub. Instruction, 415 F.2d 851 (5th Cir. 1969); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir. 1969); Hetrick v. Martin, 322 F. Supp. 545 (E.D. Ky. 1971).

occupation; rather its basis was the degree of certainty that employment by the specific school would be continued, or, as the Court stated in *Roth*, whether the teacher's interest in contract renewal was founded on "a legitimate claim of entitlement to it."[5] By so framing the issue, the Court has provided an analysis which should be determinative of a number of future cases in the area of public employment.

We must begin with some discussion of two closely related situations: those in which the discontinuation of employment operates to infringe upon specifically protected collateral rights, and those in which it forecloses an individual's future employment opportunities. It was in litigating these issues that the present theories evolved.

Effective Deprivation of Related Interests

There is a violation of due process if the termination or non-renewal of a public employee's contract is based on the employee's exercise of rights specifically protected by the Bill of Rights.[6] These civil liberties, or collateral rights, are ensured by due process as liberties within the fourteenth and fifth amendments.[7] The free exercise of these civil liberties is guaranteed by the Bill of Rights against infringement by the federal government, and through incorporation in the fourteenth amendment against infringement by a state.[8] Therefore, any state or federal action—including a decision not to renew an employment contract—which infringes upon, deters, or punishes the exercise of any of these rights is a deprivation of a liberty interest within the contemplation of the amendments.[9] Since the interest which invokes due process is the specific constitutional liberty of which one has been

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[5] 408 U.S. at 577.

[6] *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (freedom of speech); Sherbert v. Verner, 374 U.S. 398 (1963) (freedom of worship); Torcaso v. Watkins, 367 U.S. 488 (1961) (freedom of worship); Shelton v. Tucker, 364 U.S. 479 (1960) (freedom of association); Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956); (fifth amendment privilege against self-incrimination); Wieman v. Updegraff, 344 U.S. 183 (1952) (freedoms of association and speech).

[7] Shelton v. Tucker, 364 U.S. 479, 485-86 (1960); Pred v. Bd. of Pub. Instruction, 415 F.2d 851, 856 (5th Cir. 1969).

[8] *But see* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970), in which it is argued that in the area of first amendment freedoms, procedural safeguards are generated by the first rather than the fifth or fourteenth amendments.

[9] This is often stated as the theory of "unconstitutional conditions." The government cannot do indirectly (deprive one of his constitutional rights by making his employment conditional upon his surrender of them) what it cannot do directly (pass a law infringing upon Bill of Rights freedoms). Keyishian v. Bd. of Regents, 385 U.S. 589, 605 (1966); Sherbert v. Verner, 374 U.S. 398, 404-06 (1963); Speiser v. Randall, 357 U.S. 513, 518, 526 (1958). For a more detailed explanation of this rationale, see Van Alstyne, *The Demise of the Right-Privilege Distinction In Constitutional Law*, 81 HARV. L. REV. 1439, 1445-58 (1968).

deprived, then the individual's employment status—tenured or non-tenured, contractual or "at will"—is not relevant.[10] *Shelton v. Tucker*,[11] involving the non-renewal of teachers' contracts where the teachers had no tenure and no job security beyond the end of each school year, illustrates this last point.[12] The teachers in that case had refused to file statutorily required affidavits listing all the organizations to which they had belonged or contributed during the preceding five years. They alleged that the statute deprived them of the liberty of freedom of association by its requirement that they reveal every "associational tie." The Court held that non-renewal of their contracts for failure to file the affidavits was a violation of due process.[13]

The protections of due process attach once such liberties have been implicated.[14] These protections particularly include placing on the government the burden of proving that the activities engaged in are not protected,[15] and requiring that any encroachment upon constitutionally protected liberties be justified by a connection with something that is within the state's police powers to regulate.[16] Exactly what is required on the part of the employee to implicate them is unclear.[17]

United Public Workers v. Mitchell,[18] upholding the Hatch Act against charges of infringement upon the constitutionally guaranteed rights of public employees, provides an example of the *substantive* protection of due process in this area. The Court upheld the Act's constitutionality saying that the regulated activities (active participation in partisan politics) were "reasonably deemed by Congress to interfere with the efficiency of the public service."[19] The courts thus

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[10] Pred v. Bd. of Pub. Instruction, 415 F.2d 851, 856 (5th Cir. 1969); Freeman v. Gould Special School Dist., 405 F.2d 1153, 1158-60 (8th Cir. 1969).

[11] 364 U.S. 479 (1960).

[12] *Id.* at 486.

[13] *Id.* at 485-86.

[14] Speiser v. Randall, 357 U.S. 513, 520-21, 524 (1958).

[15] *Id.* at 525-26; Slochower v. Bd. of Higher Educ., 350 U.S. 551, 558-59 (1956).

[16] Barsky v. Bd. of Regents, 347 U.S. 442, 451-52 (1954); Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923).

[17] *See* Perry v. Sindermann, 408 U.S. 593, 598 (1972); Bd. of Regents v. Roth, 408 U.S. 564, 574-75 (1972); Hetrick v. Martin, 322 F. Supp. 545, 547 (E.D. Ky. 1971); *cf.* Orr v. Trinter, 444 F.2d 128, 134-35 (6th Cir. 1971); Jones v. Hopper, 410 F.2d 1323, 1328 (10th Cir. 1969). *See also* Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 899-901 (1961) (Brennan, J., dissenting).

[18] 330 U.S. 75 (1947). This case may very soon be overturned. A three-judge United States District Court panel has held the Hatch Act unconstitutional as vague and overly broad in a decision now awaiting final resolution in the Supreme Court. National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578 (1972), *prob. juris. noted*, 93 S. Ct. 560 (1972) (No. 634).

[19] United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947). For some

(Continued on next page)

could be concerned only "when such regulation passes beyond the general existing conception of government power."[20] This language is characteristic also of a number of decisions concerning *state* action against public employees.[21] Therefore, due process, once attached to the interest at stake, affords two protections: first, that one not be deprived of constitutional liberties without procedural safeguards (meaning notice and opportunity for a hearing), and second, that any encroachment upon such collateral rights be justified as protection of a valid state interest.

The protections of due process will also attach where the individual can show that the governmental action has, either directly or indirectly, foreclosed his opportunity to pursue an occupation. Whether this opportunity is better designated as a "liberty"[22] or as "property,"[23] its foreclosure by governmental action is a deprivation within the meaning of the due process clause.[24] This deprivation may be effected directly by the denial of a license to practice some profession[25] or skill,[26] or indirectly by some action foreclosing one's chance to obtain

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(Footnote continued from preceding page)
possible ramification of this see Note, *Developments in the Law—Academic Freedom;* 81 HARV. L. REV. 1045, 1083 (1968) [hereinafter cited as *Academic Freedom*], observing that the governmental interest in security, which justified the restriction on political activities in *Mitchell,* is not as significant in cases involving public school teachers.

[20] United Pub. Workers v. Mitchell, 330 U.S. 75, 102 (1947); *cf.* Flemming v. Nestor, 363 U.S. 603 (1960).

[21] *See, e.g.,* Slochower v. Bd. of Higher Educ., 350 U.S. 551, 559-67 (1956) (Reed & Harlan, JJ., dissenting); Barsky v. Bd. of Regents, 347 U.S. 442, 451-52 (1954); Adler v. Bd. of Educ., 347 U.S. 485, 494-96 (1952); Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923). The present viability of the reasonableness justification is in great doubt, however. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1968), in which the Court said that only a *compelling* state interest can justify infringement upon a specifically protected constitutional right (freedom to travel among the states). *Cf.* Keyishian v. Bd. of Regents, 385 U.S. 589, 605 (1966). For further development of the discussion compare Mr. Justice Blackmun's remarks on the subject in the majority opinion of Roe v. Wade, 93 S. Ct. 705, 728-32 (1973), with Mr. Justice Rehnquist's comments in dissent, *Id.* at 736-37.

[22] *See* Bd. of Regents v. Roth, 408 U.S. 564, 573-74 (1972); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Truax v. Raich, 239 U.S. 33 (1915); Parker v. Lester, 227 F.2d 708, 717 (9th Cir. 1955). *See also Academic Freedom, supra* note 19, at 1080-81.

[23] *See* Dent v. West Virginia, 129 U.S. 114, 121-22 (1889).

[24] *See* Schware v. Bd. of Bar Examiners, 353 U.S. 232, 239 n.5 (1957); Truax v. Raich, 239 U.S. 33, 41 (1916); Dent v. West Virginia, 129 U.S. 114, 121-22 (1889); Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961); Parker v. Lester, 227 F.2d 708, 716-17 (9th Cir. 1955). *But see* Greene v. McElroy, 360 U.S. 474, 493 (1958). *Compare Greene,* at 492 *with* Bailey v. Richardson, 182 F.2d 46, 63 (D.C. Cir. 1950), *aff'd by an equally divided Court,* 341 U.S. 918 (1951).

[25] *See,* e.g., Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957) (denial of attorney's license); Barsky v. Bd. of Regents, 347 U.S. 442 (1954) (suspension of physician's license); Dent v. West Virginia, 129 U.S. 114 (1889) (denial of dentist's license); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866) (disbarment).

[26] *See* Homer v. Richmond, 292 F.2d 719 (D.C. Cir. 1961) (denial of radio operator's license).

future jobs with private or public employers.[27] This often occurs as the result of governmental action terminating or failing to renew employment because of disloyalty, untrustworthiness, or some other grounds harmful to reputation.[28] How total the foreclosure need be to invoke the full due process protections of notice and opportunity for a hearing is still unsettled.[29] Loss of all opportunity to follow a specific vocation will afford the full protections.[30] The Court has stated, however, that when one has been denied only "the opportunity to work at one isolated and specific military installation," due process will not apply.[31] It is unresolved whether a governmental action which precludes the individual from ever again working in any capacity for the same private employer will be a deprivation sufficient to require a full hearing.[32] Where there is an effective deprivation of future employment opportunities through charges of disloyalty, dishonesty, or moral fitness, such charges will have to have been made fairly explicit through governmental action. Mere removal of a security clearance will not in most cases be sufficient for full protection since such an action might not necessarily have been motivated on grounds constituting a "badge of infamy."[33] (Notice that the issue of foreclosure of future employment is treated separately from the deprivation of a possibly protected interest in the employment directly affected by the termination or non-renewal, which was the specific issue in *Roth* and *Perry*.) The initial burden of showing that he stands to lose an interest within the ambit of the due process is again on the employee,[34] once due process has been invoked, its protection is dual—both substantive and procedural.[35]

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[27] *See, e.g.*, Truax v. Raich, 239 U.S. 33 (1916); Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

[28] *See*, e.g., Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 901-02 (1961) (Brennan, J., dissenting); Greene v. McElroy, 360 U.S. 474, 475-76, 491 n.21, 492 (1958); Wieman v. Updegraff, 344 U.S. 183, 190-91; Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

[29] *Compare* Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 894 (1961), with Parker v. Lester, 227 F.2d 708, 716 (9th Cir. 1955).

[30] *See, e.g.*, cases cited *supra* notes 25 and 26.

[31] Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895-96 (1961).

[32] *See* Kiiskila v. Nichols, 433 F.2d 745, 747 n.2 (7th Cir. 1970); Homer v. Richmond, 292 F.2d 719 (D.C. Cir. 1961). In the latter case the test was stated as being whether the governmental action "significantly curtailed their ability to follow an employment in which they had previously engaged." *Id.* at 722.

[33] Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 898-99 (1961). Mr. Justice Brennan, in dissent, disagreed strongly with this conclusion. *Id.* at 901-02.

[34] Bd. of Regents v. Roth, 408 U.S. 564, 579 (1972); *cf.* Hannah v. Larche, 363 U.S. 420, 443 (1960).

[35] *See, e.g.*, cases cited *supra* note 25.

Non-continuation of Present Employment

The belief that due process protections might extend to the employment interest directly affected by governmental action was derived from the theories and cases above. The decisions involving specific civil liberties and those involving professional licenses required due process safeguards in order to insure the individual against arbitrary, capricious, or unreasonable governmental action.[36] Might this protection against such deprivations not extend to all cases in which the individual will lose a substantial private interest, such as his continued employment in a public job?

Governmental employment was originally defined as a "mere privilege."[37] Since there was no claim of right to the job, there was no interest which could invoke due process protections. For our purposes, there was no property interest in continuation of the employment.[38] The flaw in this theory of a government's total discretionary control over the privileges which it dispenses was that the discretion was soon shown not to be total in the civil liberties and professional licensing cases.[39] That this privilege theory of public employment has been undermined in those cases became evident in two decisions rendered in 1951.

Joint Anti-Fascist Refugee Committee v. McGrath[40] involved three organizations seeking declaratory and injunctive relief against the Attorney General of the United States for alleged deprivations caused by his designating them as "communist" on a list submitted to the Loyalty Review Board[41] which dismissed federal employees who belonged to the organizations. None of the employees were joined as plaintiffs. The deprivations alleged by the organizations were loss of moral support, good will, contributions, and membership attributed to the wide dissemination of the list. The Court voted five to three to remand with instructions that the motion to dismiss for failure to state a claim be overruled, but the decision rested on the narrow ground

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[36] *See, e.g.*, cases cited *supra* notes 6, 25, and 26.

[37] Justice Holmes, while sitting on the Massachusetts Supreme Court, once uttered this famous epigram which is very often cited in decisions utilizing the privilege theory of public employment: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor & Council, 29 N.E. 517 (Mass. 1892). For a contemporary view of this epigram see Van Alstyne, *supra* note 9, at 1442-43, 1458-64.

[38] *See* 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 746 n.1 (8th ed. 1927).

[39] For an exhaustive study of the various methods used to circumvent the privilege theory, see Van Alstyne, *supra* note 9, at 1445-58.

[40] 341 U.S. 123 (1951).

[41] The function of this Board was, quite simply, to weed "subversives" out of the Civil Service. It had been created and its powers defined by Exec. Order No. 9835, 3 C.F.R. 129 (Supp. 1947).

that the Attorney General's designation of those organizations without their having had the opportunity for a hearing was not an authorized procedure.[42] Four members of the Court filed opinions indicating their belief that the losses alleged by the organizations were deprivations of interests protected by the fifth amendment due process clause.[43] Mr. Justice Frankfurter enunciated the standard that whether one would be "condemned to suffer grievous loss" by the governmental action must be considered.[44] Mr. Justice Reed, writing in dissent, felt not only that the Attorney General's procedure had been authorized, but also that there had not been a deprivation of either a liberty or property interest within the meaning of the fifth amendment.[45] The Attorney General's action, he said, did "not prohibit any business of the organization."[46] He also drew a parallel between any interests which might have been deprived and the taking of private property through eminent domain[47] (which does not require the opportunity for a hearing[48]). The decision, then, revealed some disagreement among the members of the Court as to the range of interests protected by due process.

It was, however, the second of the two cases that became significant as precedent for denying due process protection to an individual's interest in continued public employment. In *Bailey v. Richardson*,[49] the court divided four to four, Mr. Justice Clark not participating, on the protected interest issue. *Bailey* involved a civil service employee who had been dismissed without notice or hearing from her job upon "reasonable grounds . . . for belief that the person involved is disloyal to the Government of the United States."[50] The circuit decision, which was affirmed by the Supreme Court's division, categorically denied that the employment interest was one either of contract, or of liberty or property under the fifth amendment.[51] Citing cases and "a hundred and sixty years of Government administration," the opinion maintained that a public employee serves at the will of his governmental employer.[52] There was, therefore, no due process protection since "[d]ue

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[42] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 135-42 (1951).
[43] *Id.* at 142-87.
[44] *Id.* at 168 (Fankfurter, J., concurring).
[45] *Id.* at 187-213.
[46] *Id.* at 202.
[47] *Id.* at 203.
[48] Rindge Co. v. County of Los Angeles, 262 U.S. 401 (1923).
[49] 341 U.S. 918 (1951), *aff'g by an equally divided Court*, 182 F.2d 46 (D.C. Cir. 1950).
[50] 182 F.2d 46, 51 (1950).
[51] Bailey v. Richardson, 182 F.2d 46, 47 (D.C. Cir. 1950); *see* T. COOLEY, *supra* note 38, at 746 n.1.
[52] Bailey v. Richardson, 182 F.2d 46, 47 (D.C. Cir. 1950).

process of law is not applicable unless one is being deprived of something to which he has a right."[53]

The language of this court of appeals opinion provided strong support for those who denied the applicability of due process in the areas of public employment and governmental largess in general. But the limits of the privilege theory, which should have been evident from a close reading of such cases as *Ex parte Garland*[54] and *United Public Workers v. Mitchell*,[55] were clarified in *Wieman v. Updegraff*,[56] *Barsky v. Board of Regents*,[57] *Slochower v. Board of Higher Education*,[58] *Greene v. McElroy*,[59] and *Shelton v. Tucker*.[60]

> To draw . . . the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory.[61]

Wieman and *Slochower* involved teachers under contract and tenure, respectively, who were summarily dismissed pursuant to state statutory requirements. Both cases concerned specific Bill of Rights liberties as well as contractual and tenurial interests.[62] The Court found both dismissals violative of due process since no procedures had been provided for establishing that the actions punished by the dismissals were not protected.[63] *Barsky* held valid a six-month suspension of a physician's license after finding that both the procedures adjudicating the suspension and the connection of the specific reasons for suspension with a valid state interest met due process requirements.[64] *Greene* concerned the removal, without a full-trial-type

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[53] *Id.* at 58.
[54] 71 U.S. (4 Wall.) 333 (1866).
[55] 330 U.S. 75 (1947).
[56] 344 U.S. 183 (1952).
[57] 347 U.S. 442 (1954).
[58] 350 U.S. 551 (1956).
[59] 360 U.S. 474 (1959).
[60] 364 U.S. 479 (1960).
[61] Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952).
[62] *Wieman* involved first amendment freedoms of association and speech; *Slocower* involved the fifth amendment privilege against self-incrimination.
[63] Wieman v. Updegraff, 344 U.S. 183, 191 (1952); Slochower v. Bd. of Higher Educ., 350 U.S. 551, 558-59 (1956). Note, however, that the opinion in Bd. of Regents v. Roth, 408 U.S. 564 (1972), placed more emphasis on these two cases as giving protection to the employment interests (contractual and tenurial) involved. One writer feels that the effect of these two cases was to implicitly overrule those parts of the *Bailey* case that held public employment to be a mere "privilege." *See* Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 234 (1956).
[64] Barsky v. Bd. of Regents, 347 U.S. 442 (1954). For a somewhat different interpretation of the significance of Barsky, see Van Alstyne, *supra* note 9, at 1444.

hearing, of a security clearance from a privately-employed areonautical engineer, the practical effect of which was to close the field of aeronautics to him.[65] The holding there, similar to that of *McGrath*,[66] was on the narrow grounds of non-authorization,[67] but Chief Justice Warren gave strong indication that the indirect foreclosure of Greene's ability to work in his professional field would require a full hearing.[68] Finally, the *Shelton* case[69] unequivocally showed the inapplicability of the privilege concept, even for mere non-renewal of a non-tenured teacher's contract, where the effect of that non-renewal was "impairment of a constitutional liberty."[70]

The first case since *Bailey* to consider directly the issue of whether or not an interest solely in continued employment is entitled to due process protections was decided by the Supreme Court in 1961. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*[71] arose out of facts somewhat similar to those of *Greene*. The employee, Rachel Brawner, had been working for a private concessionaire operating on the premises of a United States Naval Gun Factory. Admittance to the installation required a badge, the issuance of which depended upon approval by the factory security officer. This condition appeared in Brawner's contract with the concessionaire.[72] The security officer revoked her badge for failing to meet the security requirements he had determined. After she requested and was denied a hearing by factory officials, Local 473 of the Union brought suit to have the badge returned. There was no allegation of infringement with collateral rights, and the Court pointed out that Brawner was free to take the same job with the same employer, or for that matter, any job with any employer—nothing was at stake beyond "the opportunity to work at one isolated and specific military installation."[73] The Court did not find any badge of infamy as the result of removal of the security clearance which would operate to impair her future employment opportunities.[74] Nor was it possible to dispose of the case on the narrow grounds of non-authorization used in *McGrath* and *Greene*, for here the governmental action was based upon a commanding officer's historically unquestioned power to exclude civilians from the areas of

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[65] Greene v. McElroy, 360 U.S. 474, 475-76, 491 n.21, 492 (1959).
[66] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).
[67] Greene v. McElroy, 360 U.S. 474, 508 (1959).
[68] *Id.* at 492.
[69] Shelton v. Tucker, 364 U.S. 479 (1960).
[70] *Id.* at 485-87. As discussed previously, that case involved freedom of association.
[71] 367 U.S. 886 (1961).
[72] *Id.* at 887.
[73] *Id.* at 895-96.
[74] *Id.* at 898-99.

his command.[75] In a five to four decision, the Court conceded that *some* private interest had been impaired,[76] and that this interest was substantial enough that the removal of the badge could not be "patently arbitrary or discriminatory."[77] But such was not the case here, for the reason advanced for removal of Brawner's security clearance—her failure to meet the requirements—was "entirely rational and in accord with the contract."[78] To determine exactly what, if any, procedures were required in this situation, the Court balanced Brawner's interest in her opportunity to work at that one specific installation (noting that such an employment interest might be characterized as a mere privilege) against the Government's proprietary control of the factory, and found that her summary exclusion was permissible.[79]

Both of the lower court opinions in the *Roth* litigation placed too much emphasis upon this "balancing test," concluding that Roth's interest outweighed that of the Board of Regents,[80] and ordering the Board to provide him with notice and an opportunity for a hearing. What the district and circuit courts in *Roth* failed to discern was that the Supreme Court in *Cafeteria Workers* had conceded that due process applied to protect Brawner's interest in keeping her badge. This must be deduced from the facts in light of the *Roth* analysis; in addition, it should be noted that Mr. Justice Stewart wrote both the *Cafeteria Workers* and *Roth* opinions. Given, therefore, that her interest could not be impaired without due process protections—that it could not be unreasonably, unlawfully, or discriminatorily impaired—the issue became whether those protections included notice and hearing.[81] It was in this context that the government's "historically plenary power" over such a job and its proprietary interest in the gun factory combined to deprive Brawner of the protection of a trial-type proceeding.[82] Never-

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[75] *Id.* at 892-94.
[76] *Id.* at 896.
[77] *Id.* at 898.
[78] *Id.* thus distinguishing *Wieman* and United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).
[79] Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 894-97 (1961).
[80] Roth v. Bd. of Regents, 446 F.2d 806, 808-09 (7th Cir. 1971); 310 F. Supp. 972, 977-80 (W.D. Wis. 1970). Other courts have made the same mistake. *See, e.g.*, Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971); Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970).
[81] *See* Bd. of Regents v. Roth, 408 U.S. 564, 570-71 n.8 (1972); Morrissey v. Brewer, 408 U.S. 471, 482-84 (1972); Hannah v. Larche, 363 U.S. 420, 440 (1960).
[82] *See also* Hannah v. Larche, 363 U.S. 420 (1960) (holding an *ex parte* proceeding sufficient to meet due process requirements when the governmental action was only a fact-finding investigation not adjudicating any rights); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855) (upholding an *ex parte* proceeding for issuance of a distress warrant by the solicitor of the Treasury).

theless, by failure to give more explicit treatment to the threshold question of whether due process applied at all, the Court left the door open for the varying analyses employed by the lower courts.[83]

By the time *Roth* and *Perry* were decided, several decisions indicated the theoretical basis for the distinction drawn in *Roth* and *Perry* to determine the applicability of due process. The theory itself was not new, being derived from concepts of "vested" property rights and implied contracts. What was novel was the application of the "vesting" concept to an area that had previously been analyzed solely in terms of the privilege theory. Prior to *Roth* and *Perry* it had been argued that the nature of public employment—as purely a privilege—logically precluded any claim by the beneficiary that he might be entitled to it. This idea of entitlement had been forecast in a few decisions regarding interests that were previously thought of as privileges. *Goldsmith v. Board of Tax Appeals*,[84] cited in *Roth*, attached procedural due process safeguards, including a hearing, to an accountant's application for admission to practice before the Board, reasoning that this protection arose from the accountant's having met the announced standards for qualification. *Hahn v. Burke*[85] required a hearing prior to a state's revocation of probation. "When the state created conditions of probation it impliedly agreed to continue petitioner's probation as long as the conditions were satisfied."[86] *Goldberg v. Kelly*[87] required notice and a pre-termination hearing in a case of deprivation of welfare benefits. Expressly rejecting the privilege-right distinction,[88] the *Goldberg* Court spoke in terms of "statutory entitlements," saying that these were more like "property" than "gratuities."[89] *Bell v. Burson*[90] most clearly illustrated this vesting approach. *Bell* held violative of fourteenth amendment procedural protections a Georgia statute providing for automatic suspension of the driver's license and vehicle registration of any uninsured motorist involved in an accident. The due process protections of pre-suspension notice and hearing to determine the "reasonable possibility of a judgment being rendered against him"

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[83] *See, e.g.*, the teaching cases cited *supra* note 4.

[84] 270 U.S. 117 (1926).

[85] 430 F.2d 100 (7th Cir. 1970). Morrissey v. Brewer, 408 U.S. 471 (1972), upheld the right of a parolee to a hearing before revocation, saying:

> It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. *Id.* at 482.

[86] Hahn v. Burke, 430 F.2d 100, 104 (7th Cir. 1970).

[87] 397 U.S. 254 (1970).

[88] *Id.* at 262.

[89] *Id.* at 262 n.8.

[90] 402 U.S. 535 (1971).

followed from the implication of the motorist's interest in having transportation to and from work, which he had acquired upon issuance of the license. The statute would have withstood challenge had it barred issuance of the license, but

> once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees.[91]

A few of the pre-*Roth* circuit opinions had even applied this type of approach to non-renewal cases in the teaching area.[92] The Supreme Court had attached due process protections in *Connell v. Higginbotham*[93] to a substitute teacher summarily dismissed only two months after being hired, where there had been neither tenure nor a formal contract but only a clear implication of continued employment.

As enunciated in *Roth*, the measure of what constitutes a protected property interest requires

> 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. . . .
>
> Property interests . . . are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[94]

Thus, absent any showing of infringement upon a separate liberty, such as freedom of speech or the right to pursue his vocation,[95] Mr. Roth was not protected by due process. His employment was secured by neither tenure nor any "existing rules or understandings"—he was simply not being employed for the next year.[96] Perry's interest, on

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[91] *Id.* at 539.

[92] Orr v. Trinter, 444 F.2d 128, 130 (6th Cir. 1971); Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970); Jones v. Hopper, 410 F.2d 1323, 1329 (10th Cir. 1969); Freeman v. Gould Special School Dist., 405 F.2d 1153, 1158-60 (8th Cir. 1969).

[93] 403 U.S. 207 (1971).

[94] Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). Note the similarity of this language to that used in T. COOLEY, *supra* note 38, at 749.

> [I]t would seem that a right cannot be considered a vested right, unless it is something more than a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

The first edition of that work appeared in 1868—the year in which the fourteenth amendment was adopted.

[95] *Id.* at 579.

[96] *Id.* at 578.

the other hand, *might* have been secured by a *de facto* tenure system under which his dismissal could only be effected upon showing of cause.[97] The *Perry* opinion was based upon analogous concepts drawn from contract and labor relations law.[98] The Court remanded *Perry* for a hearing to determine whether he had in fact been under such a system.

Justice Marshall in his dissent in *Roth* reasoned that government, unlike private enterprise, is always obliged to act reasonably in the conduct of its business. Hence, the citizen seeking public employment "is entitled to it unless the government can establish some reason for denying the employment." This, he felt, is a property right within the meaning of the due process clauses.[99]

Conclusions

The full theoretical ramifications of the entitlement, or "vested right," idea in the area of governmental largess is as yet highly conjectural. As has been pointed out, this concept was derived from traditional property law and implied contract theories. It could be, then, that this conceptualization simply makes explicit an analysis that has in fact, if not in language, been utilized all along. On the other hand, it may be significant that this approach was not articulated in public employment cases until after its use in the area of welfare benefits.[100] If it represents a shift in judicial philosophy with respect to governmental largess generally, then it may well signal the initiation of further inroads into the privilege concept. Certainly there is much room for development where governmentally controlled benefits are involved,[101] for the theoretical aspects of this conceptualization are applicable wherever there is a property interest involved. The theory is concerned with the boundaries of control over the property interest. At what point does the donee's claim become so secured that the donor loses his power to revoke the gift without giving a reasonable explanation, or to condition it upon the donee's compliance with certain specifications? That is, at what point, and under what circumstances,

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[97] Perry v. Sindermann, 408 U.S. 593, 602-03 (1972).

[98] *Id.* at 601-02, citing 3 A. CORBIN, CORBIN ON CONTRACTS §§ 561-672A (1960) for the contractual analogy, and United Steelworkers of America v. Warrior & Gulf Co., 363 U.S. 574, 579 (1960), for the labor analogy.

[99] 408 U.S. at 588 (1972) (Marshall, J., dissenting).

[100] Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1968).

[101] For a thorough treatment of all aspects of this new approach to the field of governmentally controlled benefits, see Reich, *The New Property*, 73 YALE L.J. 733 (1964).

does the security of the donee's claim become strong enough to obtain the protections of due process?

In any case, the explicit conditioning of due process protections on the litigant's ability to characterize an interest as specifically one of liberty or property may well have some noticeable effects. If he cannot establish either a showing of entitlement to the employment or foreclosure of future employment opportunities, he will have to carry the burden of showing that the deprivation of his employment was motivated by his exercise of constitutionally protected rights. The possibility is then quite real that these rights could be infringed upon by simple failure of the governmental body to give any reasons at all for its action when, in reality, such action was motivated by the individual's exercise of these protected rights. This particular criticism of the Court's approach is perhaps the most substantial.[102]

The relative strictness of *Roth's* classification of interests might also be subjected to criticism. The great utility of the due process concept has been its ability to adjust the protections afforded to the nature of any given case.[103] Might there not conceivably be an instance in which an individual is "condemned to suffer grevious loss," but in which the loss cannot successfully be characterized as either a liberty or a property interest? On the other hand, might there not be cases involving relatively trivial interests which nevertheless clearly meet the outlined standards of entitlement? At least one writer has suggested that the protections should be made expressly dependent on the importance, perhaps even subjective, of the interest to the person derived.[104] There is also the difficulty in applying an abstract conceptualization such as entitlement to actual facts as they arise in litigation.[105] The entitlement concept is unquestionably open to much

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[102] *See* 408 U.S. at 584 (Douglas, J., dissenting); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 899-901 (1961) (Brennan, J., dissenting); Van Alstyne, *supra* note 9, at 1453. *See also* Bd. of Regents v. Roth, 446 F.2d 806, 810-12, 814 (1971) (Duffy, J., dissenting); Drown v. Portsmouth School Dist., 435 F.2d 1182, 1185-88 (1st Cir. 1970), discussing the effects of placing an absolute requirement of procedural due process on the school boards in this situation. Note also that the American Association of University Professors has endorsed the giving of a statement or reasons and an opportunity for a hearing when requested by a teacher whose contract is not renewed. Report of Committee A on Academic Freedom and Tenure, *Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, 56 A.A.U.P. BULL. 21, 22-24 (1970).

[103] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 899-901 (1961) (Brennan, J., concurring); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); T. COOLEY, *supra* note 38, at 741.

[104] Van Alstyne, *supra* note 9, at 1462-64.

[105] For a discussion of some questions not yet answered in the teaching field see Van Alstyne, *The Supreme Court Speaks to the Untenured*, 58 A.A.U.P. BULL. 267 (1972).

development in situations involving any kind of probationary employment status. What, for example, is the full significance of rules and standards of conduct of which the employee is notified at the beginning of his employment? All of these are problems that must of course be resolved through litigation.

Nevertheless, it would seem that the standards set forth in *Roth* and *Perry* are generally satisfactory. The entitlement criterion is fundamentally an objective one, its logic is sound, and its mechanics are somewhat familiar in the forms of vested rights and implied contracts. Given its applicability, the extent of the protections afforded is still very adaptable to the range of competing interests involved. Furthermore, the *Roth* analysis leaves room for operation of the privilege theory with regard to some interests. Application of that theory would seem to be desirable in matters such as pardons of convicted prisoners, or Presidential dismissals of cabinet officers.[106] It might, therefore, be unwise at this time to apply the entitlement concept as far as it has been carried by Mr. Justice Marshall, who would have it attach upon application for a government job.[107] As in all matters of constitutional law, time will tell.

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[106] Davis, *supra* note 63, at 224.
[107] 408 U.S. at 588 (1972) (Marshall, J., dissenting).