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> The goods that are pursued and loved for themselves are called good by reference to a single form, while those which tend to promote or to preserve these somehow or to prevent their contraries are called so by reference to these, and in a secondary sense. Clearly, then, goods must be spoken of in two ways, and some must be good in themselves, the others by reason of these. Let us separate, then, things good in themselves from things useful.
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> Aristotle, Eth. Nic., Ch. 6

> If justice be totally independent of utility and be a standard *per se* which the mind can recognize by simple introspection of itself, it is hard to understand why that internal oracle is so ambiguous and why so many things appear either just or unjust according to the light in which they are regarded.
>
> J.S. Mill, Utilitarianism
> Ch. 5, On the Connection
> between Justice and Utility

INTRODUCTION

Courts treat the first amendment rights of tenured and nontenured public servants somewhat differently. The difference consists of magnification of damages recoverable by tenured servants. The amplifying device is the due process clause.[1] If a so-called tenured public servant and a nontenured colleague both express protected speech on the same topics in like circumstances and each is terminated in retaliation without a hearing, the tenured servant who sues may be able to prove noneconomic damages and receive a greater compensatory award.[2]

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1. On the question whether discharge of a tenured public servant in retaliation for speech justifies a greater award of damages than does retaliatory discharge of a nontenured servant, *see infra* notes 67, 128-30, and 219-22.

2. *See infra* notes 67, 128-30, and 219-22. There is also some lingering authority that even when the speech is not protected or the retaliatory motive is not a necessary cause, the tenured servant may extend his right to employment and income by the time required to adjudicate a claim of denial of free speech merely by making such a claim. *See infra* notes 67 and 125-30. There may also be room for a tenured servant summarily

The purposes of this Article are to juxtapose those differences in treatment and to criticize the doctrine that produced it, that is, deeming civil service employment as property protected by the due process clause. To accomplish these objectives the Article will compare various rights: free speech, liberty to seek employment, tenure based on state law, and procedural due process.

Let us first take substantive rights, and of those, let us begin with what one judge has called the first great division of public employee discharge precedents: free speech cases.[3]

I. FREE SPEECH OF PUBLIC SERVANTS

A. Substantive Law

1. General Free Speech.—Defining and delimiting rights of tenure and due process compel one first to ascertain the outlines of the substantive law of the first amendment. The points discussed here are the ones most likely to be articulated and thereby to influence litigation over tenure and procedural due process.

Many cases concerning first amendment rights of teachers and students have involved the out-of-class or off-campus activities and associations of professors or teachers or older pupils and not their performance or nonperformance of any assigned course, lesson, or curriculum.[4] There is no United States Supreme Court decision suggesting that there is "academic freedom" to deviate from official curricula; the only mention of academic freedom in Supreme Court precedents is discussion "in the large."[5] Many substantive questions remain unanswered. However, many rights of public servants to express their views in and about the work place are by now well established. But these are not rights properly classified as tenure. Authorities steadfastly show that public servants have no more first amendment rights than any other citizen, shibboleths about "academic freedom" or "tenure" to the contrary notwithstanding.

2. Criticism of Superiors.—Low level employees, at least, are free to insult the employing agency and its high officials if the rebuke touches upon public policy; but higher level employees or em-

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dismissed to obtain damages for mental suffering or indignity notwithstanding lack of merit in her claims of protected speech, retaliatory motive, and causation. *See infra* notes 67, 77, 128-30, 154-55, 164 and 201.

3. In Yielding v. Crockett Indep. School Dist., 707 F.2d 196 (5th Cir. 1983), the court speaks of "two great divisions," but proceeds to discuss three: free speech, substantive due process (or liberty to seek employment), and procedural due process in aid of state law created property rights in continued employment and income. This paper treats all three.

4. Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

5. Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969).

ployees whose work requires confidential communications and intimate cooperation with the governing body and its high officials, may be discharged for voicing public criticism in a strident tone.[6] Private criticism of the policies of superiors by low level employees is protected speech, even if abusive tones, if it is unbroadcasted, unpublished, and unaccompanied by obstruction, disobedience, or nonperformance.[7] But nonperformance and personal complaints are not protected by the first amendment.

3. Nonperformance Is Not Protected.—If a bomb inspector in a government munitions plant converts to a pacifist church or pacifist political party (suggested, it makes no difference) can he decline to inspect bombs for explosive readiness and insist he be reassigned to, say, bird conservation work in the nearby park ahead of others on the bird warden eligible list? The answer should be no. The question most often arises not in ordnance plants but in schools and state colleges, and the answer is the same.

In *Palmer v. Board of Education*,[8] a probationary teacher converted to the Jehovah's Witnesses and refused to teach certain exercises and lessons on account of her new beliefs. For example, after her conversion she believed that leading ethnic folk singing and teaching biographies of great men (e.g., Lincoln, M.L. King) were idolatry. She asked to be transferred from kindergarten to a third grade class because in third grade there is less singing and celebrating and more reading. Plaintiff excelled at teaching reading. A transfer, though inconvenient, was possible either in the same school or to another of the 700 schools that the defendant board operated. The defendants declined her transfer request and ordered her to teach singing and biography. When she refused in writing, defendants fired her without a prior hearing. Though fully certified and regularly appointed as a full time teacher, plaintiff had served only five of the six schools terms (3 years) of probationary service required by the Illinois tenure law. Plaintiff grounded her claim of a right to be retained in service and transferred, on the guarantees of freedom of speech and of free exercise of religion. The district court adjudged for defendants and found that the nonconformity of plaintiff was not protected by the first amendment. The court of appeals affirmed with the same rationale of nonprotection. The Supreme Court denied certiorari. Like the *Palmer* court, others

6. Pickering v. Board of Educ., 391 U.S. 563 (1968).

7. Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).

8. 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980). *See also infra* notes 207-17 discussing general free speech by instructors outside the classroom in historical context.

consistently have ruled that refusal to conform classroom teaching content to the curriculum is not protected.

In *Clark v. Holmes*,[9] the court affirmed a judgment for a defendant college, which had hired a nontenured biology teacher and assigned him to teach a health course. The college department prescribed the books and syllabus. The department chairman directed the teacher to conform to them but he refused. He overemphasized sex and mental health and de-emphasized other parts of the course. He also counseled students about sex and health and declined to refer them to the college counseling service as ordered. The district court entered judgment on a verdict for defendants. The judge refused to instruct the jury that a college instructor had a constitutional right to express himself as he wishes in his class. The court of appeals stated that plaintiff had no right to deviate from either the prescribed course content or from the time and the emphasis which the syllabus allocated to various parts of the course.[10] There existed on these facts no issue of first amendment rights upon which the jury needed instruction.

A high school economics teacher in *Ahern v. Board of Education*[11] departed from economics to discuss corporal punishment. The principal told her to drop the topic. When she disobeyed, the school fired her. She sued claiming "academic freedom" under the first amendment. Lower courts rejected her claim. The appellate court perceived her obstinacy as simple disobedience justifying discharge.[12]

In *Adams v. Campbell County School District*,[13] the court reviewed trial court findings that high school English teachers' unauthorized inclusions of current events discussions in literature classes justified nonrenewal of their contracts. The court expressed the view that the principal can insist on orthodox methods and standard content.[14]

On account of a reduction in force, a college in *Hibbs v. Central Community College*[15] had to eliminate a language teacher. A committee was appointed to select the teacher that would be discharged. The committee used as one criterion "tact in selection of curriculum materials that are relevant to the teaching assignment."[16] Plaintiff,

9. 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973), cited with approval in Connick v. Myers, 103 S. Ct. 1684, 1689 n.6 (1983).
10. 474 F.2d at 931.
11. 456 F.2d 399 (8th Cir. 1972).
12. *Id.* at 403-04.
13. 511 F.2d 1242, 1243 (10th Cir. 1975).
14. *Id.* at 1247.
15. 392 F. Supp. 1202 (N.D. Iowa 1975).
16. *Id.* at 1204.

the discharged teacher, had developed a street language translation exercise and had used it in class. The fact that it was not directly contemplated by the course descriptions was a factor which motivated the committee. The court entered judgment for defendant.

There is even authority that very vociferous public criticism of the curriculum may be grounds for discharge of a teacher or an administrator.[17] Cases in which absence of notice of the prohibition was the basis of relief given to teachers accused of nonconformity should be distinguished.[18]

Taken together, the cases recognize no distinction among levels of instruction.[19] While curricular nonconformity may produce more harm with younger pupils,[20] curricular conformity is an urgent matter in colleges as well.[21] It is striking to note that few first

17. Schmidt v. Fremont Co. School Dist., 558 F.2d 982 (10th Cir. 1977); Kaprelian v. Texas Woman's Univ., 509 F.2d 133 (5th Cir. 1975); *Clark*, 474 F.2d 928. But this aspect of those three cases may be undercut by the *Pickering*, 391 U.S. 5631 (1968), and *Givhan*, 439 U.S. 410 (1979), cases decided by the Supreme Court. However, the Supreme Court precedents do not diminish the value of *Kaprelian*, *Schmidt*, *Clark*, and cases cited in *supra* notes 9-16, for the proposition that nonperformance is not protected. *See also infra* notes 185-86.

18. These include Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969), and Mailloux v. Kiley, 323 F. Supp. 1387, *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971), in which high school English teachers discussed use of four-letter words as part of language classes. *But see* Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975), *declared functus officio*, 527 F.2d 611 (1975), in which a panel of the court found that the discharge without warning, of three eighth grade teachers (plaintiffs) because they introduced a poem not directly relevant to their assigned courses without prior approval by their superiors, did not violate the rights of the teachers, given the nature and contexts of the poem. By an equally divided vote, the court, sitting en banc but without the visiting judge who had written the panel opinion, affirmed the summary judgment for defendants of District Judge Bauer. *See also* Parker v. Board of Educ., 237 F. Supp. 222, *aff'd*, 348 F.2d 464 (4th Cir. 1965)), *cert. denied*, 382 U.S. 1030 (1966), where all three courts in effect sustained discharge of a probationary teacher without warning or opportunity to cure his fault, solely for introducing as assigned reading a book not forbidden by the school board but later found objectionable by it.

19. Senior college settings: *Clark*, 474 F.2d 928, *Kaprelian*, 509 F.2d 133; junior college setting: *Hibbs*, 392 F. Supp. 1202; senior high school settings: *Ahern*, 456 F.2d 399, *Adams*, 511 F.2d 1242, *Keefe*, 418 F.2d 359, *Mailloux*, 323 F. Supp. 1387, *Parker*, 237 F. Supp. 222, *Schmidt*, 558 F.2d 982; junior high school setting: *Brubaker*, 502 F.2d 973; elementary setting: *Palmer*, 603 F.2d 1271.

20. In *Developments in the Law-Academic Freedom*, 81 Harv. L. Rev. 1045, 1053 (1968), the editors of that journal state:

> The assumptions of the "free market place of ideas" on which freedom of speech rests do not apply to school aged children, especially in the classroom where the word of the teacher may carry great authority. It seems unwise to assume as a matter of constitutional doctrine that school children possess sufficient sophistication or experience to distinguish "truth" from "falsity." Furthermore, since one function of elementary and even secondary education is indoctrinative—to transmit to succeeding generations the body of knowledge and set of values shared by members of the community—some measure of public regulation of classroom speech is inherent in the very provision of public education.

21. In Mailloux v. Kiley, 323 F. Supp. at 1392, the court noted the following as-

amendment cases arise concerning senior research faculty.[22]

4. Unprotected Personal Complaints.—In *Pickering*[23] and *Givhan*[24] the subjects that stimulated the mordacious public servants were topics of public concern, *viz.* funding of the academic program and integration of the races. But in the recent case of *Connick v. Myers*,[25] personal aspirations and grievances, about work site and the character of assigned tasks, predominated and led to a refusal to perform.[26] However, the case stands for more than the proposition that nonperformance is unprotected. The court held that circulation of a questionnaire was not protected when it sought mostly to uncover inefficiency or incompetence of managers in dealing with staff rather than in achieving or failing to achieve the public mission of the office.[27] The rationale was that personal interest or concern dominated and public interest in the quarrel was minimal.[28] The

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pects of public high schools. They are community institutions; operate in loco parentis; possess no tradition of faculty discretion or independence; are composed of immature pupils; employ many immature teachers; are designed to concentrate on basics; are expected to indoctrinate the younger generation in community mores; and are expected by parents to use established methods. The ruling was affirmed on appeal, 448 F.2d 1242 (1st Cir. 1971). Submitted, that the same characteristics describe undergraduate instruction, especially during the first two years. Indeed, immaturity of instructors may describe college undergraduate teaching staffs at large state colleges better than faculties of public high schools. Leaving it to empirical investigators to ascertain, the author would not be surprised to find an average age of teaching assistants, assistant instructors, and nontenured assistant professors of state colleges substantially lower than the average age of public high school teachers, and would not even be surprised to find little difference in average educational attainment in the two populations. As to the immaturity and impressionability of undergraduate college pupils, especially in the first two years, the academic profession itself recognizes the fact and recognizes as well that the implication is a need for restraint of free expression by college instructors of undergraduates. R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 410-11 (1955) [hereinafter cited as HOFSTADTER & METZGER].

22. Part of the explanation is that the faculty teaching post graduates are doing substantial research and are often tenured by contract or rule and enjoy both contractual substantive rights (which sometimes exceed constitutional minimums) and extrajudicial procedural rights established by the contract or rule so they need not go to court. Some of the explanation might also be that fewer of them are, to use the adjective of Judge Wyzanski, "immature" teachers, *Mailloux*, 323 F. Supp. at 1392. It may also be that older professors tend to be more conventional, or it may be that older academics, on average, express unconventional views in a mature style that generates, for any given amount of doctrinal or ethical controversy, relatively less personal animosity than do styles prevalent among younger scholars.

23. 391 U.S. 563 (1968).

24. 439 U.S. 410 (1979).

25. 103 S. Ct. 1684 (1983).

26. Plaintiff, an assistant prosecutor, complained about reassignment to a branch office and refused to accept the reassignment, among other things. *Id.* at 1684.

27. *Id.* at 1688-89, 1693-94.

28. *Id.* As to these personal questions, the court did not balance interests. It declared them unprotected. There was no need to balance interests to ascertain if suppression was justified.

questionnaire did ask one question of public interest, namely, one about pressure at the agency to work for political candidates. The court excised that for separate analysis, applied the test of *Pickering*[29] regarding confidential relations, and justified the discharge of plaintiff, assuming that displeasure with the public interest question was one motive of defendant.[30] Unlike the other questions, the one about political pressure was held to have protected status.[31] But the interests of the employer were great enough to outweigh the interest in freedom to ask it.[32] The other questions plaintiff asked were not balanced or weighed at all. They were brushed aside as unprotected.

5. Legislative Power to Abolish Programs and Subsidies.—While servants are sometimes tenured, programs are not. Servants are obliged to implement the program of the employing agency but have no legally protected interest in its continuation. The contrary view erroneously equates abolition of a service with partisan substitution of servants performing it and implies that once established, a program can never be discontinued. Such a rule would mean there could never be a change in the allocation of public resources or in public policy and values. Public programs could only grow, never shrink.

Teachers generally have little discretion and very few of them formulate curricula or other policy.[33] Rather, they must conform to plans and programs as legislated. Individual teachers and other servants have no special standing to challenge programs.[34] But others, like pupils and parents, have attacked curricula in both their mandating and exclusionary aspects though with a striking lack of success.[35] All in all, the power of legislatures to designate curricula is

29. *Id.* at 1691-92.

30. *Id.* at 1693. Allocation of the burden of proof of the consequences of motives (causal element) followed Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

31. *Id.* at 1691-93. At that point, the court hearkens to patronage cases beginning with Elrod v. Burns, 427 U.S. 347 (1976), *see infra* note 56.

32. *Id.* at 1694. The Court uses the balancing of factors given in *Pickering*, 391 U.S. 563, but weighs the interests of the agency more heavily than did the *Pickering* Court.

33. Halligan, *The Function of Schools, The Status of Teachers, and the Claims of Handicapped: An Inquiry Into Special Education Malpractice*, 45 MO. L. REV. 667, 675-78 (1980) [hereinafter cited as Halligan]. *But see* Cathcart v. Anderson, 85 Wash. 2d 102, 530 P.2d 313 (1975), in which a law faculty with delegated curricular power unsuccessfully attempted to deny its curricular perogatives and thus also the necessity for a public meeting to exercise them.

34. The exception was Mrs. Epperson when her employing board instructed her to use books which contained lessons the teaching of which was defined as a crime by the state legislature. Epperson v. Arkansas, 393 U.S. 97 (1968).

35. Halligan, *supra* note 33, at 674-75 nn.21-27, 678-79 nn.40-49, *cf.* Note, *Chal-*

nearly "unquestioned."[36] The only strong limit on that the power placed by the first amendment derives not from the free speech and free exercise clauses but from the establishment clause.[37]

To limit legislative power to define, establish, and abolish curricula and other programs would be to deny the appropriation powers of legislatures,[38] the budgetary powers of executive authorities, and the general policy making power of representative government. To the criticism that the popular authorities should not legislate doctrine, the positive answer is that values are all there are to legislate.

There are some state constitutional impediments to legislative disestablishment of schools or programs; they do not derive from clauses guaranteeing free speech but from separation of powers clauses and from the constitutional status and early history of state

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lenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents, 14 HARV. C.R.-C.L. L. REV. 485 (1979).

An attack on curricula and the culture they embody, poorly disguised as an attack on intelligence tests, failed in Parents in Action on Special Educ. v. Hannon, 506 F. Supp. 831 (N.D. Ill. E.D. 1980); *contra*, Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979).

36. *Epperson*, 393 U.S. 97. *See also infra* notes 51, 52, 84, 185 and 186.

37. In *Epperson*, 393 U.S. 97, plaintiff did not claim an individual privilege of nonconformity to the curriculum on account of dissent by her but instead attacked a curriculum statute itself. No issue of disobedience to superiors existed. Indeed, in *Epperson*, the biology books designated by the school board for use by Ms. Epperson contained a chapter violative of the statute in question. To avoid the conflict between statute and prescribed books, Ms. Epperson sought to have the misdemeanor criminal law in question declared unconstitutional. The rationale is an unconstitutional attempt by the legislature to establish one religious view. The Court presents the legislative and political history showing an intent to establish one religious viewpoint. *Id.* at 107-09 nn.15-17. The state apparently agreed in its brief that the legislature had such motives. *Id.* at 109 n.18. In fact, the record showed that the state had not even once attempted to enforce the act and likely never would. Justice Black doubted existence of a real controversy justiciable by the Court and referred to the state's defense as apologetic, 393 U.S. at 109 (Black, J., concurring).

In another concurring opinion Justice Harlan accurately states the rationale of his brothers as not free speech of the teacher but unlawful establishmentarian intent of the legislature:

> I concur in so much of the Court's opinion as holds that the Arkansas statute constitutes an "establishment of religion" forbidden to the States by the Fourteenth Amendment. I do not understand, however, why the Court finds it necessary to explore at length appellants' contentions that the statute is unconstitutionally vague and that it interferes with free speech, only to conclude that these issues need not be decided in this case. In the process of *not* deciding them, the Court obscures its otherwise straightforward holding, and opens its opinion to possible implications from which I am constrained to disassociate myself.

Id. at 115-16.

In the next to last paragraph of the opinion the Court itself demonstrates that Justice Harlan is correct when he says that the only rationale is the establishment clause. It notes the clear intent of the 1928 legislature to establish one well defined, sectarian religious viewpoint (biblical fundamentalism) and to disestablish others. *Id.* at 109.

38. University of Minnesota v. Chase, 175 Minn. 259, 268, 220 N.W. 951, 957 (1928).

universities and their schools of agriculture and the like.[39] They give public servants no special standing to challenge alteration or elimination of a program.

6. Balancing Protected Speech Against Other Interests.—Even when a court concludes that speech is protected and that alleged consequences reflect interests protected by the first amendment and finds intent, causation, and other necessary elements, it may not adjudge for plaintiff unless it also finds that the protected speech is more important than the purposes of the agency in suppressing it.[40] *Pickering*[41] is the leading case in which freedom of speech[42] is balanced against the purposes of public employers. Its most recent progeny is *Connick v. Myers*.[43]

Where and when should balancing be done? Under current law, in the case of a tenured employee, the agency often will first have to prove its asserted justification in a prior hearing by a nonjudicial trier. It seems equally clear that when the employee is a servant at will or a probationer, the employer may prove asserted justification later.[44] The reasoning is the same as with other issues of cause or

39. 14 C.J.S. *Colleges* § 2 (1939); Heimberger v. Board of Curators, 268 Mo. 598, 188 S.W. 128 (1916); *Chase*, 175 Minn. 259, 220 N.W.951.

40. Finding that the speech is protected has been called a preliminary "litmus" test; but that is only the beginning of the scrutiny. Water v. Chaffin, 684 F.2d 833, 838 n.11 (11th Cir. 1982). The court notes the tendency of many courts to stop with the "litmus" test. This Article argues for content based balancing. *See infra* notes 50-57 and 185-86. The court in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), says the interests must be balanced. The intent of the language is to create a defense of justification and not to define interests protected. *See infra* note 42. Before a court reaches affirmative defenses of justification it must deliberate on the elements of the claim of plaintiff. The court defines several elements in a first amendment case brought by a dismissed public servant. One is specific intent of defendant to retaliate. Another is direct causal connection between motive and result. *Mt. Healthy*, 429 U.S. at 284-87. Cases applying *Mt. Healthy* are cited *infra* note 60.

41. Pickering v. Board of Educ., 391 U.S. 563 (1968).

42. Balancing free speech against other interests should not be confused with the process of balancing accuracy, speed, and convenient location of fact finding with other good things. The latter is a principal subject of this paper. *See infra* notes 131-70. The former is not a principal subject here.

43. 103 S. Ct. 1684 (1983). The allocation of burdens of proof in *Connick* follows *Mt. Healthy*, 429 U.S. 274. A well written case which reviews precedents since *Pickering*, 391 U.S. 563, and applies *Mt. Healthy*, is Judge Mikva's opinion in Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir. 1980). *Tygrett* separates tenure and freedom of speech. *Id.* at 1282-83. The due process clause is not mentioned and correctly not. The state of the record in *Tygrett* made it unnecessary to opine much about allocation of the burden of proof of causation. *See infra* notes 58 and 60. The *Tygrett* opinion allocates the burden of proving countervailing interests to defendant. *Id.* at 1286. Thus, public purpose is an affirmative defense of justification for suppressing in some circumstances, and for some reasons, speech which is protected by the amendment.

44. Of course, belated articulation of a justification is some evidence of insincerity of its assertion. But that is an evidentiary point or point of credibility and not a point of due process and prior hearing. *Tygrett*, 627 F.2d at 1287-89.

reason for discharge.[45] That is, the time and place to try a claim by the employer of justification by necessity is determined in part by the status of the employee under local law.

The calculus of balancing interests is not as well developed by recent decisions for first amendment cases as for due process cases.[46] The recent cases tend not to weigh the interest of the servant by very continuous, precise scales.[47] Nor is there much finer measuring of governmental interests.[48] The famous opinion of Learned Hand in *United States v. Dennis*[49] is authority for graded measuring of both governmental and private interests. Let us first look more closely at interests of plaintiff-servants.

One might say that a person's job is always a very important interest of his. And at first blush this seems correct. But further consideration makes one pause because the implication is that to constitute a defense of justification, the rationale for restriction of free speech of public servants must be as great for any one servant as for any other. This somehow contradicts the very notion of balancing of interests. Perhaps the law should distinguish between one's career in life and one's immediate employment, or even between good jobs and poor ones. Then again, this would tend toward the worst sort of elitism by suggesting that an agency may restrain speech of menial servants more than that of professional servants. But finer grading of plaintiff's interests might be introduced another way without such tendencies. For example, different personnel actions could be justified by different levels of governmental concern. The cases have not explored these possibilities.

As a hypothetical example, take a school system which transfers an outspoken teacher from one neighborhood school to another because his political opinions are less inflammatory in the latter neighborhood, but does not, however, change his pay, seniority, hours, major duties, or the like. If the teacher finds the second assignment onerous (perhaps a much longer distance from his home or in an older schoolhouse) and sues, should the school board be able to

45. *See infra* notes 154-228 discussing the time of hearing which the due process clause requires.

46. *Compare infra* notes 131-45 and 162-70 with *supra* notes 40-52 and *infra* note 184.

47. There is nothing like the exquisite distinctions between disability benefits and other forms of welfare found in Mathews v. Eldridge, 424 U.S. 319, 344-45 (1976). In United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951), Judge Hand contemplates a continuum of speech from unprotected to vigourously protected and not merely a dichotomy between protected and unprotected speech. As to different consequences from or means of suppression, *see infra* note 184 and accompanying text.

48. But in *Connick v. Myers*, 103 S. Ct. 1684 (1983) and *Bush v. Lucas*, 103 S. Ct. 2404 (1983), there was both more attention to and more sympathy with the interests of the governmental agencies and their managers.

49. 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

make a defense of justification with facts less strong than if it had fired the teacher? Suggested: less justification should suffice. This brings us back to the governmental interests.

Governmental interests are also in need of more refined and forthright measurement. Elsewhere[50] this Article notes instances of judicially approved, selective subsidization of political organizations and of partisan opinions on burning moral issues. Taken together with the cases upholding culturally loaded curricula and research programs[51] and with the notable reluctance of courts to review[52] just those areas of executive discretion that reflect the most dramatic choices among values, those cases imply that the stronger the sentiment of the government or the electorate of a jurisdiction, the greater the privilege to disfavor dissent by public servants. The perceived significance of a policy, qua policy, is a part of the governmental defendant's interest to be weighed. Yet more authority for this view lies in decisions in which courts, perhaps ironically, have found it easiest to excuse suppression of speech of servants not on mild disputes but on the most partisan of issues. We turn now to those cases.

7. Partisan Activity and Affiliations of Public Servants.—Having balanced the interests, the Supreme Court in 1973 decided in *United States Civil Service Commission v. National Association of Letter Carriers*[53] and *Broadrick v. Oklahoma*[54] that both the federal government and the states may forbid "partisan" activity by public servants. Partisan activity was broadly defined in the two cases, and the statutes in question drew no distinction between probationers and others.

While every state[55] has a "little Hatch Act," municipalities rarely do. Rather than prohibition, one sometimes still finds compulsion. But the Supreme Court has ruled[56] that patronage dismissal even of a temporary or probationary low level public servant is illegal because it violates the first amendment. But purely personal affilia-

50. *See infra* note 185.

51. *See supra* notes 33-38 and *infra* notes 84, 185 and 186.

52. Foreign relations and prosecutorial discretion, for example, are saturated with value judgment yet nearly impenetrable to judicial review. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432 (1964); Halligan, *A Political Economy of Prosecutorial Discretion*, 5 AM. J. OF CRIM. LAW 2, 4-6 (1977).

53. 413 U.S. 548 (1973).

54. 413 U.S. 601 (1973).

55. *See id.* at 604 n.2.

56. The leading case is Elrod v. Burns, 427 U.S. 347 (1976). The Supreme Court summarizes its own decisions in patronage cases since *Elrod* in Connick v. Myers, 103 S. Ct. 1684 (1983).

tions, as distinguished from party affiliations, are not protected.[57]

B. Procedure in Free Speech Cases

1. Mixed Motives and Burdens of Proof.—In *Mt. Healthy City School District Board of Education v. Doyle*,[58] the Supreme Court defined specific intent to retaliate and some causal connection between retaliatory motive and result as elements a dismissed public servant must prove in a first amendment case. But it allowed the defendant to defend affirmatively by proving that the permissible motives alone would have produced the same action.[59] The lower courts have applied *Mt. Healthy's* rules for allocating the burden of proof of causation to cases of outspoken educators and peace officers[60] and to at least one patronage firing case.[61] Though none of the cases use the specific terms, the rule that emerges is that plaintiff must prove that wrong motives contributed to the personnel action but need prove neither necessity nor sufficiency of the motive as a cause. Defendant is then free to defend by proving that other motives were sufficient psychological causes, i.e., that retaliation for dissenting speech was not a necessary psychological cause of the adverse action by the superior.

2. Damages.—The damages courts will allow under a form of action reflect the interests protected by that form. This Article elsewhere explores interests protected by the first amendment for other purposes.[62] It generally concludes that loss of wage income is a consequential harm[63] flowing from denial of free speech. We argue that the magnitude of the consequence ought to influence the extent both of the substantive right[64] and the procedural safeguards of it.[65] But here for a moment we rigorously maintain the dichotomy between violation of right and consequence.

The consequential economic loss suffered by a discharged tenured servant is arguably larger than that of a discharged proba-

57. Burris v. Willis Indep. School Dist., 713 F.2d 1087, 1094-95 (5th Cir. 1983). *See also* Yielding v. Crockett Indep. School Dist., 707 F.2d 196, 199 (5th Cir. 1983).

58. 429 U.S. 274 (1977). The causal analysis in due process cases is not dissimilar. *See infra* notes 128-29.

59. *Id.* at 287.

60. Tygrett v. Barry, 627 F.2d 1279, 1285-86 (D.C. Cir. 1980) (police candidate); Yielding v. Crockett Indep. School Dist., 707 F.2d 196, 200 (5th Cir. 1983) (school principal).

61. Nekolny v. Painter, 653 F.2d 1164, 1167 (7th Cir. 1981).

62. *See supra* notes 40-52, and *infra* notes 171-218.

63. *See infra* notes 178-202.

64. *See supra* notes 40-52.

65. *See infra* notes 107-13 and 131-45.

tioner. The reason suggested,[66] by one judge, is that the monetary measure of a secure living of a tenured servant, long into the future, discounted for risk and time value of money, is larger than the monetary expectations of a probationer evaluated the same way. Perhaps this is no different than saying that a tortfeasor who destroys the premises of a going business or the health of an established professional woman, incurs more liability than one who harms a new concern or an unfortunate person with few prospects. Viewed that way, the discrepancies in damage awards are incidents of due process cases[67] which derive from differences in risk, security, and nearness to property of income expectation and not a flaw in first amendment doctrine.

3. Standard of Review.—In public employee discharge cases grounded on the first amendment, reviewing courts are justified[68] in reviewing records plenarily, or even *ab initio*, because issues of law and policy will predominate and balancing interests will be necessary. Detailed trial court findings are always to be encouraged, but their want should not inhibit outright resolution by reviewing courts.[69] Now we can take up another substantive right of public servants.

II. SUBSTANTIVE DUE PROCESS AND PURSUIT OF EMPLOYMENT

A. Elements

The fourteenth amendment protects against governmental deprivation of the liberty to seek employment. To allege deprivation of the liberty without due process of law, a servant must plead an un-

66. Vail v. Board of Educ., 706 F.2d 1435, 1451 (7th Cir. 1983) (Posner, J., dissenting), *aff'd per curiam by an equally divided court*, 104 S. Ct. 2144 (1984).

67. *See infra* notes 76-113 and 125-30. The same would be true of discrepancies among judgments finding no retaliation and lawful cause for discharge but awarding damages (for wages lost during the time between discharge and the probably later date of termination had a hearing been conducted) to tenured servants while awarding none to probationers.

Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976), *vacated on other grounds*, 438 U.S. 901, *reinstated in rel. part*, 578 F.2d 1167 (5th Cir. 1978), cited on this point in Hardiman v. Jefferson Co. Bd. of Educ., 709 F.2d 635, 637-38 (11th Cir. 1983). We suggest, however, that the Supreme Court cut the ground from beneath *Thurston* in Carey v. Piphus, 435 U.S. 247 (1978), discussed *infra* at notes 128 and 129. For more discussion of the constitutional ramifications of suspension without pay pending hearing, *see supra* note 2 and *infra* notes 77, 130, 154-55, 164 and 201.

68. Even findings of subjective intent are reviewable *ab initio* in some first amendment cases. New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964); Bose Corp. v. Consumers Union, 104 S. Ct. 1949, 1959 (1984). Plenary review of public employee first amendment judgments also appears to be the rule. Yielding v. Crockett Indep. School Dist., 707 F.2d 196, 198-99 (5th Cir. 1983).

69. *Yielding*, 707 F.2d at 198-99.

true, derogatory statement by defendants[70] and must prove a publication outside the agency which has seriously stigmatized the plaintiff in the community.[71] But besides the elements of defamation, plaintiff must prove coincident discharge.[72] The rationale is that the interest protected is the liberty to seek other employment and neither the position plaintiff held nor reputation *per se*.[73] Absent local tenure guarantees, a local government can dismiss a servant of whom it has a low opinion but may not broadcast its opinion gratuitiously.

B. Damages for Violation of the Right to Seek Employment

Once the defendant provides a hearing, the harm abates. This should be clear enough when the trier presiding at the belated hearing finds the contested statements true.[74] There is even authority that the damages for a constitutional violation abate when a hearing is provided regardless of its outcome,[75] though presumably without prejudice to refile the case to seek common law remedies such as compensatory damages for defamation. The Article will now discuss substantive rights of public servants grounded on state law,

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70. Codd v. Velger, 429 U.S. 624 (1977); Paul v. Davis, 424 U.S. 693, *reh. denied*, 425 U.S. 985 (1976); Colaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977). Discharge without giving any reason is no cause for action. Boland v. Blakey, 655 F.2d 1231 (D.C. Cir. 1981). *See also* Finley v. Hampton, 473 F.2d 180 (D.C. Cir. 1972) (government may deny an application for a higher national security clearance, which makes one eligible for more promotions and transfers to desirable positions, without giving reasons and without conducting a hearing to ascertain the trustworthiness of the applying public servant).

71. Besides the cases cited *supra* note 70, *see* Burris v. Willis Indep. School Dist., 713 F.2d 1087, 1091-93 (5th Cir. 1983), and Hardiman v. Jefferson Co. Bd. of Educ., 709 F.2d 635, 639 (11th Cir. 1983). But when the ground of right is the guarantee of free speech rather than substantive due process, then intramural statements derogatory of a public servant may be actionable if they cause true harm. Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979); Bottcher v. Fla. Dept. of Agriculture & Consumer Serv., 361 F. Supp. 1123 (N.D. Fla. 1973), *aff'd*, 503 F.2d 1401 (5th Cir. 1974), *reh'g denied*, 510 F.2d 384 (5th Cir. 1975). *Bottcher* dealt with alleged retaliation by adverse written efficiency rating, against a servant who could be called an environmental-safety whistle blower. The court said she was entitled to a *prior* hearing. Query, why a *prior* hearing? The opinion does not do a good job of separating free speech, substantive due process, and procedural due process. *See infra* notes 95 and 171-206.

72. Paul v. Davis, 424 U.S. 693, 701 (1976); Hardiman v. Jefferson Co. Bd. of Educ., 709 F.2d 635, 638-39 (11th Cir. 1983); Burris v. Willis Indep. School Dist., 713 F.2d 1087, 1091-93 (5th Cir. 1983); Moore v. Otero, 557 F.2d 435, 437 (5th Cir. 1977). *But see Bottcher*, 361 F. Supp. 1123, and *Simpson*, 570 F.2d 240, concerning derogatory statements not coupled with dismissal where the ground of right asserted is free speech rather than substantive due process.

73. Besides the cases cited in *supra* note 70, *see* Hardiman v. Jefferson Co., 709 F.2d at 638-39.

74. Carey v. Piphus, 435 U.S. 247 (1978). *See infra* notes 128 and 129.

75. Wells v. Doland, 711 F.2d 670, 677 (5th Cir. 1983).

specifically, a right to continuity of income and employment that some but not all public servants enjoy.

III. Substantive Components of Tenure

A. Definitions and Sources of Confusion

Work, income, and status are the goods or benefits sought by workers who are attracted by tenure policies. Principal among these is income.[76] Opportunities to be heard are not sought for their own sake. A right to income, status, and work without interruption may exist by statute, rule, or express contract. Without such an objective provenience,[77] no such right exists. To be distinguished are rights to be free from the effects of discrimination on account of race, sex, religion, or opinion. When denial or termination of service is a consequence of bias, a victim often may allege denial or loss of work as a compensable consequence of the wrong. But the principal interests protected are freedom, dignity, and liberty to seek and hold work generally. In contrast, the interest called "tenure" deems a particular position or "job" and its status and income as primary goods and rights. It is acquired by service after appointment and not merely by residence or citizenship. Only a few people possess such a right. When it exists at all, it exists by virtue of an extraordinary ground. Its size, value, and quality are determined by local law. It usually has two components, seniority and dicipline.

B. Substantive Tenure

1. Seniority.—Seniority is the right to continued service and income despite reduction in agency activity.[78] This is typically a relative contractual right of senior servants.[79] It is not usually rationalized as a method of discipline. However, when strict senior-

76. Hardiman v. Jefferson Co., 709 F.2d 635, 638 n.2. *See also supra* notes 33-39.

77. Subjective expectations of plaintiff, however sincere, are not enough to state a claim. Wells v. Doland, 711 F.2d at 675. *See also supra* notes 2 and 67, and *infra* notes 78-92, 119-24, and 201.

78. Less often, the word seniority refers to passage of cut-off dates for eligibility for monetary and other benefits like greater paid vacation and vested pension rights. An example pertinent to this Article is probationary periods in civil service systems. After serving a set time, one obtains the benefit of greater employment security. Unless otherwise indicated, when this Article speaks of seniority, the meaning intended is employment security. A good description of different notions of seniority and how they combine or conflict with other objectives like qualification and merit is found in C. Randle & M. Wortman, Collective Bargaining 484-519 (2d ed. 1962).

79. 81A C.J.S. *States* § 96 (1977). The right is one relative to other servants and is defined by contract or rule. Usually it is a right vis a vis other workers in the same line of work. But the contractually defined size and scope of seniority units and work classification may be narrow or wide and is influenced by technology, commonality of skills, departmental organization, occupational licensing, and past practice. Company wide or

ity systems are modified by quality or effeciency ratings, the distinction blurs.[80] Pure seniority rights are rarely protected[81] by statutorily defined adversarial procedures because the disputes of fact implicated in straight reductions in force are of a sort that do not require trial. There can be complexities in crediting service or in classifying employees.[82] Some disputes about a reduction in force might imply a need for a trial type hearing, but not many.[83] Very few plaintiffs have sued alleging that a layoff violating seniority or other civil service rules was compounded by a motive of the public employer to suppress speech, and in the few cases that have arisen there has been no conflict with the power to abolish programs.[84] As

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agency wide seniority usually operates only for defining eligibility for monetary benefits like amounts of paid vacation.

80. *See* Hibbs v. Central Community College, 392 F. Supp. 1201 (N.D. Iowa 1975), for an example of a first amendment challenge to discharge of a teacher in a reduction of force accomplished by overall ranking of teachers on several components including seniority and compliance with designated curricula and instructions.

81. 81A C.J.S. *States* § 96 (1977); 55 C.J.S. *Mandamus* § 203 (1948). There is no right to an adversarial pre-discharge hearing to resolve ambiguities in the definitions of work units or to contest relative seniority of servants. Management inquiry and decision are adequate. But the courts are open to a petition to compel an agency to review its records of service of several employees and to decide explicitly which employees should be clustered for review of seniority and which ones are in fact senior. Tamimie v. Glass, 15 Ill. App. 3d 1, 303 N.E.2d 17 (1973).

Of course, there can exist disputes about which agency of government has personnel managerial authority and responsibility for economy and conformity to budgets and appropriations. University of Minn. v. Chase, 175 Minn. 259, 220 N.W. 951 (1928).

82. *See, e.g.*, Tamimie v. Glass, 15 Ill. App. 3d 1, 303 N.E.2d 17, which presents the situation of a person who works in a small division of an agency, but has varied skills; then the larger agency abolishes the small division and position. When positions are rigorously departmentalized and seniority is also compartmentalized to parallel the departments, then elimination of a program or service has immediate consequences for specifically identified persons. When their work includes expression of opinion, departmentalized servants may be inclined to claim violation of their individual rights of free expression by a reduction in force. Such a proposition cannot stand. *See supra* notes 33-39.

83. When there is a dispute of fact, it is usually not one about credibility of witnesses or about occurrence or not of discrete actions or episodes. *See infra* notes 131-45.

84. In Castelaz v. Milwaukee, 94 Wis. 2d 513, 520-23, 289 N.W.2d 259, 262-63 (1980), a state supreme court affirmed a judgment for defendant in a 42 U.S.C. § 1983 suit that had, atypically, been filed in state court. The court ruled that the power of a state or local government to abolish programs and to reduce the manpower or other resources assigned to a program, is broad and nearly unreviewable. But in dicta it said that a "sham" reduction in force, of one position only, could be actionable if motivated by a desire to suppress free speech of the one person terminated. It also ruled that plaintiff was entitled to a hearing prior to discharge as a matter of *state* law and did not opine whether federal law required a prior hearing. Defendant actually conceded that plaintiff was entitled not just to some trial of first amendment claims, as all would agree, but to a pre-discharge trial, because it sought and obtained summary judgment on grounds of failure to exhaust administrative remedies that existed. The program in question was not abolished. Query, what should be the rule in the unlikely case where defendant abolishes a whole program or reduces the level of some service because it wants to layoff one or two servants uttering protected speech? *See supra* notes 33-39, 51, and 52 and *infra* notes 185 and 186. The author believes that judgment in such a

to the due process clause, reductions in force have not in fact generated any major cases. One reason[85] is that while not authorizing hearings, public personnel laws typically provide substantive standards in fair detail and require survey, notification, informal opportunity for comment, and review by higher management,[86] and these may satisfy concerned parties. They satisfy the due process clause,[87] and the plaintiffs' civil rights bar apparently concedes that they do. There is much greater interest in attacking substantive seniority rights themselves as denials of equal protection of junior servants who are members of racial minorities.[88] As to due process, the second, more controversial, and much more litigated component of tenure is the disciplinary component.

2. Discipline.—The disciplinary component of tenure is the conditional right to continued work and income, assuming there is work available. The conditions are stated by local law. Usually the conditions are stated negatively, e.g., continued service "absent cause" for discharge.[89] Cases emphasize the causes for discharge and sometimes forget the substantive right. Calling tenure a right not to be discharged summarily is not strictly erroneous but unfortunately fails to identify the real interest protected. One well known positive definition is the right of federal judges[90] to hold office "during good behavior." The varieties of conditions on tenure are many. Some are extensive and harsh, some narrow and undemanding.[91] So long as the condition does not unfairly touch upon race, sex,

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case should be for defendant because judicial intervention to tell political departments what services and levels of service they must provide and finance by taxes and what values they must subsidize, is a worse constitutional evil than unfair loss of a job by an outspoken public servant. The only other case in point is Hibbs v. Central Community College, 392 F. Supp. 1202 (N.D. Iowa 1975). *But see generally* Crenshaw v. United States, 134 U.S. 99 (1890), cited in Arnett v. Kennedy, 416 U.S. 134 (1974), for a broad view of the power of the government to abolish positions for any reason.

85. Another may be that when seniority systems exist at all in the public sector, they tend to be straight seniority systems in agencies like public schools. Other laws, like certification laws, practically dictate the seniority clusters or units, and issues of fact are few and readily determined documentarily. Also, seniority and competency may be well enough correlated not to generate many real conflicts even in straight seniority systems.

86. 81A C.J.S. *States* § 96 (1977); 55 C.J.S. *Mandamus* § 203 (1948).

87. *See infra* notes 131-45.

88. Members of racial minorities argue that they should be clustered and as a group placed ahead of senior caucasian servants when the employing agency had discriminated against other members of their race in the past and delayed their entry into the public service. The Sixth Circuit had accepted the argument, but the Supreme Court rejected it in Stotts v. Memphis Fire Dept., 679 F.2d 541 (6th Cir. 1982), *rev'd*, 104 S. Ct. 2576 (1984). A related private sector case is W.R. Grace & Co. v. United Rubber, Cork, Linoleum and Plastic Workers, 103 S. Ct. 2177 (1983).

89. 63A AM. JUR. 2D *Public Officers and Employees* §§ 189-203 (1984).

90. Art. III, U.S. Const.

91. Lowe v. Board of Educ., 76 Ill. App. 3d 348, 395 N.E.2d 59 (1979).

nationality, age, religion, or opinion, the local jurisdiction is free to define the conditions of substantive tenure. There is no constitutional doctrine that obliges governments to have tenure systems, much less any doctrine that obliges them to define tenure liberally.

Like land law, substantive tenure law is local law, although the effect of defenses created by state law has created some conflict among circuits.[92]

3. Quantitative Variables Determining Constitutional Property.—The strength of the interest of plaintiff is determined by the value of the state created right owned by the plaintiff and the magnitude of forfeiture the defendant agency attempts.

a. The Value of the Substantive Right.—The cases repudiate constitutional easements in classrooms or other pulpit rights of tenured servants.[93] Similarly, preferred working conditions are probably not protected[94] by the due process clause operating alone.[95] There is, however, dicta to suggest that nonmonetary entitlements

92. An example is statutes of frauds type defenses. The Fifth Circuit follows local law. Burris v. Willis Indep. School Dist., 713 F.2d, 1087, 1090-91 (5th Cir. 1983). The Seventh Circuit is not unqualified in its commitment to follow state statutes of frauds. Vail v. Board of Educ., 706 F.2d 1435, 1440 (7th Cir. 1983), *aff'd per curiam by an equally divided court*, 104 S. Ct. 2144 (1984).

93. *See* Hardiman v. Jefferson Co. Bd. of Educ., 709 F.2d 635, 638 n.2 (11th Cir. 1983).

94. Two recent Supreme Court cases began as objections to reassignment to unpreferred duties and work sites but escalated into demotion in grade and dismissal. The initial issues were completely lost in the litigation process in one case because the servant was dismissed completely and the Supreme Court ultimately found for the employer. Connick v. Myers, 103 S. Ct. 1684, 1694 (1983). In the other case, an administrative tribunal restored a demoted plaintiff to his prior grade and awarded him back pay but apparently did not adjust his duties and work station to his older ones which he preferred. All three tiers of federal courts adjudged for the government when plaintiff sued in court for yet more relief. Bush v. Lucas, 103 S. Ct. 2404 (1983). The ultimate rationale was congressional constriction of remedies afforded public servants whose speech the government has penalized and also remedial jursidictional limitations. But the lower courts had additionally found that transfer and demotion were not "constitutional deprivations." *Id.* at 2408. If even such retaliations are not breaches of the duty of tolerance created by the first amendment, then it is difficult to see how working conditions, locations, and content can be "property" in the sense of the due process clause. *Contra* is Adcock v. Board of Educ., 10 Cal. 3d 60, 513 P.2d 900 (1973), 109 Cal. Rptr. 676, which is a very early application of Perry v. Sindermann, 408 U.S. 593 (1972), to lateral transfers. A key question is whether the public employer has truly promised specific job content, working conditions, or work sites. It is suggested that federal courts should also ask if the good in question is great enough to justify allocation of constitutional attention and federal court resources to its enforcement. *See infra* note 99. Also relevant here is the concentration on monetary income in the federal cases, *infra* notes 97-108, and the noncognizable nature of harm in the form of disappointing changes in work content, *see supra* note 93 and *infra* note 184.

95. But working conditions are protected somewhat by the first amendment. They need not be called "property" to be an instrument of retaliation for expression or the subject of judicial remedy for retaliation when there is genuine consequential loss. McGill v. Board of Educ., 602 F.2d 774, 780 (7th Cir. 1979); Simpson v. Weeks, 570 F.2d

valued strongly enough by the source state itself to make decrees of specific performance available in state court, would be deemed a form of constitutional "property" actuating the due process clause and federal remedies as well.[96] Income is the best recognized form of property of a public servant, and there may be boundaries even to that estate. There is authority that when the monetary value of the expectation is small, it is not constitutionally protected property.[97] The Seventh Circuit has held,[98] with one judge dissenting,[99] that one year's salary under a short term contract is property. Another recent case[100] illustrates the primacy of income by ruling that suspension without hearing, but with pay, was at most a *de minimis* trespass on the "property" of the tenured public servant suing, while opining that lost pay of such a servant during a fixed period of disciplinary suspension would be illegal if accomplished without prior hearing.[101] When the subject of the litigation is suspension, the discourse moves from right or duty to violation or breach.

b. The Magnitude of Forfeiture.—The Supreme Court, in *Goss v. Lopez*,[102] ruled that free public school instruction guaranteed by state statute for children between ages six and sixteen was constitutional property protected by the due process clause; but the expulsion, in nearly summary form, but by a regularly appointed official with local authority, for periods less than ten days did not violate the clause. The Court reasoned that ten or fewer days was not a sufficiently large forfeiture of the substantive right to be a constitutional wrong. Soon afterwards the court vacated and remanded, for reconsideration in light of *Goss* and other recent authorities, the public sector employment case of *Snead v. Department of Social*

240, 242 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979). *See infra* note 184 for further brief comment.

96. *See infra* notes 229 and 230. But the converse is not true. Availability of the remedy of specific performance in state court is not an attribute a substantive right must have in order to constitute constitutional property. It is suggested, however, that as a technique of good policymaking, judicial economy, and federalism, federal courts ought to consider how state law evaluates a substantive right which is a creature of the state before deciding to classify it as constitutional property and thereby make it a subject of federal judicial intervention into state and local government personnel management.

97. *See infra* notes 93-101.

98. Vail v. Board of Educ., 706 F.2d 1435, *aff'd per curiam by an equally divided court*, 104 S. Ct. 2144 (1984).

99. *Vail*, 706 F.2d at 1453-56 (Posner, J., dissenting)

100. Hardiman v. Jefferson Co. Bd. of Educ., 709 F.2d 635, 637-38, 637-38 n.1 (11th Cir. 1983).

101. *Id.* But the case did not carefully distinguish fixed term disciplinary suspensions from suspensions pending a hearing scheduled to ascertain cause *vel non* for final dismissal. *See infra* notes 102-13.

102. 419 U.S. 565 (1975). But even for shorter suspensions a rudimentary form of instantaneous hearing is required. *Id.* at 576-77, 581-85.

Services.[103] In *Snead*, a three judge court struck down a law that included some safeguards but no right to a contested hearing and further provided for long term involuntary leave without pay of nonprobationary public servants, in a civil service system, who suffered mental disease. In an ordinary disciplinary case decided several years before *Goss* and never appealed, a district court had found for a civil service employee suspended without pay for ninety days with no provision for hearing either before or after the fact.[104]

Distinguishable from the first set of suspension cases, are a second group of decisions reviewing suspensions without pay in systems which provide for hearings *ex post* and the possibility of back pay awards. In *McIntyre v. New York Department of Corrections*,[105] the district court assumed that a thirty day suspension wihout pay is a forfeiture grievous enough to require contested hearing on the issue of cause in some state tribunal but reasoned that prompt hearing *ex post* constituted due process. In *Muscare v. Quinn*,[106] the Seventh Circuit expressly ruled that a twenty-nine day disciplinary suspension without pay of a nonprobationary firefighter in a civil service system was grievous and that hearing *ex post* was not adequate due process, and it reversed the judgment for defendant. The Supreme Court took briefs and heard argument but dismissed the writ as improvidently granted.[107] In such cases the question whether the magnitude of forfeiture activates the due process clause is masked somewhat by the question of the timing of safeguards required by the clause.

Also to be distinguished are yet a third cluster of authorities in which suspension without pay of a tenured public servant is ordered pending a hearing to ascertain proper cause for complete dismissal. In such cases the issue of proper timing of the proceeding is isolated. The rule of *Arnett v. Kennedy*,[108] is that a hearing *ex post* suffices as due process. The system, approved in *Arnett*, of dismissal followed by later hearing by an impartial person with power to reinstate, has the same effect as "suspension" without pay pending hearing to ascertain cause for dismissal; at least one lower court has so found.[109] Both *Arnett* and other cases, representative of the re-

103. 355 F. Supp. 764 (S.D.N.Y. 1973), *vacated and remanded* in light of Arnett v. Kennedy, 416 U.S. 134 (1974), *aff'd*, 389 F. Supp. 935 (1974), *vacated and remanded as moot*, 421 U.S. 982 (1975).

104. Buggs v. Minneapolis, 358 F. Supp. 1340 (D. Minn. 1973).

105. 411 F. Supp. 1257 (S.D.N.Y. 1976).

106. 520 F.2d 1212 (7th Cir. 1975)

107. 425 U.S. 560, *reh'g denied*, 426 U.S. 954 (1976).

108. 416 U.S. 134 (1974), discussed *infra* note 164 and accompanying text.

109. Smith v. Carey, 473 F. Supp. 268 (S.D.N.Y. 1979). *Contra*: Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976), *vacated on other grounds*, 438 U.S. 901 (1978),

cent trend[110] to justify hearing after the fact, make it safe to predict that both disciplinary suspension short of dismissal and suspension pending dismissal hearing, will be validated so long as, afterwards, there is provided some review or hearing by a person with power to remedy ungrounded suspension. The reasons for confidence in predicting judgments on the issue of timing of a hearing are developed below. Whether the Supreme Court will define some class of disciplinary suspensions without pay which an agency could impose without any hearing before or after the fact, is harder to predict.

Whether the court should do so also begs some of the questions we take up in the next several sections, *viz.* what are the costs and benefits and how shall interests be balanced in due process employment cases? By way of preview, consider that no state is obliged to create any civil service system. For that reason it is suggested that the federal judiciary ought to concede to a state the power to have limited civil service systems and to give its managers and department heads summary power[111] of suspension without pay for significant periods[112] as a sort of third alternative between public service at will and a full blown civil service apparatus. Limited constitutional freedom summarily to demote would rest on similar arguments. Demotions of public servants with tenure have not been litigated too often,[113] but such cases are likely to follow patterns arising in suits reviewing other sanctions short of dismissal.

C. Equal Protection and Tenure

In granting and denying tenure within personnel systems and in

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reinstated in relevant part, 578 F.2d 1167 (1978); and dicta in *Hardiman v. Jefferson Co.*, 709 F.2d at 637-38 n.1.

110. *See infra* notes 164-68.

111. Its exercise, of course, should be amenable to challenge, on extraordinary grounds, after the fact in courts of general jurisdiction. An example of an extraordinary ground is racial bias or a motive to retaliate for protected speech uttered by the suspended servant.

112. The author believes that courts should tolerate local rules and statutes which give higher managers power to suspend for 200 work days without pay and without having to prove cause in a state or local tribunal. Civil service employment on such terms would still be more secure than the service at the will of employers of most of the American labor force. Such tolerance would do a lot for federalism and for productivity in the public sector while still making it preferable to security conscious persons.

113. Demotions in grade producing reductions in pay are likely to be treated as substantial trespasses on "property" of tenured servants if they are permanent and large. The administrative tribunals seemingly had viewed things that way in Bush v. Lucas, 103 S. Ct. 2404 (1983), but the lower courts had not. *Id.* at 2408. *See infra* note 151. Query: should reduction by two or three "steps within grade" producing less than a 15% reduction in pay and likely to be recovered in three or four years, be deemed a trespass large enough to require a state hearing and, in default of state hearing, federal court trial? The author believes that some demotional acts of managers should be classified as constitutionally *de minimis* in the interests of federalism, judicial economy, and good order in the segments of the public service with civil service systems.

designing systems, officials must refrain from unlawful classification and discrimination. That branch of public employment law is beyond our agenda. The required level of justification for a system that grants tenure in some agencies, departments, and position classifications, but not in others would depend on the identity of classes of persons adversely affected and perhaps on other rights which may be implicated. Tenure itself, however, is not a fundamental federal right;[114] it is not a federal right at all, but a locally created right. In many cases, a state will be able to justify its classifications by showing advancement of reasonable but noncompelling interests. One challenge based on denial of equal protection to a system with several "paths" to tenure was virtually brushed aside.[115]

This brings us to implied tenure.

D. Implied Tenure

1. Vague or Unrecorded Promises.—The Supreme Court cases[116] which initiated recognition of public employment security as constitutional property, required a source in state law but did not limit the sources and did not reason about state law substantive conditions, defeasances, or bars to substantitive rights. We have already noted that a subjective expectation of the plaintiff servant is not enough.[117] Generally courts look for a reasonably clear entitlement. This is good policy and articulates well with prevailing notions of public contracts. Here it is also relevant to mention oral contracts because, while an oral promise can be express and unambiguous, as a practical matter vagueness and lack of a written memorandum often go together.

The enforceability of oral contracts differs in the several states. We have noted that federal courts who hear constitutional claims usually, but not always,[118] follow state law and refuse to deem oral promises unenforceable in state law, as sources of federal constitutional property. Like requiring clear entitlements, requiring written sources whenever state law does, is good policy and conforms to familiar values in public contract law and public finance. The alternative amounts to judicial legislation of a federal statute of frauds and comes close to creating substantive due process rights of public employment security. That in turn violates the principle of federalism. A particular form of asserted implied tenure should now be

114. *See supra* notes 76-113.
115. Wells v. Doland, 711 F.2d 670, 675 (5th Cir. 1983).
116. *See infra* note 125.
117. *See supra* notes 77-92.
118. *See supra* notes 92 and 97-99.

explored because it illustrates both the interrelations and distinctions between substantive rights and procedural protections.

Tenure systems often include special tribunals to hear objections to disciplinary actions against nonprobationary servants. Occasionally an agency creates a tribunal with greater or lesser power to redress grievances of servants, whether tenured or not, or even in the absence of any promise of tenure as such. An example is a committee at a state college that gives all faculty an opportunity to discuss implications for freedom of expression that personnel decisions may or can have. Also, an agency sometimes promises disciplinary interviews, warnings, or hearings without, in so many words, promising any continuation of service. Employees will argue[119] that such procedural rights for their own sake are nearly meaningless. There is something to be said for the argument. But varied inferences are possible. The question of substantive employment security implied by procedural safeguards is a question of intent.

If an employing agency chooses to do so, it can give everybody a little bit of tenure. Whether it has done so is a question of local law and construction of local documents, promises, and regulations. For example, a state college might promise not to discharge junior faculty members, not tenured in the usual sense, for some few reasons while retaining the privilege to discharge them for any other or for no reason. Alternatively, the creation of panels to hear disputes about certain reasons may not evidence an intent to promise anything more about such reasons than public law provides anyway. Indeed, such panels may limit rights, not enlarge them.

Consider, for example, a promise of a state college to junior faculty not to take adverse personnel action on account of institutional, factional, or decanal disagreement with the published opinions of a faculty member and its creation of a panel to hear grievances about alleged breaches of the promise. In a case so hypothesized, the junior faculty member has not received a promise of employment security or tenure in the usual sense. In such circumstances creation of the special panel does not create a new substantive right because the right of a public employee to publish freely is established with but few limitations by the constitution and by federal precedents and not by local mechanisms or rules. If one assumes that the promises of fairness in matters of free expression

119. In Kurle v. Evangelical Hosp. Ass'n, 89 Ill. App. 3d 45, 411 N.E.2d 326 (1980), plaintiff argued that the state nursing act obliged private hospitals to retain nurses absent objective cause or reduction in force. Plaintiff grounded her argument on clauses in the act requiring employers of licensed nurses to establish channels of "professional" communications for nurses to voice complaints to management and for management to admonish nurses. The court rejected the argument, in effect ruling that a mandatory procedure does not imply a substantive right.

made by the college do not exceed the obligations of the college that the constitution requires in any event,[120] then the creation of panels to hear grievances about the promises may be protective of the institution more than protective of the servant. The state in such a situation may be able to assert a defense of non-exhaustion of remedies to a complaint[121] which alleges trespass on first amendment rights and does not allege prior recourse to the special panel or tribunal. Creation of such panels is not likely to deprive courts of ultimate power or jurisdiction to adjudicate disputes about free expression, but local employment terms requiring that disputes of some types be referred to special panels might be construed as covenants of employees not to sue until they have fulfilled a precondition of prior recourse elsewhere. Closely viewed, protective terms of personnel regulations and employment contracts may create no new substantive rights but rather a limitation upon the enforcement of preexisting substantive rights. This is especially likely in the case of probationary employees.[122]

In *Bishop v. Wood*,[123] a city ordinance required the city manager to warn police officers of deficiencies, to give "reasons" in writing to an officer discharged, and to allow comment by the officer. Plaintiff argued that the requirement that the manager notice "deficiencies" and state "reasons" implied a substantive right to uninterrupted service and pay, absent deficiencies in fact, and implied that the manager could not fire an officer unless there be objective reasons. Construing local law to the contrary, all three federal courts adjudged for the city which had refused to conduct a pre-termination hearing to determine existence or not of real deficiencies, but all three courts agreed that the question was one of state law. One court, in *Edward v. Brown*,[124] found an implication directly opposite to that usually advanced by plaintiff employees. It ruled the

120. If a college promises to afford greater liberty of expression than the constitution obliges, then arguably the employee has an additional substantive right which might be denominated as property; he might therefore in some circumstances enjoy the guarantee of procedural due process that other promises of employment security provide.

121. *See infra* notes 148-49.

122. For an example of such an outcome, *see* Koch v. Board of Trustes 39 Ill. App. 2d 51, 187 N.E.2d 340 (1962).

123. 426 U.S. 341 (1976). Apparently in accord are Swab v. Cedar Rapids Community College School Dist., 494 F.2d 353 (8th Cir. 1974), and Hibbs v. Central Community College, 392 F. Supp. 1202 (N.D. Iowa 1975), both cases concerning Iowa teachers. Iowa has no express tenure guarantees but its statutes outline procedures that boards must use to fire faculty. The courts did not reach or decide the implication issue in *Hibbs* or *Swab* because the boards in question had complied with procedures.

124. 699 F.2d 1073 (11th Cir. 1983). An ordinance provided procedural safeguards to police officers and substantively promised them continued work during "good behavior and efficient service to be judged by the commissioner." The court ruled that the quoted words made the substantive promise illusory. Thus, dismissal of a police major

substantive promise of job security to be ultimately illusory and, for that reason, ruled that the promised procedural protections were dispensable.

IV. THE PROCEDURAL GUARDIANS OF TENURE AND FREE SPEECH

A. Allegations of Denial of Procedural Due Process of Law: The Elements of Substantive Entitlement and Causation

If a discharged public servant without tenure as defined by local statutes, alleges a denial of due process of law but does not allege denial of some substantive civil right, then the charge is demurrable because the due process clause by itself creates few substantive entitlements. Rather it guarantees procedural protection of substantive property or liberty rights created by other sources. For that reason, the failure of a plaintiff to allege either a substantive right to employment or a discrimination in employment on forbidden grounds, implies a failure as well to state a violation of the due process clause. As the Supreme Court expressed it in *Board of Regents v. Roth*: "Property interests, of course, 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 . . . ."[125] Another court put the point in a nutshell: "the Fourteenth Amendment does not create a protected interest."[126]

For there to exist a duty to provide due process, there must be an entitlement independent from the due process clause and worthy of denomination as a "property" or "liberty" interest. One court recently found that a short term expectation based on a verbal employment contract was protected "property" as much as long term tenure based on written policies. The Supreme Court affirmed the decision.[127]

Approaching the same question as one of causation is *Carey v.*

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by the Commissioner without hearing was justified. *Id.* at 1077. The opinion reversed a judgment for the plaintiff officer.

125. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The companion case is Perry v. Sindermann, 408 U.S. 593 (1972). Later it will be argued that the Supreme Court should have found outright for defendants in both cases, that it should not have recognized tenure as constitutional property, and that it should not have conflated the first amendment and the due process clause. *See infra* notes 225-31 and accompanying text.

126. Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980). *See also* Webster v. Redmond, 599 F.2d 793, 796-97 (7th Cir. 1979), *cert. denied*, 444 U.S. 1039 (1980).

127. Vail v. Board of Educ., 706 F.2d 1435 (7th Cir. 1983), *aff'd per curiam by an equally divided court*, 104 S. Ct. 2144 (1984).

Piphus,[128] which teaches that even where an arguable substantive right exists, failure to afford a procedure to ascertain it does not by itself constitute a cause of action for monetary damages; pleading and proof of actual individual loss proximately caused by violation of the underlying substantive property or liberty right is necessary. Failure to afford due process is not generally compensable without proof that the missing due process would have secured for plaintiff a real substantive benefit.[129] But in dicta, the *Piphus* court suggested that mental discomposure caused by denial of due process could be compensated even though the merits of the underlying dispute were with the defendant.[130] But assuming an allegation of duty, damages, and causation, what allegation of breach will suffice? Just what procedures are due to one with a substantive employment right? And when and where must they be afforded?

B. The Character of Procedures Due

Bureaucratic methods of personnel management and removal will often withstand due process scrutiny. In nondisciplinary terminations, nonadversarial factual investigation and review will likely suffice, and many personnel management decisions effected without an adversarial hearing will withstand challenge when the system is systematic and consultative. In *Mathews v. Eldridge*,[131] plaintiff sued the secretary of HEW to enjoin enforcement of regulations governing the continuing payment of benefits to disabled persons. The regulations implement 1956 statutory benefits payable to persons unable "to engage in substantial gainful activity" on account of "physical or mental impairment."[132] The regulations allowed state agencies acting as delegates of HEW to review files and terminate payments without a hearing.[133] A recipient may later request a

128. 435 U.S. 247 (1978). The opinion demonstrates the subtle interplay of the elements of duty, breach, damages, and causation in constitutional torts.

129. 435 U.S. at 255-56. *See supra* note 58 and accompanying text, concerning the causal element in free speech cases.

130. *Id.* at 260-64. It is this possibility combined with the classification of civil service guarantees as property for purposes of the due process clause that creates the disparity in treatment of free speech of different classes of public servants. The tenured servant may charge not only restriction of free speech but denial of due process and can get added damages. More than that, notwithstanding *Carey*, 435 U.S. 247, in at least two circuits, *see supra* note 67, a tenured servant who makes a weak or insincere first amendment claim, arguably can collect damages on his due process count for defendant's failure to provide prior or expedited hearing, even though later trial shows that a hearing officer or other trier of fact would have brushed aside the charge. The disparity seems wrong, and that in turn should make the courts rethink the doctrine that tenure and civil service job security are constitutional "property." *See supra* notes 2, 67 and 77, and *infra* notes 154-55, 164 and 201.

131. 424 U.S. 319 (1976).

132. *Id.* at 336.

133. The regulations create a system of monitoring by state agencies. The state

hearing by a federal administrative law judge. The time elapsed from a demand for a hearing and a written decision was typically eleven months.[134] Some 3.3% of benefit denials had been reversed by the state review process. Administrative law judges had reversed some 58.6% of denials sustained by the state agency.[135]

This particular case conformed to this pattern[136] but the particular consequences were extreme. Creditors foreclosed on the home of plaintiff and repossessed his furniture so that plaintiff, his wife, and their children had to sleep in one bed.[137] The opinion, however, emphasizes that the typical scenario is what is relevant to the constitutional issues. The trial court had ruled that the Social Security Administration must afford an evidentiary hearing before terminating benefits. The Court of Appeals had affirmed but the United States Supreme Court reversed.[138]

The rationale is a balancing of interests. The due process clause is not a technical rule; it relates to time, place, and circumstance.[139] With this proviso, the Court gives the usual rule: something less than an evidentiary hearing is sufficient prior to adverse agency action.[140] The court identifies four factors which will sometimes dictate a need for prior hearing: the private interest jeopardized, the risk of erroneous deprivation in the existing procedures, improved accuracy expected from substitute or added safeguards, and the governmental interests injured or burdened by the substitute or additional procedures.[141]

As for risk of error, the Court reasons that the relevant inquiry is medical and that the value of an evidentiary hearing to a decisionmaker is not great when the issues are medical because hearings are designed principally to determine issues of credibility. The

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agency regularly inquires of recipients by mail or phone and requires proof of continuing disability. Regulations impose a continuing burden on the recipient to prove disability. The agency obtains data from providers of medical service as well as from a questionnaire from the recipient to prove disability. A team of two persons reviews the material. One is a physician; one is a layman. They determine the existence or nonexistence of continued disability without a hearing. The state notifies the recipient of the decision. When it is adverse to a recipient, he may examine the file, submit more data, and request reconsideration. But no adversary hearing occurs. The Social Security Administration affords a hearing on demand but only after the recipient has requested state agency reconsideration. The Social Security Administration terminates benefits two months after the date which the state agency finds was the day the disability ceased. It does not pay benefits pending hearing.

134. Mathews v. Eldridge, 424 U.S. at 342.
135. *Id.* at 346.
136. *Id.* at 324-25.
137. *Id.* at 350 (Brennan, J., dissenting).
138. *Id.* at 349.
139. *Id.* at 335.
140. *Id.* at 343.
141. *Id.* at 335.

Court notes that the regulatory system allows the recipient to supplement the file with added data or opinions and to request reconsideration.[142]

Against the probativeness of the system and unpromising likelihood of large improvement by prior hearing, the opinion weighs the governmental interest. It notes the complication and delay of prior hearings and the large cost of hearings and of interim payments to ineligible persons. It even notes the possibility that such costs might result in budgetary action to reduce payments to eligible persons. These facts outweigh the harm to erroneously terminated recipients despite very harsh results in an occasional hard case. Rules are to be shaped by the overall risk of error inherent in the generality of cases and not by preoccupation with exceptional cases. Legislators and administrators are free to select a procedure reasonably appropriate to the type of decision to be made.[143]

The last part of the rationale is deference to legislative and administrative balancing. In the absence of bad faith, the assessment of the relevant factors by administrators is entitled to some weight. The court assumes administrators acting in good faith will design procedures to reduce error to a low level.[144] That affords due process of law even though some errors unfortunately occur despite good will and reasonable design.

One lower court[145] refined the *Mathews* principles by declaring that the required degree of added procedural safeguards, if any, varies directly with the importance of the private interest affected and with the usefulness of the additional safeguards advanced and varies inversely with the governmental burden and any other adverse consequences of affording the added safeguards.

Query, under *Mathews*, could an agency which promises its servants continued employment on the condition of efficiency, devise a system of efficiency rating computed by observations and measurement by several persons expert in the area of performance and who consult with one another over time, justify termination of a person with several low ratings who had served long enough to obtain tenure under local law? Suggested, such a procedure is lawful if it gives the servant an opportunity to comment to the decisionmaker on the ratings and if it possesses some safeguards against extreme partiality of the observers. Ascertainment of efficiency is better made by means other than a trial. What procedure is due to the holder of a right depends upon local substantive law defining the

142. *Id.* at 346.
143. *Id.* at 345.
144. *Id.* at 349.
145. Coralluzzo v. New York Parole Bd., 420 F. Supp. 592, 597 (W.D.N.Y. 1976).

right and substantive conditions. Yet assuming that an adversary hearing be required, where and when should it be completed?

C. *The Place to Proceed*

In what local forum one may litigate is a question of the local law of subject matter jurisdiction. The due process clause does not require a local jurisdiction to allocate disputes among its tribunals in any particular way. The question of identity of the correct local forum is not a federal constitutional question. When the employment is employment in the federal service, questions of allocation of adjudicatory power become questions of federal constitutional separation of powers but not questions of construction of the due process clause. The due process clause regulates the procedure of tribunals and the timeliness of their action but does not require tribunals of one identity rather than another.[146]

Absent a statute allocating the task elsewhere, the courts of general jurisdiction hear employment disputes from the public sector. However, most public employment tenure schemes create special tribunals to hear disputes between nonprobationary employees and the employing agency concerning cause and condition. A jurisdiction may create several tribunals[147] to hear disputes about different conditions or causes. Universities and schools sometimes create a separate tribunal to hear disputes about alleged motives of superiors to limit free expression.

The jurisdiction of federal courts over first amendment disputes is concurrent. But the federal courts themselves will sometimes close their doors to litigants who by-pass state tribunals.[148] When there is a doubt about either their access to or the subject matter jurisdiction of a special tribunal, nonprobationary employees are well advised first to assert first amendment rights in administrative tribunals, lest courts, especially federal courts, later entertain a defense plea of prematurity, failure to exhaust administrative remedies,[149] lack of standing,[150] or even *res judicata*.[151] But when local

146. 16A AM. JUR. 2D *Constitutional Law* § 854 (1979); State *ex. rel.* Burchett v. Taylor, 150 W. Va. 702, 149 S.E.2d 234 (1966). But a federal statute implementing the fourteenth amendment and granting aid to the states may oblige the states to create new tribunals. Turbedsky v. Commonwealth Dept. of Labor & Industry, 65 Pa. Commw. 363, 442 A. 2d 849 (1982); Helms v. McDaniel, 657 F.2d 800, (5th Cir.), *reh'g denied*, 664 F.2d 291 (1981), *cert. denied*, 455 U.S. 946 (1982).

147. Koch v. Board of Trustees, 39 Ill. App. 2d 51, 187 N.E.2d 340 (1962), *cert. denied*, 375 U.S. 989 (1964), mentions a number of tribunals or panels at the employing agency, a university.

148. The developing view is that state remedies after the fact are all that is due. *See infra* notes 153-57. This is a more fundamental limit than the defense of failure to exhaust other remedies. *See supra* note 122 and *infra* note 149.

149. For a spirited dialogue about the nature of the exhaustion defense, its availability in public employment cases, and its relation to the issue whether prior hearing is the

law makes it very clear that no administrative tribunal has subject matter jurisdiction to hear disputes about free speech or that probationary employees are denied access to such panels, then seeking administrative relief would be a waste of time. Even if the parties cooperate, the proceedings would be a nullity, because the parties cannot confer subject matter or remedial jurisdiction upon a tribunal.[152]

When an administrative tribunal has jurisdiction to hear a dispute about substantive rights of free speech and tenure and a servant has access to it, then the servant should assert any claim of denial of due process before that tribunal, lest a later claim elsewhere be barred. Examples are disputes about tardiness in a proceeding amounting to a denial of due process of law. A nonprobationary servant who believes that his unfairly long suspension pending hearing denies him due process of law will be well advised administratively to assert that unfairness along with his assertion of violation of his substantive rights.

While selecting forums, both agencies and servants must keep in mind any time limits for action stated by local law. If such limits are either bars to action or restricted times to perfect inchoate causes or claims, then activity in the wrong forum may not interrupt their running. Time limits of those sorts operate in substance. Though running of time is sometimes said to rob a tribunal of "jurisdiction," usually what it does is to rob a litigant of a claim or defense, and mistaken activity in the wrong tribunal does not save

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procedure due, *see* Vail v. Board of Educ., 706 F.2d 1435 (7th Cir. 1983) (Eschbach, J., concurring) and at 1453-56 (Posner, J., dissenting). The history of and exceptions to the doctrine that the defense of failure to exhaust administrative remedies does not operate in 42 U.S.C. § 1983 actions are very well explained in Castelaz v. Milwaukee, 94 Wis. 2d 513, 514-16, 289 N.W.2d 259, 266-68 (1980).

150. To answer the question whether a position is a high level position for purposes of implementing federal precedential distinctions used to define the extent of the privilege of the servant to criticize superiors and the employing agency, requires recourse to local law defining the office or duties of the servant and the organization of the agency. *See supra* notes 6 and 7.

151. The court has ruled that arbitral decisions against employees claiming racial discrimination and inadequate pay do not bar Title VII or Fair Labor Standards Act suits alleging the same elements. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 782 (1981). The Supreme Court reversed an unreported Sixth Circuit decision which barred a claim of discrimination a public employee had made and lost in a "just cause" arbitral hearing. McDonald v. City of West Branch, 104 S. Ct. 1799 (1984). Stronger even than *res judicata* is the defense of merger in judgment. In Bush v. Lucas, 103 S. Ct. 2404 (1983), a public servant punished first by transfer and then by demotion, got back pay and restoration of grade from an administrative tribunal but later sued in district court for added relief. All three tiers of federal courts rejected his claim, ruling that the administrative relief authorized by statute was all he could obtain notwithstanding the constitutional source of the substantive right (free speech) in question.

152. 20 AM. JUR. 2D *Courts* § 139 (1965).

the claim or defense.[153]

D. The Time of Proceeding

1. Prior Hearing in General.—Nonprobationary or so called tenured employees, by statute are often entitled to some form of predetermination hearing to contest the issue of cause for discharge. But it is typical for tenure statutes to allow suspension of an employee and his income pending hearing and resolution of the dispute.[154] The existence of such suspensions without prior hearing suggests that in real effect statutory predetermination hearing rights hardly exist in the public service in the United States. As we shall see[155] when we come to the constitutional cases, such preliminary suspension procedures have largely survived constitutional attack. The stage for such attack has been set only when a court first has found substantive rights and a requirement of a hearing. Then, and only then, there arises a further question about timeliness: may the agency interrupt work and income of a person to whom it has promised employment continuity before it invokes or completes the procedures required? This is a constitutional question distinct from time limits and time bars established by local law.

The constitutional time inquiry asks what sequence of actions, if any, does the due process clause require? Such a question differs from questions of ripeness and from inquiries whether there be a matter in bar of trial such as limitations or another affirmative defense; it differs from the question whether a guarantee of speedy trial has been violated or not.[156] Failure of an agency to invoke its procedures soon enough or failure of the agency promptly to complete its procedures, once invoked, may constitute defenses of the employee as a matter of local law.[157] How such time limits should be categorized is itself a question of local law.[158] Some local stat-

153. For an example of a case in which plaintiff argued jurisdiction when he might better have argued matter in bar or nonperfection of a cause for discharge, *see* Carter v. State Bd. of Educ., 90 Ill. App. 3d 1042, 414 N.E.2d 153 (1980). On the distinctions among dilatory pleas like want of jurisdiction, pleas in bar like limitations and justification, pleas to the general issues, and the *sui generis* plea of want of speedy trial, *see* Halligan, *Speedy Trial and the Criminal Appeals Act*, 55 MARQ. L. REV. 457 (1972) [hereinafter cited as as Halligan, *Speedy Trial*].

154. 63A AM. JUR. 2D *Public Officers and Employees* §§ 255-60, esp. § 258 (1984) (prior hearing not required by the due process clause).

155. *See supra* notes 2, 128-30, and *infra* notes 162-70, esp. 169. *But see also supra* notes 100 and 101.

156. Halligan, *Speedy Trial*, *supra* note 153.

157. For example, Carter v. Board of Educ., 90 Ill. App. 3d 1042, 46 Ill. Dec. 431, 414 N.E.2d 153 (1980); Litin v. Board of Educ., 72 Ill. App. 3d 889, 28 Ill. Dec. 863, 391 N.E.2d 62 (1979); Jones v. General Superintendent of Schools, 58 Ill. App. 3d 504, 16 Ill. Dec. 59, 374 N.E.2d 834 (1978).

158. Some time limits are more like speedy trial guarantees, others more like bars by

utes with strict time limits introduce a concept of a no claim rule which makes misconduct of a servant a merely inchoate ground for discharge which must be perfected by the employing agency's taking prompt action.[159] Others introduce notions of waiver[160] or estoppel like those found in employment contract cases.[161] All of these subjects are important but do not define the sequence of action required by the due process clause. Our subject here is timeliness or promptness of deliberative procedures as an aspect of due process and the lawfulness of adverse personnel action taken pending the outcome of those procedures. The prohibition of taking of property or liberty "without" due process, taken literally, might imply a requirement of prior adjudication of grounds whenever the entity denying or taking is governmental. Thus, our inquiry is, in a sense, how we should interpret the word "without" in the phrase "without due process of law." The balance of interests test in *Mathews*[162] suggests, that the answer to the question when must a hearing be scheduled, assuming it be necessary, likewise depends on the surrounding circumstances.

Less poignant than *Mathews v. Eldridge*[163] but more relevant here is *Arnett v. Kennedy*,[164] which explores due process of law in public employee removal under United States Civil Service regulations which permit managers to fire protected career service employees on thirty days notice. In *Arnett* the government had fired plaintiff because he wrongly accused his superiors of bribery. He sued without first demanding an administrative hearing. The post dismissal hearing privilege sufficed to validate the statutory procedure. The Court refused to excuse the failure of plaintiff to exercise the privilege.

In retrospect, *Arnett* appears to be the start of a trend, which continued with *Mathews*, to categorize subsequent proceedings as

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way of limitation; yet others are like appellate court time limits, or like no claim rules for want of timely perfection of the chose in action. Some are *sui generis*.

159. Some property rights or claims are "inchoate" and must be "perfected" by more or less strict adherence to procedures within strict time limits. Perfection is a more than usually important precondition to such a claim. The notion is that there is no claim or right or property or lien absent the acts of perfection. In civil law the best known example is the mechanics' lien. 53 AM. JUR. 2D *Mechanics' Liens* §§ 167, 178 (1970).

160. 53 AM. JUR. 2D *Master and Servant* § 47 (1970).

161. Waiver, of course, is an affirmative defense (or matter of reply when asserted by plaintiff) whereas an assertion that an inchoate right of the plaintiff was never perfected is a defense litigated as a part of the general issues. 28 AM. JUR. 2D *Estoppel and Waiver* §§ 168, 173 (1966).

162. 424 U.S. 319 (1976).

163. *Id.*

164. Arnett v. Kennedy, 416 U.S. 134 (1974). In effect the court permitted suspension without pay, pending hearing. *See supra* notes 2, 67, 116-17, 140-41, and *infra* note 187.

generally sufficient constitutionally. Two cases validate common law tort forms as adequate remedies for wrongs of the state. In *Parratt v. Taylor*,[165] trespass, negligence, and conversion were ruled adequate remedies for loss by an inmate of his tangible personal property on account of alleged wrongs by prison workers. In *Ingraham v. Wright*,[166] the Court balanced the interests of school officials and of pupils who recieve corporal punishment. It concluded that the due process clause left local governments free to select abbreviated, informal prior hearing or instead to rely on initiation by a pupil of post punishment hearing in a court of common law under forms of action such as battery.

More recently, in a case of violation of first amendment rights, the Court found the after the fact personnel code remedy in the federal service not only an adequate but an exclusive remedy.[167] The initiative changes in such cases.[168] The plaintiff sues after the governmental agency has acted. These moderate balancing tests contrast with absolutist arguments that the constitution requires an adversarial proceeding in advance of any serious adverse personnel decisions affecting a non-probationary public servant.

The policy of balancing interests reflects traditional values. Balancing of interests is a technique of the law of torts and especially of the law of negligence.[169] Nor is the balancing of interests new in first amendment cases. In *United States v. Dennis*,[170] Judge Learned Hand proposed that in each case the court evaluate alternatives by ascertaining the gravity of potential harm of each alternative weighted by the probability or improbability that the potential harm will occur.

2. Prior Hearing of Disputes About Free Expression: Interests Protected and Interests Not Protected by the First Amendment.— Some tribunal equipped to conduct adversarial hearings should be open to a citizen who asserts that a government has violated his

165. 451 U.S. 527 (1981).

166. 430 U.S. 651, 679-80 (1977), where the opinion uses the methodology of a calculus of interests like that used in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

167. Bush v. Lucas, 103 S. Ct. 2404 (1983).

168. The general effect of providing an administrative hearing after the fact and requiring the implicated citizen to initiate it by demand, was explored in Fahey v. Mallonee, 332 U.S. 245 (1947), cited with approval in *Arnett*, 416 U.S. at 153-54, which held that such later hearing initiated by plaintiff fulfilled the guarantee of due process. In *Fahey*, owners of a savings association attacked the constitutionality of a federal statute under which defendant administrator had seized its assets on grounds of mismanagement and danger to depositors. The statute allowed owners to contest the seizure and regain possession and control. But the initiative to seek administrative hearing was with the owners and delay might be substantial.

169. 57 AM. JUR. 2D *Negligence* § 70 (1971).

170. 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). The Supreme Court uses a *Dennis* type calculus in due process cases. *See supra* notes 137-44.

right to free expression by firing him. But before a government may fire a servant, must he have an opportunity of prior hearing to test his allegations? Many servants claim the answer is yes. The procedural right claimed is priority of hearing; the source is said to be the due process clause. Particularly interesting are assertions of such due process rights for probationary and at will employees rather than for "tenured" servants. But to understand the former, let us consider the latter first.

When they arise, disputes about free expression of tenured servants will usually be implicated in disputes about the possible existence of cause for discipline. This may imply a right to a hearing in advance of discharge because the discharge is itself a forfeiture or taking of an independent right deemed property for purposes of the fourteenth amendment. In that situation the first amendment and fourteenth amendment are both violated by a wrongly motivated discharge effected without hearing. Yet one can imagine a case in which there exists an unambiguous but unconstitutional local rule limiting speech of public servants. In such a case, one may hypothesize a violation of the first amendment without simultaneous violation of the fourteenth.

Assume a public servant who readily admits his affiliation with an organization which is prescribed under local law; assume that non-affiliation with that organization is a locally well defined precondition to continuity of employment with the agency in question; assume further that the local precedents have definitely decided that the affiliation in question is not protected by the first amendment. Assume even further, however, that the employee disputes the local precedents and wishes to assert his federal first amendment rights and to challenge the state precedents as error. Must a nonprobationary servant in these circumstances insist on a hearing prior to his discharge, await discharge, and thereafter take his case to the federal court or to the state court with general subject matter jurisdiction? From the viewpoint of the servant, he should not have to demand futile local hearings before having access to federal or state court. And from the viewpoint of the governmental employer, can it be said that the employing agency has violated the rights of the servant to due process should it fail to convene a prior hearing? Arguably, the answer is no. If there is no dispute about the local contractual conditions and their nonfulfillment, then there is no obligation, one might argue, to conduct any pre-discharge hearing. But the holding in *Perry v. Sindermann*[171] and the dicta in *Board of Regents v. Roth*[172] imply the contrary. Those cases seem to require

171. 408 U.S. 593 (1972).
172. 408 U.S. 564 (1972).

public employers to afford prior hearings to tenured servants but not to others, in order to try first amendment disputes surrounding job terminations. The requirement of prior hearing for tenured servants depends on local law and employment contracts. Yet the safeguards of first amendment rights of such servants are imposed whether or not local agencies have made any special promises or commitments about free speech. It is as if an agency that promises any substantive employment security, must also promise special solicitude for free speech or, at the least, must afford extraordinary procedural protection of free speech of some servants if it has promised them other things. This makes job security of any sort an involuntary carrier of special safeguards of free speech, or a sort of tying requirement, a mandatory package deal imposed by the Supreme Court. Later we will criticize this adhesive treatment of job security and free speech. But first we must explore its implications and demonstrate the anomalies it produces in different treatment of tenured and nontenured public servants.

In a case like the one hypothesized the tenured servant should have ready access to state and federal courts to allege denial of free speech but not to allege denial of due process. Yet a hypothetical of this sort is improbable. A tenured servant will usually enjoy some locally defined right to hearing, prior to dismissal, in some forum, when the asserted cause for discharge is an act by him allegedly protected by the first amendment, and he is well advised to exercise the right to prior hearing. But the assertion of a right to prior hearing is not cogent when made by probationary servants or servants of agencies that have no tenure system. By definition, such an employee is a servant to whom the agency has not promised continuity of employment. It follows that the agency need not convene or approach any tribunal before adverse action.

Probationary and other nontenured public servants dispute this[173] conclusion when they allege that the motive of their superiors in dismissing them was opposition to their opinions.[174] Many cases arise in agencies where some servants are tenured but plaintiff is untenured.[175] However, the argument has not been made that to give some servants security against dismissal on account of opinion denies equal protection to others not tenured.[176] Rather, the argu-

173. For example, Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

174. Plaintiff servants would like to be able to secure procedural barriers to their discharge by their unilateral acts of making charges. But this bootstrap argument has been rejected. *See supra* notes 2, 67, 77, 128-30, 151-53, 164, and *infra* note 201.

175. Untenured servants most given to claim breach of first amendment rights are probationary and junior faculty in public schools and colleges where tenure systems are widespread.

176. Where some but not all servants are tenured under local law, such an argu-

ment seems to be that the first amendment creates not only freedom from prior restraint and criminal punishment of speech but also a property interest in a public servants' position for the purposes of the due process clause. The argument was brushed aside in *Palmer v. Board of Education*[177] and it is fair to predict that the Supreme Court would reject it also. This prediction can be categorized three ways, each of which has different implications for construction of the first amendment. The three parts of prediction parallel three different possible categorizations of an act of a government to discharge an employee deliberately on account of opposition to an opinion she has expressed.

One categorization of such dismissal is that it is itself a trespass on a right or an *injuria*. This categorization puts dismissal in the same category as, say, seizure of pamphlets. The best indication that the Court will not so categorize a dismissal is dicta in *Board of Regents v. Roth*[178] which distinguishes direct and indirect infringe-

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ment, for a limited right of a probationary servant to so much employment continuity as is needed to foster free expression, would not claim that employment security is an interest of public servants protected by the first amendment, but would assert that the guarantee of equal protection forbids a government's affording employment security against dismissal on account of opinions to some servants but not to others. This proves too much and produces unreasonable consequences. What the argument tends to assert is this: if an agency promises employment security of any sort to any servants, then, at a minimum, it must someway provide for the resolution, before termination, of disputes between the agency and any of its servants concerning allegations of trespass by the agency on the rights of free expression of the servants. It might be a fine idea to do such a thing, but it seems on the face of it to be an extreme proposal to oblige all state and local and federal agencies to do so. Another reason to repudiate the argument is that it is doctrinally inelegant. This argument for a requirement of prior proceedings before any termination where there is alleged to be a dispute about free expression, is an argument based not on the amendment which protects free expression, the first amendment, but upon the due process and equal protection clauses of the fourteenth amendment coupled with the choice of an agency to promise employment security of an extraordinary sort to some servants and not others. It is strange or even bizarre to derive procedural rights designed to protect free expression not from indestructable substantive rights created by the first amendment but from local substantive tenure rights which an agency can obviate and which are, at that, rights of third persons. Unlike the arguments more often made, this sort of argument would be possible only when an agency promises tenure to some of its employees. Such arguments have failed in the few cases where plaintiffs have made them. *See supra* notes 114 and 115.

177. 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

178. In *Roth*, the Supreme Court, in dicta, commented that "[i]n the respondent's case, however, the State has not directly impinged upon interests in free speech. . . . [T]he interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest." *Roth*, 408 U.S. 564, 575 n.14 (1972). The Court contrasted post speech discharge with such things as pre-utterance injunction of speech or pre-sale seizure of writings. In the text of the opinion, the Court said that the first amendment issues in the case below were not before it. *Id.* at 574. In Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir., 1980), the District of Columbia Court of Appeals remanded and directed the trial court to fashion remedies, but stated that in the case of a probationary police officer there is no "tenure" to be "protected." *Id.* at 1283. Since the due process clause is not mentioned, the intent must be to say that loss of a job in a case grounded

ment of free speech for purposes of the due process clause. Another indication is the appreciation[179] of the distinction between *injuria* and *damnum* and the view that dismissal is often only the latter.

Rejection of this first categorization is just, because it recognizes differences in both the character and results of different restrictions. Firing a servant who has spoken does not literally prevent the utterance as does injunction, seizure, or arrest, and its character is less drastic than criminal prosecution for having spoken. Rejecting this first alternative classification directs exploration of both first amendment and due process questions along reasonable lines and fosters a balancing of interests rather than an abrupt conclusion.[180]

The second categorization would be to classify retaliatory dismissal as *damnum* or a compensable consequence of a violation of the right of free speech. Under either of these first two constructions, employment security is impliedly an interest protected by the first amendment. In the first view it is a principal interest protected. That would imply a strong claim of a procedural right to prior hearing lest an essential substantive right be forfeited without due process of law. The Court, as stated,[181] seems to reject that view. The second view could be adopted with or without finding a right to a prior hearing and requires more analysis than the other two alternatives. We will return to it after discussing the third categorization of retaliatory dismissal.

The third category is *injuria sine damnum*. This category again presupposes protected speech of plaintiff. But under this view the practical loss is not a legally recognized loss. That is, the practical hardship is not legally cognizable as damage. Stated yet another way, this third view is the notion that employment security is not an interest protected[182] by the first amendment. Some authority for

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on the first amendment is *damnum* and not *injuria*. The opinion says nothing about damages assessment.

179. Delaware State College v. Ricks, 449 U.S. 250 (1980). *See also* Carey v. Piphus, 435 U.S. 247 (1978).

180. In Carey v. Piphus, 435 U.S. 247 (1978), the Court in effect subsumed the constitutional wrong of violation of the due process clause to the tort of case, not trespass, by disallowing presumptions of compensable damages and requiring specific proof of individual harm. In *Delaware State College*, 449 U.S. 250, the court again drew the distinction between *injuria* and *damnum* and ruled that the Title VII limitations begin to run when defendant commits the wrong or *injuria* and not later when the consequence or *damnum* become complete. The opinion indicates that actual removal from a position and cessation of wage payments may sometimes be the *injuria* or wrongful act and sometimes the consequences of a breach or violation of or a deviation from right. *See also infra* notes 219-22.

181. *See supra* notes 178 and 179.

182. In this Article, the phrase "interest protected" has the meaning of the phrase found in treatises on damages and the like. The phrase "protected speech" in constitutional law, though perhaps prompted by the common law phrase, differs. The concept of interests protected is partly substantive and partly adjective law. The concept of

that view is dicta[183] mentioned earlier and rationales in cases of employee discipline by means less drastic than outright dismissal.[184] Perhaps in rationales of permissible subsidies[185] and other instances of governmental support of points of view,[186] one can find yet more

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protected speech, whatever its origins, is now a concept of substantive law. Viewing retaliatory discharge of an outspoken public servant as *injuria sine damnum* implies that wages and work are not interests protected by the first amendment. But the view of discharge as *damnum absque injuria* tends to imply that the speech in question is wholly or partly unprotected speech. A few points of the substantive law of the first amendment separating protected speech from unprotected speech are found at *supra* notes 4-57 and accompanying text.

183. *See supra* notes 178 and 179. *But compare* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), and Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir., 1980). In both those cases the courts said that a probationary, nontenured servant may sue for damages for violation of first amendment rights when his public employer has discharged him on account of an expression of opinion or proposal by him.

184. Cases in which servants transferred to less attractive duties have recovered or at least sustained their complaints against demurrer when they alleged a motive of defendant agency to retaliate for speech of plaintiff criticizing the agency or its officials are cited in Riechert v. Draud, 511 F. Supp. 679 nn.7, 10 (E.D. Ky. 1981), and at first view seem to cut the other way. But the court reads them generally to include allegations either of pay reduction or of "demotion" in some other real and substantial sense in circumstances of tenure or civil service systems. The opinion concludes that a plaintiff must qualitatively allege a "legally cognizable" harm besides a great enough quantum of harm. *Id.* at 686. While suggesting that subjection to adverse action with substantial, objective competence to chill speech might sometimes *per se* be legally cognizable harm, the rationale seems to be that usually the harm alleged must be loss of all or part of a right, other than freedom of speech, created by local law, such as employment security and pay for such employment. In *Riechert* the court found retaliatory motive, found that the motive in fact led directly and immediately to change in work assignment of plaintiff, and found that the change distressed plaintiff and did not help the employing agency, but nevertheless adjudicated for defendant. On the facts, the teacher plaintiff had for seventeen years taught an elective course in psychology in senior high school and enrollment in it was full. *Id.* at 682. The principal switched her to a mandatory junior high school English class because she had criticized pupil assignments and other actions. She had job tenure but no guarantee of program content.

185. The Court sustained the statute awarding subsidies for presidential campaigns of only "major" parties in Buckley v. Valeo, 424 U.S. 1, 92-93 (1976). Query, are the abortion funding decisions additional authority justifying use of non civil service payrolls and the processes of employment or even dismissal to support some views, opinions, or values? The abortion funding cases sustained state and federal statutes against various challenges including ones based on the first amendment and ruled that state and federal agencies may subsidize parturition and not subsidize abortion as a reflection of policies to favor life and parturition and to discourge abortion. Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980). *See supra* notes 33-39, 51, 52, and 84.

186. The clearest examples of state subsidy of ideology are school and university curricula and research plans, programs, and budgets which usually are loaded to favor some subjects, often very specifically, and some methodologies and methods of research and instruction, while others are virtually neglected completely. Yet these choices seem impenetrable to constitutional attack even when changes in appropriations make individual employees redundant. *See supra* notes 33-39. Let us reconsider *Mt. Healthy*, 429 U.S. 274 at this point. The Court says that want of tenure does not bar a plaintiff from asserting dismissal or non-rehiring as a trespass on rights of speech. But the Court views the action of the school board, so far as it constitutes a reaction to speech of plaintiff, as no more than a petulant "ad hoc response" to an acerbic teacher who disliked a proposed dress code. *Id.* at 282. Query, would more deliberate action on a more

authority for this notion of damages not cognizable or interests not protected. On this view, loss of public employment by an outspoken servant is withdrawal of a subsidy of his viewpoint and not a harm inflicted, penalty, or *damnum*. While there are contrary cases[187] currently read in several different ways by members of the Supreme Court,[188] some pledge cases[189] and other cases limiting rights of association[190] of public servants might support this conception of public employment as might some cases[191] which uphold dismissal of servants who criticize the program of the agency though they neither obstruct the program nor refuse to perform their own part in it.[192] On the other hand, the patronage[193] cases are opposed to this view of public service but not as strongly as one might suppose,[194] especially when they are read along with the

serious subject like the curriculum be a different matter? Suppose, for example, that Doyle had sneered at the curriculum and that the emphasis or sentiment of the board had been not firing Doyle but recruiting another person truly enthusiastic about the designated curriculum and keen to teach it? What result then? Suggested, the outcome would have been different. *See supra* note 17.

187. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Torcaso v. Watkins, 367 U.S. 488 (1961); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); United Pub. Workers v. Mitchell, 330 U.S. 75 (1946).

188. Compare the reading of four judges who joined in the opinion of the Court in Elrod v. Burns, 427 U.S. 347, 356-60 (1976), with that of the dissent of three judges, *Id.* at 387-89. Two judges specially concurring in the result only said that questions about politically biased hiring had not been presented and should not have been mentioned. *Id.* at 374-75.

189. *See, e.g.*, Biklen v. Board of Educ., 406 U.S. 951 (1972).

190. Again to use public education as a touchstone, both mandatory membership and prohibition of membership in unions and occupational associations have withstood constitutional challenge, 68 AM. JUR. 2D *Schools* §§ 131, 175 (1952), and unconventional sexual preferences unaccompanied by criminal or indiscreet conduct have sometimes disqualified applicants for teaching positions and led to dismissal of persons already serving. *Id.* at §§ 133, 176.

191. Schmidt v. Fremont Co. School Dist., 558 F.2d 982 (10th Cir. 1977); Kaprelian v. Texas Woman's Univ., 509 F.2d 133 (5th Cir. 1975). But this aspect of those cases may have been undercut by the Supreme Court, *supra* note 6 and 7. However, the Supreme Court precedents do not diminish the value of *Kaprelian*, *Schmidt*, and cases cited in *supra* notes 8-22, as authority for the proposition that nonperformance is not protected. Moreover, Connick v. Myers, 461 U.S. 138 (1983), somewhat limits *Pickering*, 391 U.S. 563 (1968).

192. It should go almost without saying that an employee who fails to perform his assigned tasks or obstructs agency business ought to be discharged without any inquiry about whether his motive be religion or other beliefs. *See supra* notes 8 and 22. The reason is that nonperformance is not protected speech, and that reason operates whether or not employment security be an interest protected by the first amendment. *See supra* note 182.

193. Elrod v. Burns, 427 U.S. 347 (1976).

194. The only thing very certain is that patronage dismissal of low level, nontenured, non-policy making employees is illegal when motivated by their refusal to join a party, contribute money to its treasury, canvass voters for its candidates, and obtain endorsement or sponsorship from its captains. Elrod v. Burns, 427 U.S. 347. The justices could not agree on a majority opinion. There is no reason to suppose that in a patronage firing case the elements are fewer or modes of proof less demanding than in other suits based on the first amendment. *See supra* note 183. Rules and statutes re-

cases[195] and statutes[196] limiting partisan activity of public servants. First amendment cases[197] adjudging for defendants are easier to read as decisions finding either that the activity or speech was not protected or that the trespass by the employing agency was justified by compelling government need. That is, cases insinuating *injuria sine damnum* are more readily read as cases finding *damnum absque injuria*, in other words, finding no trespass[198] upon substantive first amendment rights. The third view is not likely to prevail.

Under this third conception of dismissal of one who has spoken protected speech, *injuria sine damnum*, a plaintiff who is a nontenured servant can claim no violation of the due process clause because the precedents[199] are clear that where the thing plaintiff has lost is not legally protected, then no deprivation of property occurred and he has no right to hearing or process.

Since the first categorization has been repudiated and the third categorization of discharge is unlikely to become operative, we return to the second. That is the view that discharge of a public servant is a compensable loss when it is a proven consequence of a wrongful motive of the employing government to suppress or quiet speech. The question then becomes: can a nontenured servant dismissed without prior hearing, who proves the motive and causal connection between it and his loss of work, sue not only for restriction of speech but for denial of due process?[200] As a preliminary

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quiring public servants to refrain from partisan political activity have been sustained. *See infra* note 195. On many aspects of patronage, issues are open and circuits are divided. Annot., 51 L.Ed.2d 924, § 8 (1978). To be distinguished are cases brought not by non civil service employees themselves but by candidates for office and their voting, taxpaying supporters who claim disenfranchisement of office seekers and voters who must oppose a publicly paid patronage army. Shakman v. Democratic Org. of Cook Co., 435 F.2d 267 (7th Cir. 1970).

195. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

196. All fifty of the states have enacted a "Little Hatch Act." *See* 413 U.S. at 604 n.2.

197. *See supra* notes 189-91, and 195.

198. *See supra* notes 4-57 and accompanying text.

199. *See supra* notes 125-29. In the Iranian hostage bargain litigation, the Supreme Court reasoned that when rights are frustrated by the government, the frustration is actionable as taking of property without due process of law only if the rights were judicialy enforceable by both judgment and also execution or attachment. Only monetarily collectible choses in action destroyed by the government can be said to be property taken without due process. Seemingly wrongful destruction of an uncollectable claim is no more actionable as a denial of due process than action thoroughly without fault. Dames & Moore v. Regan, 453 U.S. 654, 688 n.14 (1981).

200. Realistically, the risk of liability for an added increment of monetary damages imposed because a dismissal violated not only the first amendment, but simultaneously the due process clause of the fourteenth amendment is a trivial exposure after Carey v. Piphus, 435 U.S. 247 (1978). The more serious matter would be bills by servants for injunctions forbidding discharge pending trial. Query, assuming employment continuity as an interest, of servants without local tenure, protected by the first amend-

point we can say that the servant must prove a retaliatory motive and causation; it is not enough that he show he charged those elements or raised them in discussion before his discharge.[201] But even assuming such proof, the answer should be no. In taking up the question, we assume job security as an interest protected[202] by the first amendment but reason that post discharge suits in courts of general jurisdiction are an adequate remedy when the competing factors are computed by the calculus of *Mathews*.[203]

The private interests are not strong. The speech itself will not have been restrained.[204] The loss of the public job may be more or less severe. The probationary status or the absence of a tenure system implies few expectations of job security and no forfeiture of accumulated property. Continued work, after uttered speech, in a job without tenured status under local law, is not, in the constitutional hierarchy, a great right. As stated before, its very existence as a constitutionally protected interest is questionable.[205] Moreover, suspension pending hearing would be available to the employer so that interruption of income of servants would often occur in any event.[206]

The probability that an added safeguard of pre-termination hearing will prevent many ill motivated dismissals is small. A post discharge suit is an adequate deterrence and existence of pre-termination hearing rights is not likely to make proof of motive and causation any easier. Reduced injustice or lesser error in individual cases is not a likely consequence of extending a right of pre-termination hearing to probationary employees even when they have strong evidence they were fired because they expressed opinions contrary to those of their superiors.

Moreover, the burden on the governmental employers would be great. Even a suspended employee can interfere with operations. For one thing, his position cannot readily be filled because local rules often closely regulate recruitment of persons to fill positions of

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ment, then what quantum of proof of suppressive motive and of causation should the chancellor require before compelling hearing and what duration of preliminary injunction might a chancellor order?

201. Plaintiff's mere assertion of a protected interest is not enough to give him a right to procedural due process. Board of Regents v. Roth, 408 U.S. at 575 n.14; Perry v. Sindermann, 408 U.S. at 599 n.5. One must actually have and prove the substantive right in order to have, and to be able to prove violation of, procedural rights. *See supra* notes 125-30. *See also supra* notes 2, 67, and 77.

202. This assumption is not ungenerous to non civil service public servants. *See supra* notes 171-98.

203. 424 U.S. 319 (1976). For more detail *see supra* notes 131-44.

204. The point must again be made that discharging a servant who has spoken differs from arresting him after he has only just begun to speak.

205. *See supra* notes 130-46.

206. Arnett v. Kennedy, 416 U.S. 134 (1974).

suspended workers. Absent suspension, the agency work place has a sort of lame duck servant hanging about awaiting trial and preoccupied with its outcome and not with his duties. Poor effects on morale and efficiency of persons close by are likely. Another burden possible is occasional evasion of probation systems by servants. Unruly or inefficient servants near the end of a probationary period will be tempted to extend their service by demanding pre-termination hearings, insincerely alleging an intent of their superiors to suppress protected speech, and then use every method to postpone and prolong the pre-termination hearings. When the costs and benefits on both sides are evaluated and estimated, the better policy emerging is that dismissed public servants without local tenure or civil service status should be obliged to assert any claims of violation of the first amendment in courts of general jurisdiction after the fact. The due process clause should not be construed to afford them any right to pre-termination hearing.

This is the right place to explore how the notions of free speech and tenure may have become confused. One source is use of the word tenure in educational employment contracts, especially in the private sector, juxtaposed with phrases like academic freedom, which sounds like constitutional free speech though its history and office are different.

Academic freedom is a privilege often guaranteed in employment contracts of some or all of university faculty. Contractual job security in a wider sense is also granted by contract to a smaller number of senior faculty and such faculty are said to be "tenured." Thus, tenure and rights of free expression are associated by their companionship in some employment contracts. It will be beneficial to compare contractual academic freedom and constitutional free speech.

The term academic freedom is rarely used in reports of judicial opinions and its meaning is somewhat variable. Historically, academic freedom in the United States as conceived by its leading proponents such as the American Association of University Professors, has been a claim of privilege to publish findings of research and to express opinions related to one's research in the community generally. It has not included a claim by leading academics, and their scholarly associations, of privileges not to teach material assigned or to introduce material to the classroom not pertinent to the announced subject of the course or class, and has contained only a limited claim of privilege to criticize material one has been assigned to convey.[207] According to Hofstadter and Metzger, the privilege,

207. Even moderately ambitious proponents of "academic freedom" have conceded the obligations of a contracting teacher to avoid introducing material irrelevant to the

when recognized at all, was established by contract, and such contracts for a long time were enforced more by moral persuasion[208] than by litigation. The same authors say that protective clauses were included mostly in the contracts between research institutions and their research professors.[209] But such clauses were often construed narrowly by institutions and even more narrowly by courts.[210] Before *Tinker v. Des Moines Community School District*,[211] and *Pickering v. Board of Education*,[212] the freedom of expression of a faculty member of a state institution as a citizen even outside the classroom was restricted somewhat by institutional retaliation and was protected little by freedom clauses in tenure or employment contracts.[213] In private sector contract litigation between faculty and institution, the restrictive cases cited by Byse and Murphy, and by Emerson and Haber, including state university cases rationalized on contractual grounds, are still good law and should be briefed by lawyers for parties to such suits.[214] But the circumstances are now different in the public sector.

Since *Pickering*,[215] public employees (and older pupils) in colleges

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syllabus, to teach the prescribed syllabus competently, and either to adopt a posture of neutrality in the classroom on issues where there is room for genuine difference of inference or opinion or even to promote the partisan or sectarian predilection of the employing institution if at the time of employment it has notified him or her of its expectation he or she do so, the leading freedom of opinion of the academic being advanced being "full freedom in research and in the *publication* of the results." HOFSTADTER & METZGER, *supra* note 21, at 407-12, 480-90 (emphasis added) (*citing* policies of the Am. Ass'n of Univ. Professors Achievements: The AAUP As An Agent Of Codification).

208. *Id.* at 490-95. The early codes of the AAUP never disputed the legal authority of trustees of institutions to limit the freedom even of publication, and those codes apparently conceded the point even for state institutions. HOFSTADTER & METZGER, *supra* note 21, at 409. Among research minded academics there even has been, more than tolerance, some equivocal support for some institutional control not just of speech within the lecture hall but of extramural speech or at least of the style or decorum thereof, so long as the senior faculty or its committees have a large share in the governance. *Id.* at 407-12.

209. HOFSTADTER & METZGER, *supra* note 21, at 368-82.

210. Byse, *Academic Freedom, Tenure, and the Law: A Comment on Worzella v. Board of Regents*, 73 HARV. L. REV. 304 (1959) [hereinafter cited as Byse]; W. Murphy, *Academic Freedom*, 28 LAW AND CONTEMP. PROBS. 447 (1963) [hereinafter cited as Murphy]. *See supra* note 5.

211. 393 U.S. 503 (1969), was a case of pupils' rights but contained dicta concerning rights of expression of teachers about the schoolhouse generally, as opposed to speech inside the classroom during instruction. *Id.* at 506.

212. 391 U.S. 563 (1968).

213. Emerson & Haber, *Academic Freedom of the Faculty Member as a Citizen*, 28 LAW AND CONTEMP. PROBS. 525 (1963) [hereinafter cited as Emerson & Haber]. Koch v. University of Ill., 39 Ill. App. 2d 51, 187 N.E.2d 340 (1963), *cert. denied*, 375 U.S. 989 (1964) (treating the issue of one of employment contract law).

214. *See generally* Byse, *supra* note 210, at 304; Murphy, *supra* note 210, at 447; and Emerson & Haber, *supra* note 213. Even the academic profession itself, or its research minded members anyway, as noted before, have not been certain of their desire for complete freedom even outside the classroom and lecture hall. *See supra* note 208.

215. 391 U.S. 563.

and schools have not had to tilt at windmills like academic freedom for events outside the classroom and, as noted later, assertions of a privilege of non-conformity in the classroom have failed with hardly a judicial word[216] about academic freedom. Today academic freedom clauses are significant in employment contracts of private universities but of reduced significance in the public sector.

Academic freedom in the private sector is probably less generous than the constitutional privilege of free speech in the public sector, especially after *Givhan*.[217] Of course, an employer, public or private, may by contract or rule voluntarily afford a servant more liberty than the constitutional minimum guaranteed for servants in the public service.[218] And it may do that without also affording employment security in other particulars. This brings us again to the observation that while free expression and tenure are often associated and understandably so, they are not identical.

E. Damages for Denial of Procedural Due Process

Not all losses caused by a breach of duty need be compensated by verdicts. What damages should be awarded to one who suffers a denial of due process of law? Courts should award damages to compensate for the loss of the property right or other substantive good the existence of which gives rise to the duty to afford due process, and there is little dispute about that. But what damages, if any, should be awarded to one who experiences a denial of due process but does not suffer a loss of protected property or liberty? Are there any incidental interests protected? In *Carey v. Piphus*,[219] plaintiff school children had a right under local law to free instruction in public schools. That substantive right was conditioned on obedience to school rules. Asserting disobedience of the plaintiffs, principals of schools in Chicago expelled the pupils with periods greater than ten days. The school officials had not established any mechanism to resolve impasses or factual disputes for pupils who contest a charge of disobedience. The pupils sued alleging a denial of the substantive right of several days instruction and also a denial of procedural due process. However, they did not allege that the charges of infraction of the rules were untrue. Nor did they allege that, had a tribunal been convened to hear evidence before expul-

216. By the time Perry v. Sindermann, 408 U.S. 593 (1972), came up for decision, Justice Marshall could say that possession of tenure by plaintiff was "irrelevant" to his first amendment claims. *Id.* at 605.

217. 439 U.S. 410 (1979).

218. For example, one section of the Hatch Act exempts educational employees of the District of Columbia from the prohibitions on speech which the act places on other federal employees. 5 U.S.C.S. § 7324(c) (Law. Co-op 1980).

219. 435 U.S. 247 (1978).

sion, it would have found in favor of the pupils. In short, the pupils did not allege that they would not have been expelled had they received a fair hearing prior to expulsion. In substance, the district court found for the defendants, but the court of appeals reversed, reasoning[220] that the failure to have a pre-expulsion adjudicatory mechanism was a constitutional violation which should be compensated by monetary damages even though grounds for expulsion existed and would have been found by an impartial administrative trier of fact. The Supreme Court reversed. It ruled that a plaintiff may not receive more than nominal damages for a denial of procedural due process unless he also pleads and proves that he lost a substantive right or good different from due process itself. The Court states that for a plaintiff to recover damages for a denial of procedural due process, he must prove that the proceeding, the absence of which is the subject of the complaint, would have resulted in a finding for the plaintiff and his retention of a substantive right or good.[221] The Court ruled that denial of procedural due process by itself is worth no more than one United States dollar but intimated that, if proved, actual subjective mental hurt or indignity produced by denial of due process would be compensable even if the merits in the underlying dispute were with defendant.[222] These dicta, coupled with the cases joining the due process clause and the first amendment when plaintiff is "tenured" under local law, effectively expand the damages tenured plaintiffs can obtain on an allegation of violation of their right of free speech by their public employer and require us to reconsider the cases linking the two constitutional provisions.

F. Burden of Proof and Standard of Review

Since *Carey v. Piphus*[223] cleared the air, there have been no special rules of proof, presumptions, or shifting burdens in due process cases unmixed with first amendment claims. Since legal issues predominate, reviewing courts may deliberate[224] nearly *ab initio* on

220. But the court of appeals agreed with the district court and Supreme Court that there could be no recovery for lost time from instruction without proof that the absent administrative hearing would have avoided the loss by a ruling against suspension or expulsion. *Id.* at 260-61.

221. *Id.* at 260-61.

222. *Id.* at 266-67. The reason is that even indignity or hurt feelings will not be presumed from a denial of due process but must be proved, *Id.* at 262-64. Query: should the dicta concerning compensability of mental discomposure be made a rule of decision? Should they be extended to public servant discharge cases? If so, should mental discomposure of untenured servants be compensable in first amendment cases?

223. 435 U.S. 247 (1978). *See supra* notes 128 and 129.

224. Constructions of written contracts and findings of local law are freely reviewable. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2588,

the issues.

V. *PERRY V. SINDERMAN* RECONSIDERED

The opinion in *Pickering*[225] emphasized and *Connick*[226] reasserted that freedom of speech of public servants is a right of citizenship and not a special attribute of their employment. Public servants have no more freedom of speech than anyone else. The holding in *Perry v. Sinderman*[227] and dicta in *Board of Regents v. Roth*[228] contradict these principles. It is true that *Perry* does not define more substantive freedom of speech of public servants. But it does grant some of them more procedural safeguards of that freedom than other citizens enjoy. Tenured servants are peers of the rest of us. Freedom of speech is a civil right. The reasoning of *Perry* and *Roth* excessively conflates different expectations. But more unwholesome than elaborate rationales are deleterious results. Besides confusion, the practical consequences of *Perry* are demoralization, reduced efficiency, and a backlash that harms dutiful public servants.

The court in *Perry* derived elevated federal procedural rights, in aid of substantive freedom of speech, from repealable state law. This must deter states and local agencies from promising security or extending civil service or merit systems, because it means a local agency must also budget for special adjudicative expense and added levels of review and litigation if it makes any promise of job security. Also, it must extend the benefits and incur the cost of added levels of review and adjudication to topics like free speech that are already justiciable in courts. Though other interpretations[229] of *Perry* are possible, the view currently prevailing[230] is that it dictates that a state which wants to give any substantive job security, must also give servants a great deal of procedural benefits, including prior

2589 (1971). This is especially so when first amendment issues articulate with public employment law. *See supra* note 68.

225. 391 U.S. 563 (1968).

226. 103 S. Ct. 1684 (1983).

227. 408 U.S. 593 (1972).

228. 408 U.S. 564 (1972).

229. A competing view is that the state remedies afforded are part of the substantive state right and that the federal courts should not deem a right to be constitutional "property" unless the state remedies available include extraordinary measures like decrees of specific performance. Vail v. Board of Educ., 706 F.2d 1435, 1432 (7th Cir. 1983) (Posner, J., dissenting), *aff'd per curiam by an equally divided court*, 104 S. Ct. 2144 (1984); Barthuli v. Board of Trustees, 434 U.S. 1337 (1977) (order of Justice Rehnquist denying stay of enforcement).

230. In *Barthuli v. Board*, 434 U.S. at 1337, Justice Rehnquist predicted that the judges who were his colleagues in 1977 would reject the view that the state remedies available should influence the decision whether to characterize a substantive right as constitutional "property." Vail v. Board of Educ., 706 F.2d 1435, *aff'd per curiam by an equally divided court*, 104 S. Ct. 2144 (1984). *See also supra* notes 93-101.

administrative hearing, that are redundant on some points with existing safeguards, *viz.*, access to courts to seek compensation for denial of free speech. When an incremental approach is disallowed, some authorities will choose to give nothing or to remove modest benefits theretofore afforded.[231] As to efficiency of the public service, the detriment of redundant procedural safeguards is by now well documented.[232] And the interplay among the first amendment, the due process clause, and local law is subtle even for lawyers and generates complex litigation. But more than that, such contingencies create envy because probationary servants, employees of agencies without a tenure or civil service system, and people who work in the private sector will not readily understand why so many extra resources are allocated to protect just a few citizens in the exercise of a right that is supposed to be common to all. Nonprobationary civil service employees who claim infringement of their rights under the first amendment should receive the same ration of procedural opportunities to assert and realize the right, at about the same times and places as other citizens enforcing the same rights. This suggests a larger or wider doubt about the wisdom and fairness of *Perry*. Why should essentially contractual expectations of public servants in agencies with civil service or like guarantees, have a federal constitutional right to expedited or even prior hearing and federal court oversight of the mechanisms for hearing? Aggrieved independent contractors who sell services and goods to local governments must litigate after the fact in the courts unless the local agency has chosen to create an administrative tribunal. Salaried servants in the private sector with written employment contracts usually expect they will have to sue for breach after the fact in the courts unless an express arbitration clause or the like is provided. Unions and employers have the same expectations. A local government should be free contractually to promise procedural safeguards greater than public law guarantees, but should not be obliged to do that by the federal judiciary. Creating a constitutional class of procedurally privileged characters does not advance the public interest.

CONCLUSION

As a general proposition public servants enjoy the same rights of

231. In Arnett v. Kennedy, 416 U.S. 134 (1974), a plurality of three justices came very near to overruling *Perry* by saying that a public employee must accept any procedural bitter with the substantive sweet of job security that a personnel statute serves. 416 U.S. at 152-53 (Burger, Rehnquist, and Stewart, JJ.). The other six justices, three dissenting and three joining in the judgment but not in the plurality opinion, disagreed with that view.

232. The opinion in Connick v. Myers, 103 S. Ct. 1684 (1983), notes the effect as had Arnett v. Kennedy, 416 U.S. at 169-70.

free speech as others. They may criticize the public policies and practices of their agency and superiors. But dissent does not excuse nonperformance of assigned duties. Personal grievances with little implication for public policy are not protected speech. When speech is protected, its suppression by a governmental employer is sometimes affirmatively justifiable especially *vis-a-vis* confidential and higher ranking servants. When defendants assert justification, courts try the issue by balancing interests. Special cases of justification are the Hatch Act and "Little Hatch Acts." Not justifiable are patronage dismissals. A substantive liberty protected by the fourteenth amendment is the freedom to seek employment and to be free of serious defamation by a government employer which limits that liberty.

Distinguished from constitutional substantive liberties to speak and to seek employment are contractual or statutory rights to employment security sometimes called tenure or civil service status. Tenure is a creature of local law.

When a public servant who does not have such locally created rights of employment security, has been discharged and alleges that the discharge was motivated by governmental or official opposition to opinions expressed by her, after the fact she may assert her lost income and status as consequences or damages to be remedied, but the fourteenth amendment gives her no claim to prior hearing of her grievances before discharge and no access to special tribunals local law may have created for hearing grievances of tenured employees. The situtation is different for tenured public servants.

Nonprobationary employees in a civil service system or so called tenured employees, will usually enjoy a right to prior hearing or to expedited hearing after discharge. That is not because they have more substantive rights of expression but because they are servants of agencies who have promised them employment continuity, absent cause, and such contractual or statutory rights are deemed property rights for purposes of the fourteenth amendment. For such servants the question whether their expression is protected or not by the first amendment will almost always also constitute a question whether or not there will be cause in the absence of which they, unlike servants at will and probationers, have a property right to continued employment and income. It is the simultaneity of the first amendment issues with the question of justification for forfeiture of "property" of the tenured servant that gives her a right of prior or reasonably prompt post discharge hearing. For such a servant, a retaliatory discharge without expedited hearing is supposedly a violation not only of the first amendment but also of the fourteenth. This allows tenured servants to claim more damages for

violation of rights of expression and gives them more procedural safeguards of free expression than others have. This Article has argued that this result is good reason to pause and reconsider the wisdom of treating tenure or civil service status as property for purposes of the fourteenth amendment.

ADDENDUM

Digested below in chronological order are thirty-two cases which are not cited in the text but which discuss tenure and free speech (19 cases) of public servants and closely related points of practice analyzed in the paper. Of the thirty-two cases, seven were decided in 1984 and 20 in 1983. Taken along with the cases cited in the text, these include all public employee first amendment cases decided in 1983 and 1984 and printed in Federal Reports, 2d, and the Supreme Court Reporter. The last volume searched was 747 F.2d 1584, December 24, 1984.

Webster v. Redmond, 599 F.2d 793 (7th Cir. 1979) (Likelihood of promotion, in a short time, to school principal from formal list of eligibles, is not property protected by the due process clause. Also, it is not liberty, at least not when the school board does not broadcast its reasons for changing its mind and passing over plaintiff for another. Plaintiff had tentatively been selected when board found he had once been arrested for theft but had been discharged without trial when evidence against him was suppressed).

Fucik v. United States, 655 F.2d 1089, 228 Ct. Cl. 379 (1981) (Amount and type of damages suffered by plaintiff may determine subject matter jurisdiction of courts and other tribunals to hear the case, but some tribunal should be provided. Dismissal of tenured public servant without just cause and without procedural safeguards may be remedied under several forms because such measures are unlawful in various senses. For example, they are "capricious" in administrative law and reversible under the form of judicial review of administrative action).

Dusanek v. Hannon, 677 F.2d 538 (7th Cir. 1982) (Independent psychiatric examination scheduled with probable cause pursuant to school board rule is more than "due" process to justify long term, effectively involuntary leave without pay of a mentally ill tenured teacher; also, lawful to dismiss teacher after long term leave expires unless the teacher takes the initiative and either demands trial type hearing or persuades board's medical director in non trial examinations that he has obtained a cure).

Borrell v. USIA, 682 F.2d 981 (D.C. Cir. 1982) (In 1978, Congress created new boards to provide safeguards for non probationers. Court finds that that act altered allocation of jurisdiction over complaints by such employees but not over those of probationary servants. Also found that Congress did not intend, and could not if it wished to, abolish all causes for action of probationers for retaliation for exercise of free speech. Absent any other forum, they may sue in district court which has general jurisdiction over federal questions).

Cutts v. Fowler, 692 F.2d 138 (D.C. Cir. 1982) (Issues very similar to those in *Borrell v. USIA*, above).

Nilsen v. City of Moss Point, 701 F.2d 556 (5th Cir. 1983) (Joinder of Title VII and § 1983 claims made compulsory).

Lyznicki v. Board of Education, 707 F.2d 949 (7th Cir. 1983) (Job title and content said not to be property or liberty. Principal was demoted to teacher without any hearing to contest cause but without reduction in pay. First amendment aspects abandoned by plaintiff before appeal).

Gonzales v. Benavides, 712 F.2d 142 (5th Cir. 1983) (Early progeny of *Connick v. Myers*).

Bell v. Sellevold, 713 F.2d 1396 (8th Cir. 1983) (Leasehold of clinic building owned by county treated as property; summary eviction under state forcible entry law found to fulfill requirement of due process).

Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983) (Finding the substantive entitlements, intended by a legislature which created a civil service personnel system, is difficult. A statutory list of personnel actions that may be taken only "for cause" is a valuable aid to interpretation. Dicta that duty station and title and work content in the federal service are probably not property protected by the fifth amendment. Point not decided because counsel did not brief it. Judgment for defendant affirmed *pro forma*. On facts, customs official was reassigned but not reduced in grade; later, his old position was upgraded. Also, discussion of *Borrell v. USIA* and *Cutts v. Fowler*).

Bueno v. City of Donna, 714 F.2d 484 (5th Cir. 1983) (Compensatory damages measured the same way for due process as for free speech violations; local procedural rights rejected as an indication of substantive rights intended by drafters of local law).

Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983) (Transfer of state policeman to a post 200 miles from his home found not to constitute loss of liberty; interests in free speech balanced against needs of state; discussion of when hearing to clear one's name should be afforded).

Hadley v. County of Du Page, 715 F.2d 1238 (7th Cir. 1983) (Innocent construction of allegedly stigmatizing words adopted by court; opinion ruled that mere name clearing without money or reinstatment is the remedy for deprivation of liberty to seek work).

Pollack v. Baxter Manor Nursing Home, 716 F.2d 545 (8th Cir. 1983) (Court awarded attorney fees in a case where only nominal damages were due for denial of procedural due process).

Zeigler v. Jackson, 716 F.2d 847 (11th Cir. 1983) (Grievance mechanisms and implied tenure were analyzed; review of medical

data without trial type hearing found to constitute due process; discussion of due process for reapplying former employees).

Engelstad v. Virginia Municipal Hospital, 718 F.2d 262 (8th Cir. 1983) (Staff privileges at a city hospital deemed not to be property).

Mosrie v. Barry, 718 F.2d 1151 (D.C. Cir. 1983) (Loss of prerequisites, prestige, and preferred duties, without loss of pay or formal grade of captain in police force, adjudged not to be a loss of liberty and status for constitutional purposes).

Crawford v. Garnier, 719 F.2d 1317 (7th Cir. 1983) (Pure first amendment case by an untenured, low level, temporary public servant; the opinion identifies the interests protected by and damages cognizable on account of a violation of the first amendment).

Carroll v. United States, 721 F.2d 155 (5th Cir. 1983) (Court ruled that the only remedies for former United States government employees for violation of their right of free speech are those provided by Civil Service rules).

Patteson v. Johnson, 721 F.2d 228 (8th Cir. 1983) (A recent example of balancing the interests in free speech of a public servant against the public need for confidential cooperation between high officials and their principal deputies).

Loya v. Desert Sands Unified School District, 721 F.2d 279 (9th Cir. 1983) (The opinion reaffirms that balancing of interests in a free speech case is a task for the judge and not for the jury).

Loudermill v. Cleveland Board of Education, 721 F.2d 550 (6th Cir. 1983) (Opinion rules that while full hearing before the fact is not required, some form of preliminary hearing or procedure to ascertain probable cause to discharge a tenured public servant is required by the constitution and that prompt, plenary, post discharge hearing by itself is not due process; the opinion acknowledges contrary authority).

Shakman v. Democratic Organization of Cook County, 722 F.2d 1307 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 279 (1983) (Patronage firing of a higher level, political appointee found not to violate a prior decree and implicitly not to violate the first amendment).

Bowman v. Pulaski County Special School District, 723 F.2d 640 (8th Cir. 1983) (Transfers of outspoken teachers to unpreferred locations and duties found to be a violation of the first amendment but not of the fourteenth; the remedy ordered was reasonably prompt reassignment to duties and schools like the preferred assignments but not necessarily to the exact initial posts).

Vasquez v. Van Lindt, 724 F.2d 321 (2nd Cir. 1983) (A state court judgment on a point of federal constitutional law was *res judicata* and barred relitigation in federal court of a claim of denial of

due process by a corrupt jockey whose license had been suspended by the racing board).

Migra v. Warren City School District Board of Education, 104 S. Ct. 892 (1984) (Supreme Court interpreted 28 U.S.C. § 1738, which deals with *res judicata*; preclusive effect in later federal court litigation of a prior state court judgment will be the same as the preclusive effect state law gives to prior judgments of the state courts in later state court proceedings).

Poorsina v. Merit Systems Protection Board, 726 F.2d 507 (9th Cir. 1984) (Probationer M.D. fired for criticizing health care quality of Bureau of Indian Affairs clinic. Case distinguishes "statutory" from "regulatory" substantive rights. Comes close to saying that authority creating a substantive right is privileged to posit if and how the right will be protected procedurally. Interplay between types of speech and subject matter jurisdiction. Different types of speech claims to be referred to different administrative tribunals for hearing. No express constitutional analysis. Partisan political, political, and nonpolitical speech compared for jurisdictional purposes).

McBee v. Jim Hogg County, 730 F.2d 1009 (5th Cir. 1984) (en blanc) (Interesting because the case involved, in a sense, free speech about free speech; Ms. McBee criticized her superior for unfair patronage reprisal against other employees who had supported the superior's opponent for election as sheriff. Reading *Connick* to limit *Elrod v. Burns*, majority (12 judges) of entire court says even a patronage dismissal often can be justified by "balancing." Three judges dissented).

Altman v. Hurst, 734 F.2d 1240 (7th Cir. 1984) (per curiam) (Constructive demotion without pay reduction and assignment to arduous duties (foot patrol and sentry duty in bad weather) not a deprivation of property or liberty, but they are actionable damages if inflicted in retaliation for free speech. As to latter, court finds balance of interests entitles police chief defendant to judgment. Opinion relies on *Mathews v. Eldridge* and *Connick v. Myers*).

Yoggerst v. Hedges, 739 F.2d 292 (7th Cir. 1984) (Case concerned personal comment about agency head. Progeny of *Connick v. Myers* and its two stage test (first inquire if speech is protected *vel non*; then balance interests if speech is protected.) Speech ruled unprotected because it contained no matter of genuine public concern).

Manning v. Merit Systems Protection Board, 742 F.2d 1424 (Fed. Cir. 1984) (Reassignment without demotion of employee who filed grievances. Progeny of *Bush v. Lucas*. Regulations made jurisdiction, of administrative tribunal, to hear first amendment claim, turn on seriousness of adverse action).

Williams v. IRS, 745 F.2d 702 (D.C. Cir. 1984) (*Per curiam* opinion vacated and remanded for fuller record. First amendment rights of association and free exercise of religion asserted in a dense thicket of federal procedural law enacted in 1978 for the federal civil service. Discusses *Borrell v. USIA*, *Cutts v. Fowler*, and *Carducci v. Regan*. Federal civil service—first amendment cases look like a growth sector of the mid-1980's).