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Constitutional Rights of Public Employees: Progress toward Protection

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COMMENT

Constitutional Rights of Public Employees: Progress Toward Protection

I. INTRODUCTION

A discussion of the constitutional rights of public employees invariably begins with Justice Holmes's famous quotation, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[1] Although later courts have been more sympathetic to policemen[2] and other public employees,[3] vestiges of the attitude exemplified by Justice Holmes's statement remain.[4] The purpose of this comment is to survey the progress[5] public employees have made in their efforts to firmly establish the extent of their constitutional rights in the employment setting and, in so doing, to point out some of the present and potential problems facing these employees, their employers and the courts.

Justice Holmes's holding was based on a widely-held[6] theory that public employment, like other forms of government largess, was not a right, but a privilege that the government could retract at will. Although other traditional notions[7] were cited by the courts in dealing summarily

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[1] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

[2] *E.g.*, Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968), *modified*, 425 F.2d 469, *aff'd*, 425 F.2d 472 (1969).

[3] *E.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968) (school teacher); Taylor v. New York City Transit Authority, 309 F. Supp. 785 (E.D.N.Y. 1970) (transit authority employee).

[4] *E.g.*, Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 38 U.S.L.W. 3128 (U.S. Oct. 14, 1969).

[5] At least one author feels that the progress made by public employees has been dramatic enough to be called a revolution. Leahy, *From McAuliffe to McLaughlin: A Revolution in the Law of Constitutional Rights of Public Employees*, 57 ILL. B.J. 910 (1969).

[6] Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1441 & n.7 (1968) [hereinafter cited as Van Alstyne].

[7] Some courts relied on the axiom that absent "a statute or ancient custom to the contrary, executive offices are held at the will of the appointing authority, not for life or for fixed terms." Bailey v. Richardson, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951). Other courts applied a "good faith" test, which seldom uncovered decisions made in bad faith. Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 COLUM. L. REV. 719 (1966). Still others relied on the old concept that teachers and defense workers were keepers of the public trust whose compromise would endanger the nation. Bruff, *Unconstitutional Conditions Upon Public Employment: New Departures in*

with public employee discharge cases, the right-privilege distinction was the major basis upon which courts upheld summary dismissal of public employees. The gradual demise of that distinction has resulted in the progress that has been made thus far.[8]

A number of practical factors have produced more litigious public employees and courts that are more receptive to their claims. The prime factor has been the unforeseen expansion of governmental functions in general. Governmental operations in education, defense, housing, welfare and other fields have expanded to the point that it may have become the basis of security for many individuals[9] or at least a new kind of "property."[10] As the individual's "rights" to this new property are litigated, as, for example, in the area of public housing,[11] the decisions will naturally affect the administration of other forms of governmental largess, including employment.[12] As governmental programs have expanded, so has governmental employment. Exclusion from or the loss of public employment can foreclose a person from an ever expanding segment of the job market.[13] Also, public employers have become more sophisticated in personnel management and more thorough in their investigations into an employee's personal life and beliefs.[14] This new expertise makes it even more necessary that public employees have a sufficient remedy in the event they lose their jobs for reasons unrelated to their on-the-job performance. Another reason that public employees are asking for and receiving more protection is the progress made by their counterparts in the private sector, who are gaining greater job security and protection from arbitrary treatment.[15]

the Protection of First Amendment Rights, 21 HASTINGS L.J. 129 (1970) [hereinafter cited as Bruff].

[8] See Van Alstyne, *supra* note 6. Professor Van Alstyne delineates five theories that have been used to erode the foundation of the right-privilege distinction. They are: 1) the doctrine of unconstitutional conditions; 2) the doctrine of indirect effects; 3) procedural due process; 4) equal protection; and 5) bills of attainder.

[9] Van Alstyne, *supra* note 6.

[10] Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[11] *E.g.*, Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970).

[12] See note 90 *infra*, and accompanying text.

[13] Federal, state, and local governments already employ fifteen per cent of the total civilian labor force. Bruff, *supra* note 7, at 129 & n.1. *See also* Rosenbloom, *The Constitution and the Civil Service, Some Recent Developments, Judicial and Political*, 18 U. KAN. L. REV. 839 (1970).

[14] *See* Creech, *The Privacy of Government Employees*, 31 LAW & CONTEMP. PROBLEMS 413 (1966).

[15] See Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 COLUM. L. REV. 719 (1966).

There are other, perhaps less significant, factors that have made public employees more militant and the courts more receptive to their needs.[16] Whatever the influence of each of these factors individually, they have, in combination, provided the impetus for the progress discussed below.

II. Protection—Past and Present

Perhaps the best way to assess the protection against invasion of the constitutional rights that has been and is currently being afforded public employees is to take three employment discharge situations and examine how courts have or might handle each of them. Section A will deal with the problem of the employee who has been discharged for exercising a constitutionally protected right. Usually this is a first amendment right[17] but may be a fifth amendment right.[18] Section B will deal with the problem of the employee who is discharged for an arbitrary or capricious reason or for no reason at all. Section C is concerned with the employee who is fired in a manner that is not compatible with procedural due process.

A. Discharge in Violation of a Specific Constitutional Right

The first situation to be examined is that of the public employee who has been discharged for his exercise of a clearly protected constitutional right. The employee can usually obtain relief more easily in this situation than any other because his rights have been more clearly defined by the courts;[19] the employee has a number of constitutional doctrines and court decisions on which to rely in asserting his constitutional rights.

The public employee discharged under these circumstances might rely upon the doctrine of unconstitutional conditions in an action for reinstate-

[16] These additional factors include: 1) the growth of such organizations as the ACLU, NAACP and NEA which often subsidize court tests that individual plaintiffs would be unwilling or unable to undertake; 2) the increasing influence of unions among public employees; and 3) the strength in numbers that has resulted from the expanse in government employment. The current upheaval in educational institutions may also be considered a factor. As will become apparent later in this comment, discharged teachers are bringing an increasing number of suits against their former employers. These suits are resulting in precedents that will be useful to other government employees.

[17] *E.g.*, McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (right to join a union).

[18] *E.g.*, Slochower v. Board of Educ., 350 U.S. 551 (1956) (right against self incrimination).

[19] See Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A.L. Rev. 751, 754 & n.14 (1969).

ment and/or for money damages.[20] The doctrine can be traced back to *Frost v. Railroad Commissioner*.[21] In holding that California statutes that required a trucking company to become a common carrier before permitting it to operate its trucks on the state's highways for compensation were unconstitutional, the Court said:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.
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> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.[22]

The doctrine of unconstitutional conditions has been applied in public employment cases. The earliest cases involved state statutes. In *Wieman v. Updegraff*[23] the Court struck down an Oklahoma statute that prescribed a loyalty oath for all state employees.[24] *Wieman* was followed in *Slochower v. Board of Education*.[25] In that case, a professor employed to teach at a state college was discharged after he invoked the fifth amendment right against self-incrimination in hearings before a subcommittee of the Committee on the Judiciary of the United States Senate. The Court held unconstitutional the state statute that required his dismissal.[26]

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[20] The most common action is one brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964).

[21] 271 U.S. 583 (1926).

[22] *Id.* at 593-94.

[23] 344 U.S. 183 (1952).

[24] "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

[25] 350 U.S. 551 (1956). *See also* Shelton v. Tucker, 364 U.S. 479 (1960).

[26] "The heavy hand of the statute falls alike on all who exercise their con-

The doctrine of unconstitutional conditions has recently been applied in two very similar cases involving public employee discharges. These cases involve state action through its agent/employer, not by statute. In *Pickering v. Board of Education*,[27] the plaintiff, a public schoolteacher in Illinois, was dismissed for writing a letter to the local newspaper in which he criticized the school board's handling of a bond issue. The board found, after a full hearing, that the letter contained many false statements and that its publication was detrimental to the efficient operation and administration of the schools of the district. It therefore concluded that the interest of the school required Pickering's dismissal. Unable to determine whether the Illinois Supreme Court held that the first amendment had no applicability to the dismissal or that the particular statements were unprotected, the Court said:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocably rejected in numerous prior decisions of this court. . . . '[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'[28]

The Court went on to say that the state might have some interests as an employer that differed from those it possessed in connection with regulation of the speech of citizens in general. It then proceeded to balance the interests of the teacher against those of the state and found that since no showing had been made that the letter interfered with Pickering's proper performance of his daily duties in the classroom, the state had no more interest in controlling his speech than it did in controlling similar speech by any member of the general public.

> In sum, we hold that, in a case such as this [where no predominate state interest is shown], absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on

stitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of Wieman v. Updegraff . . . ." 350 U.S. at 558. *Contra*, Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958). *But see* Board of Pub. Educ. v. Intille, 401 Pa. 1, 163 A.2d 420 (1960).

[27] 391 U.S. 563 (1968).

[28] *Id.* at 568 (citations omitted).

issues of public importance may not furnish the basis for his dismissal from public employment.[29]

In *Meehan v. Macy*[30] the plaintiff's employment as a policeman in the Canal Zone was terminated after he arranged for printing and began distributing a contemptuous, intemperate and defamatory letter and poem lampooning the Governor of Canal Zone and his policies. He also had made statements to the press concerning the governor's new plan to hire foreign nationals for the police force although there was evidence that he had been specifically requested to confine his objections to proper channels. These activities took place shortly after a series of riots in the Canal Zone and at a time where an "aura of tension persisted, generated by fears that renewed outbursts might erupt."[31] Meehan's subsequent discharge was based on three grounds: 1) Conduct unbecoming an officer; 2) failure to obey instructions; and 3) failure to obtain clearance before releasing for publication articles pertaining to government activities in the Canal Zone.[32]

The court's opinion is a blend of the old and new approaches to the protection of the constitutional rights of public employees. The court specifically rejected the Holmes statement in *McAuliffe* yet made it clear that public employees have "lesser rights" than others have under the Constitution.[33] It refused to apply strictly the test set out in *New York Times v. Sullivan*[34] although specifically asked to do so. But the court went on to say that although the government's interests gave it some powers to suppress or inhibit the free speech of its employees, the government was not relieved of its obligation to define narrowly and with as much precision as possible the speech which it prescribes. The court examined each of the grounds for discharge in detail; sustaining charge 1, but finding charges 2 and 3 deficient. Charges 2 was found deficient because the order inhibiting the employee's speech was not reasonably specific. Charge 3 was found wanting because Meehan was not given notice and because the clearance regulation had not been invoked by the government for a long period of time. The case was remanded since it was not clear whether the three charges had been separate or cumulative

[29] *Id.* at 574-75.
[30] 392 F.2d 822 (D.C. Cir. 1968), *modified*, 425 F.2d 469, *aff'd*, 425 F.2d 472 (1969).
[31] 392 F.2d at 826.
[32] *Id.* at 828.
[33] *Id.* at 832.
[34] 376 U.S. 254 (1964).

grounds for discharge. On rehearing after the *Pickering* decision was handed down, the order on remand in *Meehan* was altered to provide for reconsideration of charge 1 in light of *Pickering* and the introduction of additional evidence.[35] The three dissenting judges found that the expanded order on remand was unnecessary as Meehan's conduct clearly did not come within the protection of *Pickering*.[36]

These two recent applications of the doctrine of unconstitutional conditions point out the strengths and weaknesses in the doctrine. They should make it clear to the public employer that he may not discharge an employee for the exercise of one of his constitutionally protected rights unless he feels confident that the state has a predominant interest in inhibiting that exercise. The state's exercise of its powers should be limited to that which is necessary to protect its interest and not inhibit other freedoms. The cases should make it equally clear to the public employee that the courts will protect his constitutional rights to the extent that no superceding state interests are involved. They also sound a warning to the lower courts that each case must be decided on its own facts. The lower court must, in each instance, balance the interests of the individual and the interest of the government. There is no easy formula to be applied.[37] For example, if Pickering's letter had criticized his immediate supervisor or fellow teachers or had actually created enough disturbance to affect his daily performance, the state's interest might have become predominant.[38] There is already sufficient indication that Meehan's conduct was so disruptive that he forfeited his rights.[39] Numerous other examples can be conceived in which compelling interests exist on both sides. For instance, what about the teacher whose religious beliefs prevent her from leading the class in the pledge of allegiance to the flag everyday? What about the employee who is dismissed for both permissible and impermissible reasons?[40] The cases and examples only indicate that the courts will have many difficult decisions to make. The doctrine of

[35] 425 F.2d 469 (1968).

[36] 425 F.2d 472, 474-79 (1969).

[37] *Compare* Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 WASH. L. REV. 4 (1964), 40 WASH. L. REV. 10 (1965) *with* Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A.L. REV. 751 (1969).

[38] See Watts v. Seward School Bd., 454 P.2d 732 (1969), *cert. denied*, 38 U.S.L.W. 3311 (U.S. Feb. 24, 1970).

[39] See note 36 *supra* and accompanying text.

[40] The problem is discussed in Note, *Refusal to Rehire a Nontenure Teacher for a Constitutionally Impermissible Reason*, 1970 WIS. L. REV. 162.

unconstitutional conditions is useful in prohibiting employee discharges arising out of the exercise of a constitutionally protected right because it avoids the issue of whether there is a constitutional right to public employment. The doctrine is limited however in that it has been applied only in cases involving explicit constitutional rights.[41]

B. The Arbitrary and Capricious Discharge

The dilemma of the public employee who is discharged for what he considers arbitrary or capricious reasons is even worse than that of the employee who is dismissed for the exercise of some explicit constitutionally protected right. Unable to invoke the doctrine of unconstitutional conditions and faced with Justice Holmes's still unreversed assertion that there is no right to government employment, it is difficult to perceive what "life, liberty or property"[42] the would-be plaintiff has been deprived of by his discharge. This situation is factually similar to that presented in *Freeman v. Gould Special School District.*[43] Plaintiffs in that case were teachers whose contracts had been terminated at the end of the school year; they alleged that their dismissals, based solely on the recommendation of their principal, were arbitrary, capricious and a denial of due process under the fourteenth amendment.[44] A majority of the court held that the school board had an absolute right to decline to employ or reemploy any teacher for any reason or for no reason at all as long as it was not violative of a specific constitutional right. They found there to be no federal question involved.

Different legal theories have been developed to overcome the problem facing the teachers in *Freeman,* with varying degrees of success.[45] The common factor in each theory has been the attempt to shift the focus from the "right" to the job to some other "right" or "interest"—one logical shift is to argue that arbitrary dismissals may constitute a deprivation of constitutionally protected rights. Once again one of Professor Van Alstyne's erosive theories may come into play—here the doctrine of indirect effects.[46] The public employee's argument based on this doctrine

[41] For a more thorough discussion of the benefits and defects of the doctrine, *see* Van Alstyne, *supra* note 6, at 1447-49.

[42] U.S. CONST. amend. XIV § 2.

[43] 405 F.2d 1153 (8th Cir. 1969).

[44] An equal protection argument was made, but abandoned on appeal. *Id.* at 1157.

[45] *Compare* Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970) *with* DeCanio v. School Comm., — Mass. —, 260 N.E.2d 676 (1970).

[46] Van Alstyne, *supra* note 6.

is that permitting the employer to dismiss an employee for arbitrary and capracious reasons will inhibit the employee in the exercise of such constitutional rights as free speech, assembly or religion since the employer will simply assign an arbitrary motive for his actions, and thereby make it even more difficult for the employee to establish his first amendment claim. The employee might never know for what exercise of his constitutional rights he was fired. The principle case cited in support of this doctrine is *Shelton v. Tucker*,[47] in which the Court held unconstitutional an Arkansas statute that required teachers to file an annual affidavit listing every organization to which they had regularly contributed within the preceding five years because of the chilling effect it had on the freedom of association of the teachers. The employer's ready reply to this claim is that the Court in *Shelton* recognized the teacher's position and acquiesced in it, using it as one of the factors against which it judged the statute.[48] Still, the argument that arbitrary dismissals could have a chilling effect on the exercise of constitutional rights is sound, practical and may be of some use to the employee.

Courts that have been unwilling to apply the doctrine of indirect effects have found other interests worthy of constitutional protection. In *Bomar v. Keyes*,[49] the court found an interest in "an expectancy of continued employment." Still other courts have sought a "substantial interest" besides the interest in a government job to justify invoking the due process clause.[50] Often the employee's "reputation" may furnish the additional interest necessary.[51] While this approach has produced some results,[52] it has one major drawback. It does not give the employer, employee or courts any standards to use in judging what interests and in what situations due process is required.

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[47] 364 U.S. 479 (1960).

[48] Freeman v. Gould Special School Dist., 405 F.2d 1153, 1158 (8th Cir. 1969).

[49] 162 F.2d 136 (2d Cir. 1947). *See also* Sindermann v. Perry, 430 F.2d 939, 943-44 (5th Cir. 1970).

[50] *E.g.*, Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966); Meredith v. Allen County War Mem. Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968) (discussed *infra* at p. 317).

[51] *Id. See also* Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969). "Whatever the derivation and scope of plaintiff's alleged freedom to wear a beard, it is at least an interest of his, especially in combination with his professional reputation as a school teacher, which may not be taken from him without due process of law." *Id.* at 117-18. In still other cases, courts have been concerned that a "badge of disloyalty" has been bestowed on the employee. Heckler v. Shepard, 243 F. Supp. 841 (E.D. Idaho 1965). *Cf.* Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

[52] See cases cited in notes 50 and 51 *supra.*

There is another and perhaps more manageable method for skirting the direct issue of the right to public employment. The public employee dismissed for an unconvincing reason or for no reason at all can argue that he has a constitutional right to be free from arbitrary and capricious government action. Although apparently rejected by the eighth circuit in *Freeman*, the argument has been accepted by some courts. In *Johnson v. Branch*,[53] plaintiff, a schoolteacher active in civil rights work who had not had her contract renewed for the ensuing year, alleged that she had been terminated because she had exercised her constitutional right to protest racial discrimination or, alternatively, for arbitrary and capricious reasons. The Court of Appeals for the Fourth Circuit, relying on *Frost*, summarily rejected the proposition that plaintiff could lose her job for exercising her first amendment rights.[54] The court then proceeded to deal with the arbitrary discharge claim. The school board had maintained that plaintiff's contract was not renewed because she failed to follow seven relatively insignificant school rules. The district court, upholding the school board's decision not to renew the teacher's contract, found that she was terminated because of her inability to perform expected extracurricular activities. Holding that the court's inquiry was restricted to the reasons advanced by the school authorities, the court of appeals reversed the district court, finding that the reasons given by the board "were neither individually nor collectively" sufficient to justify nonrenewal of plaintiff's contract and that they were arbitrary and capricious. Although the authority of the decision on this point is greatly diminished by the interjection of the racial discrimination issue,[55] it can be argued that the court recognized the right of a public employee to be free from arbitrary and capricious action by a public employer.[56]

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[53] 364 F.2d 177 (4th Cir. 1966).

[54] "We take it to be beyond cavil that the state may not force the plaintiff to choose between exercising her legitimate constitutional rights and her right of equality of opportunity to hold public employment." *Id.* at 180.

[55] *Id.* at 182.

[56] One of the cases relied upon by the court in *Johnson* was Konigsberg v. State Bar, 353 U.S. 252 (1957). In that case, plaintiff had been denied admission to the state bar for failure to answer certain questions of the Board of Law Examiners relating to his membership in the Communist Party. Plaintiff contended that there was no evidence to support a finding of doubt as to his character and loyalty and thus no justification for the action of the state officials. The Court said:

> If this contention is correct, he has been denied the right to practice law although there was no basis for the finding that he failed to meet the qualifications which the State demands of a person seeking to become a lawyer. If this is true, California's refusal to admit him is a denial of due process and

In a recent decision, *Roth v. Board of Regents*,[57] a district court expressly found that there was a constitutionally protected right to be free from arbitrary and capricious state action.[58] That case involved the failure to renew the contract of a nontenured assistant professor at a state university. No reason was given for the nonrenewal and no hearing was held. The issue, as stated by the court, is identical to that under discussion in this section.

> With respect to substantive protection against arbitrary non-retention, there is some uncertainty in the present state of the law. To test the point, we must assume a situation in which there is in fact no "First Amendment" problem; that is, the basis for non-retention is definitely not that the professor has exercised that freedom secured to him by the Constitution. The question, then, is whether the Fourteenth Amendment permits non-retention on a basis wholly without factual support, or wholly unreasoned.[59]

The court explored the decision in *Cafeteria & Restaurant Workers Union v. McElroy*[60] to be discussed below. Applying the balancing test employed by the Court in *Cafeteria Workers*, the *Roth* court came to this conclusion:

> The balancing test of *Cafeteria Workers v. McElroy* compels the conclusion that under the due process clause of the Fourteenth Amendment the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or a basis wholly without reason. This standard is intended to be considerably less severe than the standard of "cause" as the latter has been applied to professors with tenure. Unless this substantial distinction between the two standards is recognized in case-by-case application of the constitutional doctrine here enunciated, the rationale for the underlying doctrine will be gravely impaired. To be more direct, in applying the constitutional doctrine, the court will be bound to respect basis for non-retention enjoying minimal factual support and basis for non-retention supported by subtle reasons.

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of equal protection of the laws because both arbitrary and discriminatory. 353 U.S. at 262.

[57] 310 F. Supp. 972 (W.D. Wis. 1970).

[58] *Accord*, Roberts v. Lake Cent. School Corp., 317 F. Supp. 63 (N.D. Ind. 1970); Gouge v. Joint School Dist., 310 F. Supp. 984 (W.D. Wis. 1970); Lafferty v. Carter, 310 F. Supp. 465 (W.D. Wis. 1970). *Contra*, DeCanio v. School Comm., — Mass. —, 260 N.E.2d 676 (1970).

[59] 310 F. Supp. at 976.

[60] 367 U.S. 886 (1961).

> . . . .
> In deciding to afford to professors in a state university substantive protection against arbitrary non-retention, I am strengthened by an awareness that this is consistent with the development of the law with respect to public employment generally. The time is past in which public employment is to be regarded as a "privilege" which may be extended upon any conditions which public officials may choose to impose.[61]

The constitutional doctrine espoused in *Roth* and arguably in *Johnson* has not been expressly accepted by the Supreme Court.[62] It does, however, present a viable solution to the problem of the public employee discharged for arbitrary and capricious reasons. It has the same benefit as the doctrine of unconstitutional conditions; it avoids a direct challenge to the proposition that there is no constitutional right to public employment. It also features essentially the same test in which the interests of the individual, as employee, are balanced against the interests of the government acting as employer.

C. Discharge Without Procedural Due Process

The last situation to be discussed is that of the public employee who is discharged without notice, a hearing or in any other manner that is inconsistent with procedural due process. The problem of procedural protection could have been discussed under each of the two previous topics but will be dealt with separately for two reasons. First, some authors have suggested that the right to procedural due process is in and of itself a substantial enough interest that its denial warrants redress.[63] Second, decisions determining the extent to which procedural due process is required in employer/employee relations will, in a practical sense, directly affect the protection afforded the public employee's other constitutional rights. The manner of discharge may be as important as the reason.

There is dicta in some federal court decisions to support the contention that even a governmental privilege cannot be withheld or withdrawn

[61] 310 F. Supp. at 979. As the quotation indicates, the most troublesome argument raised in opposition to the application of a rule such as *Roth's* is that the courts are imposing "tenure" on governmental employers. The opinion deals with the problem in a straightforward manner and its caveat concerning the misapplication of the constitutional doctrine should not be disregarded.

[62] *But see* the discussion of *Cafeteria Workers infra* p. 316.

[63] *E.g.*, Rosenbloom, *The Constitution and the Civil Service, Some Recent Developments, Judicial and Political*, 18 KAN. L. REV. 839 (1970).

without procedural due process.[64] It is not unreasonable to argue that procedural due process is an interest which, alone, or in combination with employment by the government is substantial enough to come within the ambit of "life, liberty, or property." It is also important to note that there is a growing body of case law holding that other forms of government largess cannot be denied without due process of law.[65]

Discharge without procedural protection is subject to another attack. It has the same if not more of a chilling effect on the exercise of first amendment rights as the arbitrary or capricious dismissal.[66] An excellent example of the application of the doctrine of indirect effects in a case involving denial of procedural due process to an employee is *Albaum v. Carey*,[67] in which a teacher was not accorded tenure after completing his probationary period with high marks in every field. Plaintiff asserted that he was denied tenure because of certain of his expressions and associations. Defendant's motion to dismiss was denied on the grounds that plaintiff had alleged facts constituting a deprivation under color of state law or authority of a right guaranteed by the fourteenth amendment.[68] In the course of its opinion, the court pointed out that the state claimed that the power to deny tenure was completely unrestricted and that New York law gave substance to the plaintiff's view that the Superintendent had unlimited power in determining which teachers were accorded tenure. The court said:

> The mere statement of the defense's position that the job of school teacher in public schools is not life, liberty, or property within the mean-

[64] "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 185 (1951). *See also* Willner v. Committee on Character and Fitness, 373 U.S. 96, 103 (1963); Williams v. Zuckert, 371 U.S. 531, 534 (1962); Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961); United States *ex rel.* Smith v. Baldi, 192 F.2d 540, 544 (3d Cir. 1951), *aff'd*, 344 U.S. 561 (1953). See generally Van Alstyne, *supra* note 6.

[65] Wheeler v. Montgomery, 397 U.S. 280 (1970) (welfare benefits); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970) (housing); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967) (dismissal of student from Merchant Marine Academy); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961) (dismissal of student from university); Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968) (deprivation of social security benefits); Kelley v. Metropolitan County Bd. of Educ., 293 F. Supp. 485 (M.D. Tenn. 1968) (denial of right to participate in high school athletics); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961) (dismissal of student from college).

[66] See p. 309 *supra*.

[67] 283 F. Supp. 3 (E.D.N.Y. 1968).

[68] *Id.* at 9.

> ing of the fourteenth amendment, and that therefore no fair process is due the teacher, establishes its untenability.[69]

The court noted that previous teacher cases had involved the overbreadth of a substantive prohibition and found that the allowance of such broad discretion in the Superintendent created the same constitutional deficiency:[70] "When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone. . . ."[71]

The argument that procedural due process should be denominated a "liberty" as the word is used in the fourteenth amendment is not unappealing. It, too, shifts the emphasis from the right to a government job to the protection of fundamental liberties. But, viewed in proper perspective, such an interpretation is not consistent with the language of the amendment. If "procedural due process" is substituted for "liberty" the argument boils down to the assertion that the public employee may not be deprived of due process without due process. This is not to say that procedural due process does not have a place in this discussion—it is to point out that it may be used in somewhat misguided efforts to circumvent Justice Holmes's holding and that that is not the proper place for it.

Procedural due process is an instrument to insure that fundamental liberties are not illegally usurped or dissipated. This is best illustrated by the *Roth* case. After determining that a public employee could be discharged neither for reasons which abridged his fundamental liberties nor for arbitrary or capricious reasons, the court said:

> The latter comment brings me to a conclusion which follows inexorably from what I have said. Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards.[72]

The *Roth* decision has not and will not be met with immediate acceptance. In *DeCanio v. School Committee of Boston*,[73] six nontenured teachers were dismissed for teaching in a "liberation school" when the public school in which they taught was temporarily closed by demonstrators

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[69] *Id.*

[70] *Id.* The court in Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969), was also concerned with the absence of predetermined standards. *But see* note 73 *infra* and accompanying text.

[71] Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967).

[72] 310 F. Supp. at 979-80.

[73] — Mass. —, 260 N.E.2d 676 (1970).

at the beginning of the school term. The teachers argued that they could not be dismissed without a hearing. The court, following "the greater weight of authority,"[74] rejected the reasoning of *Roth* and held that no hearing was required for nontenured teachers.[75]

Still, the extent to which procedural safeguards are required in public employee discharge cases does directly affect the protection afforded and thus deserves separate treatment. In *Cafeteria & Restaurant Workers Union v. McElroy*,[76] the Supreme Court set out the test by which courts are to determine the scope of the due process requirement in public employment. Rachel Brawner was a short order cook at a cafeteria operated by a private concessionaire on the premises of the Naval Gun Factory. She was summarily required to turn in her identification badge and was thereafter denied admission to the Gun Factory. The only explanation given was that she failed to meet security requirements. When her employer, at the request of the union, sought to arrange a meeting with the officials of the Gun Factory, the request was denied. Her union then filed an action to compel the return of her identification badge so that she could resume her former employment. In a five-to-four decision the Court held that notice and a hearing was not required "under the circumstances of this case."[77] Although the majority opinion contains some inconsistencies,[78] it clearly states the test to be applied in determining when and to what extent the public employees are entitled to due process.

> The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interests. . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.[79]

The majority found that the government's interest in maintaining security at the gun factory outweighed Rachel Brawner's right to be employed as a short-order cook at "one isolated and specific military in-

[74] *Id.* at 681.
[75] See also Bonner v. Texas City Ind. School Dist., 305 F. Supp. 600 (S.D. Tex. 1969).
[76] 367 U.S. 886 (1961).
[77] *Id.* at 894.
[78] Roth v. Board of Regents, 310 F. Supp. 972, 977 (W.D. Wis. 1970).
[79] 367 U.S. at 894-95.

stallation."[80] The majority also found that the government's action had not operated to bestow a badge of disloyalty or infamy on the plaintiff. The dissent specifically disagreed with the latter point but more important, it said:

> It [the majority] holds that the mere assertion by government that exclusion is for a valid reason forecloses further inquiry. That is, unless the government official is foolish enough to admit what he is doing—and few will be so foolish after today's decision—he may employ "security requirement" as a blind behind which to dismiss at will for the most discriminatory of causes. . . . Such a result in effect nullifies a substantive right—not to be arbitrarily injured by Government—which the Court purports to recognize. What sort of right is it which enjoys absolutely no procedural protection?[81]

The *Cafeteria Workers* test has been applied in *Birnbaum v. Trussel*[82] and *Meredith v. Allen Co. War Memorial Hospital Commissioner.*[83] In the former, a doctor was dismissed from his employment at a hospital for alleged anti-Negro bias and in the latter a doctor was refused reappointment without proper notice and a hearing. In *Meredith* the court held that plaintiff had no constitutional right to practice his profession at a public facility, but that due process and equal protection were limits on the manner of his exclusion. The court found, after weighing such factors as the government's need to act summarily and the extent that an employee would be harmed by the dismissal, that the circumstances required that the doctor be given a hearing. In the *Birnbaum* case, the second circuit concluded that where a doctor could show a substantial interest other than his public employment, he could not be dismissed for arbitrary reasons and was entitled to a "procedure calculated to determine whether legitimate grounds do exist."[84]

Cafeteria Workers, Birnbaum and *Meredith* seem to indicate that the test to determine the scope and extent of the due process requirement is the same test applied in section A and B above. In many cases this may be true, but the tests are different. Reasons that may ultimately sustain a discharge may not sustain action without a hearing. Under the procedural test, the government must show an interest of sufficient weight to

[80] *Id.* at 896.
[81] 367 U.S. at 900.
[82] 371 F.2d 672 (2d Cir. 1966).
[83] 397 F.2d 33 (6th Cir. 1968).
[84] 371 F.2d at 678-79.

justify its acting summarily. For example, Mr. Meehan's activities may have warranted his discharge, but if he had been discharged without a hearing or notice, the government might not have been able to establish that its interests were sufficient enough to sustain the summary action. One of the real benefits to be derived from requiring procedural due process is the protection from discharge or other punitive action that is not based on fact or is based on erroneous fact. To deprive its employees of this benefit by not giving them a hearing, the government should have to show a very substantial interest.

Not only the employees, but also the courts derive benefits from a more expansive application of due process requirements, a fact that should not be overlooked in determining the scope and extent of the requirement in each case. These benefits stem from the unenviable situation in which the courts find themselves. Courts do not want to become a review board or a super NLRB to second guess public employers each time a public employee is discharged. But they do have to protect the public employee's rights. Expansive procedural requirements can facilitate the court's work or at least diminish the number of cases actually litigated.[85] Requirements of notice, a hearing and perhaps cross examination will have a number of salutory affects. First of all, the employer will be reluctant to act arbitrarily or to deprive the employee of his fundamental liberties when his actions will be exposed to public scrutiny. Political redress is facilitated.[86] The employee who is given an adequate explanation of the reasons for his discharge is less likely to resort to the courts. If the employer does have a legitimate reason for discharging him, the employee may not want the resulting publicity. If the reasons are not detrimental, the employee's chances of future employment have not been harmed.[87] Notice and a hearing will also serve to clarify the facts and may result in speedier and less expensive court proceedings as these cases will probably lend themselves to summary judgment motions. In this regard, it is in-

[85] The courts can, of course, limit the number of cases coming to them by applying the rule that administrative remedies must be exhausted before resort to the courts will be allowed. However, this rule should not be woodenly applied, especially in civil rights cases. Eisen v. Eastman, 421 F.2d 560, 567-68 (2d Cir. 1969). Stricter application of rules such as the requirement that limitations on the exercise of fundamental liberties be spelled out may encourage employers to adopt procedures that will eliminate situations that might give rise to litigation.

[86] Van Alstyne, *supra* note 6.

[87] The effect of the dismissal on future employment is often a concern of the employee and the courts. *E.g.*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 898 (1961).

teresting to note that in *Roth* the plaintiff's summary judgment motion was partially granted on the basis of the denial of procedural protection. A decision on the issues of arbitrary dismissal and deprivation of first amendment rights was reserved.[88]

The main objection to requiring notice and hearing is the burden placed upon the employer.[89] It should be noted, however, that the system has proved workable in the private sector. It is also significant that in *Escalera v. New York City Housing Authority*,[90] the court required the Authority, which controlled the housing of 144,000 families, to afford those tenants whose leases it wished to terminate the following procedural safeguards: 1) the tenant must be allowed to see the folder upon which the decision to terminate was based; 2) the decision must be based on evidence produced at a hearing and the decision must state the reasons for termination; 3) the tenant must have the right to confront and crossexamine a witness; and 4) the Authority must disclose the rules and guidelines its panel uses in making termination decisions. Few employers could argue that they would be more burdened than the housing authority by the application of such due process requirements.[91]

The issues raised by the application of due process requirements to employment relations will not revolve solely around notice and a hearing. For example, in *Taylor v. New York City Transit Authority*,[92] the court held that an employee who had been dismissed after a hearing had been denied procedural due process because of the "conflict of interests" of one of the members of the Transit Authority who ruled on his case on appeal. Although the case was dismissed due to plaintiff's failure to avail himself of the adequate state remedies open to him, the court's holding on the constitutional question could raise significant problems for state agencies such as school boards, which act as prosecutor, judge and jury. Other problems will certainly arise but a full discussion of them would furnish material for a separate article.

III. Conclusion

The constitutional rights of public employees do receive more protection today than in the past. If the public employee still has no constitu-

[88] 310 F. Supp. at 983.
[89] Thaw v. Board of Educ., 432 F.2d 98 (5th Cir. 1970).
[90] 425 F.2d 853 (2d Cir. 1970).
[91] *See also*, Orr v. Trinter, 318 F. Supp. 1041 (S.D. Ohio 1970) (procedural due process required in teacher nonrenewal case).
[92] 309 F. Supp. 785 (E.D.N.Y. 1970).