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Carol Herrnstadt Shulman

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EMPLOYMENT OF NONTENURED FACULTY: SOME IMPLICATIONS OF *Roth* AND *Sindermann*

BY CAROL HERRNSTADT SHULMAN*

INTRODUCTION

In concurrent 1972 decisions authored by Justice Potter Stewart, the Supreme Court examined the right of nontenured teachers[1] in public institutions to a statement of reasons and collegiate due process hearings prior to nonrenewal of their contracts. These cases, *Board of Regents v. Roth*[2] and *Perry v. Sindermann*,[3] came before the Court at a time when there was considerable conflict among the various circuits concerning the rights to be accorded to such teachers.[4] They raised two major issues: whether the fourteenth amendment entitled teachers to institutional due process hearings prior to contract nonrenewal, and whether nonrenewal might be an infringement of free speech interests protected by the first amendment.

The Court held in *Roth* and *Sindermann* that nontenured teachers are entitled to due process protection[5] only under limited conditions: (1) when a teacher has been deprived of proven interests in "property" or "liberty" as these concepts have been interpreted under the fourteenth amendment; or (2) when an institu-

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*Research Associate, ERIC Clearinghouse on Higher Education; B.A., 1966, City College of New York; M.A., 1967, University of North Carolina, Chapel Hill.

[1]A tenure system provides that:

> After the expiration of a probationary period, teachers, or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

AMERICAN ASS'N OF UNIV. PROFESSORS, *Academic Freedom and Tenure, 1940 Statement of Principles and 1970 Interpretive Comments*, in A.A.U.P. POLICY DOCUMENTS AND REPORTS 2 (1973).

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

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

[4]*See, e.g.*, Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969).

[5]"Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Rochin v. California, 342 U.S. 165, 169 (1952), *citing* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). The central meaning of procedural due process is that "parties whose rights are to be affected are entitled to be heard; and in order that they enjoy that right they must first be notified." Fuentes v. Shevin, 407 U.S. 67, 80 (1972), *citing* Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864).

tion has directly violated a teacher's first amendment free speech interests.

This article will analyze the decisions in *Roth* and *Sindermann*, consider their impact on first and fourteenth amendment rights of nontenured teachers, and explore some of the policy implications raised by the decisions.

I. ANALYSIS OF THE DECISIONS IN *Roth* AND *Sindermann*

A. Board of Regents v. Roth

David Roth was employed under a 1-year contract for the 1968-69 academic year as an assistant professor at Wisconsin State University-Oshkosh. He did not have tenure, which is granted under Wisconsin statutes only after 4 years of continuous service.[6] Without a statement of reasons, Roth was notified in January 1969, that his contract would not be renewed for the next academic year. This notification followed a period of conflict on campus during which Roth had openly criticized the university administration. His suit in federal district court[7] claimed that his free speech and due process rights under the fourteenth amendment had been violated because his publicly expressed views were the reasons his contract was not renewed, and, in any case, he was entitled to an institutional hearing before a final decision on his contract could be made.[8] The district court agreed with the latter contention[9] and granted summary judgment ordering the university to provide Roth with a statement of reasons and to set a mutually agreeable date for a hearing.[10] The court of appeals affirmed.[11] In its review of *Roth*, the Supreme Court addressed itself only to Roth's due process rights under the fourteenth amendment and did not consider the free speech aspects of the case, which had caused the district court to deem summary judgment[12] inappropriate, since the facts surrounding the alleged interference with Roth's freedom of speech would have to be developed at trial.

The Supreme Court approached the case differently than did

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[6]WIS. STAT. § 37.31 (1966).

[7]Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970).

[8]*Id.* at 974.

[9]*Id.* at 983.

[10]*Id.* at 984.

[11]Roth v. Board of Regents, 446 F.2d 606 (7th Cir. 1970).

[12]Summary judgment is granted where there are no material facts in the controversy that need to be litigated and where the party asking for summary judgment is entitled to judgment as a matter of law. FED. R. CIV. P. 56.

the district court and the court of appeals. The lower courts had been concerned with weighing the plaintiff's interest in securing his job against the institution's need for unfettered discretion in its employment practices. The Court asserted that this weighing process must come only after a determination that there is either a "liberty" or "property" interest under the fourteenth amendment. Therefore, the Court examined the circumstances surrounding Roth's initial employment and his contract nonrenewal for the existence of such interests.

On the question of liberty, the Court recognized that term as meaning "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[13] The Court held that if a teacher's liberty under this interpretation were impaired, he would be entitled to a due process hearing. Examples given by the Supreme Court of circumstances that would impair a teacher's liberty when his contract is not renewed are an accusation that "might seriously damage his standing and associations in his community,"[14] or a nonrenewal that "impose[s] on [the teacher] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."[15] The Court noted that while the district court and the court of appeals deemed nonretention itself to have a "substantial adverse effect" on a teacher, it found nothing in the record to support this belief. Therefore, the Court held that there was nothing in Roth's case to show that his liberty had been impaired.[16]

After reviewing decisions on property interests, the Court announced a standard to be used in determining the existence of such an interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.[17]

The Court found that such a claim emerges from the "rules or understandings" issued by an independent source, such as a state government.[18] In Roth's case, a property interest would have

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[13]408 U.S. at 572, *quoting from* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[14]408 U.S. at 573.
[15]*Id.*
[16]*Id.* at 574 & n.13.
[17]*Id.* at 577.
[18]*Id.*

to have been shown from the terms of his employment or the state statutes relating to granting tenure at public institutions. Roth's appointment, however, did not provide for employment beyond June 30, 1969, nor was there any renewal provision in his teaching contract. Despite Roth's observation that Wisconsin State University-Oshkosh generally rehires teachers who have 1-year contracts, the Court noted that the district court had found no "common law" of reemployment.[19] Therefore, the University's practices did not create the sort of expectation of renewal that would require a statement of reasons and a hearing on nonrenewal. State statutes also did not establish any right to reemployment for Roth. Given these considerations, the Court found that Roth did not have a "sufficient" property interest to entitle him to a statement of reasons and a hearing.[20] Accordingly, the Court reversed and remanded the case for further proceedings consistent with its decision.

In its conclusion, the Court made clear that its

> analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities.[21]

B. Perry v. Sindermann

Sindermann presented the Court with a claim of free speech violations under the first and fourteenth amendments, as well as a charge that he was entitled to fourteenth amendment procedural due process. Because it dealt with different issues and with a substantially different set of circumstances in *Sindermann,* the Court's judgment was more favorable to the teacher than in *Roth.*

Robert Sindermann had been employed at Odessa Junior College in Odessa, Texas from 1965 through 1969 under a series of 1-year contracts. Odessa had no tenure system at that time.[22] He had previously worked for 6 years in the Texas state college system. During the 1968-69 academic year Sindermann testified before committees of the Texas legislature in his capacity as president of the Texas Junior College Teachers Association. He favored changing Odessa to a 1-year institution, a position opposed by the college's Board of Regents. In May 1969, Sindermann was

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[19] *Id.* at 578 n.16.
[20] *Id.* at 578.
[21] *Id.* at 578-79.
[22] This situation has been changed. *See* note 68 and accompanying text *infra.*

notified that his contract would not be renewed, and the Board of Regents issued a press release setting forth allegations of insubordination by Sindermann. Despite its public stance, the board refused to provide Sindermann with an official statement of the reasons for nonrenewal of his contract or with an opportunity for a hearing.

In federal district court, Sindermann claimed that his nonrenewal was based on his public criticism of the Board of Regents and it therefore infringed upon his right of free speech. He also asserted that his fourteenth amendment right to procedural due process was violated by the college administration's refusal to provide a hearing. The district court's summary judgment for the college[23] was reversed because the court of appeals felt that a full hearing on the contested facts was necessary.[24] It further held that despite Sindermann's nontenured status, his contract nonrenewal would be impermissible if it violated his constitutionally protected free speech rights.

The Supreme Court agreed with the court of appeals that the district court had to investigate the facts of Sindermann's claim that his free speech rights had been violated. The Court declared it to be a well-established principle of constitutional law that a government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[25]

On the issue of Sindermann's right to a due process hearing, the Court held that he should have been given the opportunity to demonstrate that he had a property interest in continued employment, despite the absence of a formal tenure policy at Odessa. The Court defined such a property interest as follows:

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.[26]

It found that Sindermann's allegations based on factors such as his years of service in the Texas state college system and the policies and practices of Odessa Junior College might be suffi-

[23]Sindermann v. Perry, Civil No. MO-69-CA34 (W.D. Tex., Aug. 4, 1969).
[24]Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970).
[25]Perry v. Sindermann, 408 U.S. 593, 597 (1972).
[26]*Id.* at 601.

cient for him to prove a property interest.[27] In this regard, Sindermann had claimed that he had a form of job tenure because the guidelines of the Coordinating Board of the Texas College and University System provided for tenure after 7 years of service in institutions of higher education. (Sindermann had 10 years of service.) Odessa's faculty handbook declared:

> Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure . . . as long as he displays a cooperative attitude toward his co-workers and his supervisors, and as long as he is happy in his work.[28]

The Court therefore found that Sindermann had raised tenable claims to a property interest in continued employment.

The Court concluded that "[Sindermann] must be given an opportunity to prove the legitimacy of his claim of [property] entitlement in light of 'the policies and practices of the institution.'"[29] Such proof would require the college to grant him a hearing at which he would be given the reasons for his nonretention and would be able to "challenge their sufficiency."[30]

II. IMPLICATIONS OF THE COURT'S INTERPRETATIONS OF LIBERTY AND PROPERTY

A. *Liberty*

As noted earlier, *Roth* held that for the nonrenewal of a teacher's contract to violate his liberty as guaranteed by the fourteenth amendment, it must cause serious damage to his reputation in the community or so stigmatize him as to impair his ability to obtain other employment.[31] Precisely what constitutes a stigma severe enough to be considered deprivation of liberty is not yet clear.

Both the district court[32] and the court of appeals[33] in *Roth* viewed nonretention as a serious impediment to a college teacher's career, but the Supreme Court stated:

> [O]n the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches

[27] *Id.* at 599-601.
[28] *Id.* at 600.
[29] *Id.* at 603.
[30] *Id.*
[31] *See* note 15 and accompanying text *supra*.
[32] 310 F. Supp. at 970.
[33] 446 F.2d at 809.

the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another.[34]

Disagreeing with the majority opinion, Justice Douglas argued in his *Roth* dissent:

Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State.[35]

Others have also recognized the obstacles to future employment which may result from nonrenewal of a teacher's contract.[36] For example, Professor William Van Alstyne of Duke University Law School,[37] a distinguished commentator on matters relating to higher education, observed that the majority opinion in *Roth* fails to recognize the stigma of nonrenewal by treating Roth as if he had only a special, 1-year, limited appointment:

By placing Professor Roth in this different frame, as though he were not a regular appointee and as though there were no significant distinction between his situation and that of a special one-year terminal appointment, the majority of the Supreme Court reduced his constitutionally cognizable substantive interests in reappointment to zero.[38]

Laurence H. Kallen notes the Court's statement:

Mere proof, for example, that his [Roth's] record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty.[39]

and asks: "[W]hat does this say about the teacher who is given notice of nonrenewal in January and by May has one hundred rejections to applications for employment?"[40]

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[34]408 U.S. at 575.

[35]*Id.* at 585 (Douglas, J., dissenting).

[36]*See, e.g.*, Kallen, *The Roth Decision: Does the Nontenured Teacher Have a Constitutional Right to a Hearing Before Nonrenewal?*, 61 ILL. B.J. 464 (1973); Levinson, *The Fourteenth Amendment, Fundamental Fairness, the Probationary Instructor, and the University of California — An Incompatible Foursome?*, 5 DAVIS L. REV. 608 (1972); Van Alstyne, *The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann*, 58 A.A.U.P. BULL. 268 (1972); Comment, *Constitutional Law — The Rights of the Untenured Teacher to Procedural Due Process Prior to Dismissal — Roth v. Board of Regents*, 7 RICHMOND L. REV. 357 (1972).

[37]Professor Van Alstyne was formerly Chairman of the American Association of University Professor's Committee on Academic Freedom and Tenure.

[38]Van Alstyne, *supra* note 36, at 268.

[39]Kallen, *supra* note 36, at 467.

[40]*Id.*

That the stigma caused by nonrenewal of a teacher's contract can indeed create difficulties in securing other employment is illustrated by the two case histories which follow.

In *Orr v. Trinter*[41] a Columbus, Ohio high school teacher whose contract was not renewed and who was not given a statement of reasons was unable to find a teaching position for the following year. He claimed that he

> will continue throughout the remainder of his professional career to suffer the [stigma] of having his professional qualifications [impugned] by the present action of the [school board] in refusing to renew his contract for unknown reasons, and will have his prospects of acquiring future teaching positions at other schools substantially impaired by the aforementioned actions . . . .[42]

The district court agreed and held that Orr was entitled to a statement of reasons and to a hearing,[43] but the court of appeals reversed,[44] holding that the school board's interest in freedom to hire was not outweighed by the teacher's interest in learning the reasons for nonrenewal.[45]

Mrs. Susan Russo, a high school art teacher in Henrietta, New York, also found that she was not able to find employment in her profession after her contract was not renewed. The reason given for nonrenewal was "insubordination." However, the court of appeals found that this reason was invalid because "Mrs. Russo's dismissal resulted directly from her refusal to engage in the school's daily flag ceremonies."[46] The court of appeals therefore reversed the lower court and remanded the case for proceedings not inconsistent with its opinion.[47] Despite this judicial finding, a highly satisfactory teacher observation report during her probationary year, and further scholastic achievement, Mrs.

[41]318 F. Supp. 1041 (S.D. Ohio 1970), *rev'd*, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943, 409 U.S. 898 (1972).

Two petitions for certiorari were filed. The first petition, submitted before the *Roth* and *Sindermann* decisions were handed down, raised the issue of whether Orr was entitled to a statement of reasons and procedural due process before nonrenewal. The second petition, submitted after the Court's decisions in *Roth* and *Sindermann* and after Orr's first petition was denied, raised the issue of first amendment violations, which was present in the original complaints but not examined by the district court.

[42]Petition for Writ of Certiorari at 5, Orr v. Trinter, 408 U.S. 943 (1972).

[43]318 F. Supp. at 1046-47.

[44]444 F.2d 128 (6th Cir. 1971).

[45]*Id.* at 135.

[46]Russo v. Central School Dist. No. 1, 469 F.2d 623, 630 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

[47]*Id.* at 634.

Russo has been unable to find work as an art teacher in and around Henrietta. She believes that work is available, but she has found that the controversy surrounding her nonrenewal has proved an insurmountable obstacle to employment as an art teacher. She has been told as much in job interviews.[48]

Although it is clear that nonrenewal can be a professional detriment, cases decided since *Roth* have not clearly settled the extent to which difficulty in reemployment—and, hence, how great the stigma of nonrenewal—constitutes deprivation of liberty.[49]

For example, in *Lipp v. Board of Education*[50] the Seventh Circuit held that an elementary school substitute teacher was not deprived of liberty when he was characterized as "anti-establishment" in a generally satisfactory efficiency rating, since the court did not consider the comment sufficient to damage his reputation so as to constitute a deprivation of liberty. Further, the court of appeals found that the comment did not prevent him from obtaining other employment in the school system.[51] Moreover, the court of appeals noted, "not every negative effect upon one's attractiveness to future employers violates due process if it results without a hearing."[52]

But in another 1972 decision, *Wilderman v. Nelson*,[53] the Eighth Circuit reviewed a case in which it found evidence "tending to show state action imposing a stigma upon Wilderman which may affect his future employment opportunities."[54] Wilderman, a welfare worker, was discharged, and his letter of dismissal, which cited his unfavorable attitude, was filed in several state offices. Also, a reference letter to a prospective employer "commented adversely upon [his] ability willingly to carry out his employer's policies."[55] The court held that the district court

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[48]THE NEW YORKER, July 30, 1973, at 35.

[49]*See, e.g.*, Lipp v. Board of Educ., 470 F.2d 802 (7th Cir. 1972); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972); Wilderman v. Nelson, 467 F.2d 1173 (8th Cir. 1972); McDowell v. Texas, 465 F.2d 1342 (5th Cir. 1971); Wellner v. Minnesota State Junior College Bd., No. 4-71 Civil 555 (D. Minn., Dec. 18, 1972); Franz v. Board of Educ., No. 772 Civil 151 (N.D. Ill., Aug. 10, 1972); Hostrop v. Board of Junior College Dist., 337 F. Supp. 977 (N.D. Ill. 1972).

[50]470 F.2d 802 (7th Cir. 1972).

[51]*Id.* at 805.

[52]*Id.*

[53]467 F.2d 1173 (8th Cir. 1972).

[54]*Id.* at 1176.

[55]*Id.*

"was not justified in summarily dismissing Wilderman's complaint insofar as it alleged a right to a pretermination hearing."[56]

An examination of *Roth, Sindermann,* and the other cases discussed in this section suggests that college administrations and school boards can minimize legal entanglements if they avoid impairing a teacher's reputation in his community or attaching such discredit to his nonrenewal that other job opportunities are foreclosed. Thus, college administrators and school boards may find that the best course legally is to say or publish nothing about a teacher whose appointment is not being renewed.[57]

B. *Property*

The Supreme Court's treatment of the deprivation of property question in *Roth* and *Sindermann* suggests that it is in the best interest of a school board or college administration to be very explicit in its employment policy concerning yearly contracts and probationary teachers. This conclusion is suggested by the different results reached in *Roth,* where clearly the teacher had not been granted tenure, and *Sindermann,* where the teacher was able to allege that he had tenure based on a de facto tenure system.

Although in *Roth* there had been an explicit tenure system, neither state statutes nor university regulations gave rise to a legitimate expectation by Roth of continued employment as a probationary teacher. Professor Van Alstyne notes, however, that the Court made this finding in the absence of any evidence to the contrary in the record. He suggests that there may be situations in which,

> on a better record, under more compelling circumstances, where the

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[56]*Id.* The district court had granted summary judgment for the defendants. Wilderman v. Nelson, 335 F. Supp. 1381 (E.D. Mo. 1971).

[57]James F. Clark, of Ela, Christianson, Esch, Hart & Clark, counsel for the Wisconsin Association of School Boards, noted that the Supreme Court decisions "appear to have resulted in some reluctance on the part of school officials to give reasons for nonrenewal." Letter from James F. Clark to Carol Herrnstadt Shulman, July 10, 1973. His view is corroborated by Bruce F. Ehlke of Lawton & Cates, counsel for the Wisconsin Education Association. Letter from Bruce F. Ehlke to Carol Herrnstadt Shulman, Aug. 8, 1973. *See also* Shannon, *Due Process for Nontenured Teachers from the Board's Viewpoint,* in FRONTIERS OF SCHOOL LAW 15 (1973). However, Mr. Clark has also informed the author that reasons for nonrenewal were given to some plaintiffs following the court of appeals' decision in *Roth* and, in turn, these plaintiffs have amended their complaints following *Roth* and *Sindermann* to charge a deprivation of an interest in liberty without due process, because the reasons given for their nonrenewal damage their professional reputations.

> faculty member is well along the tenure track under policies explicitly encouraging reliance, peremptory notice of nonreappointment may not be enough to quench the constitutional claim to more specific consideration than none at all.[58]

In order for schools with an explicit tenure system to avoid creating expectations of continued employment for probationary teachers, another writer has suggested following Harvard's example.[59] It hires more probationary teachers than can be used to fill the available and expected tenured positions, and stresses to them that tenure is only a "faint possibility." Since administrators at other institutions and teachers are aware of this competitive situation, Mr. Levinson believes that little stigma is attached to nonrenewal of these teachers' contracts, and that the same would be true for other institutions that adopt similar hiring policies.[60]

Institutions without explicit tenure systems may discover that they have created an expectancy of reemployment in some circumstances. A series of 1-year contracts may indicate a property interest in continued employment.[61] In *Johnson v. Fraley*[62] the court appeared to recognize what one authority has called the "quasi tenure" situation which had been acknowledged in the Supreme Court,[63] *i.e.*, official actions by the institution that lead a teacher to expect continued employment despite the legal barrier of mere periodic contracts.[64]

On the other hand, one court has found that a long period of employment under a series of 1-year contracts did not constitute de facto tenure.[65] In this case, the Fifth Circuit held that the complaint of a public school teacher who had been employed 22 years under 1-year contracts, but whose contract was not renewed for the 23d year, failed to state a claim upon which relief could be granted. The court further found that the teacher did not allege "the existence of rules or understandings promulgated or fostered by state officials which would justify any legitimate claim of entitlement of continued employment."[66]

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[58]Van Alstyne, *supra* note 36, at 270.

[59]Levinson, *supra* note 36, at 619.

[60]*Id.*

[61]*See, e.g.*, Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972); Scheelhaase v. Woodbury Cent. Community School Dist. 349 F. Supp. 988 (N.D. Iowa 1972).

[62]470 F.2d 179 (4th Cir. 1972).

[63]Perry v. Sindermann, 408 U.S. 593, 601-02 (1972).

[64]Letter from William Van Alstyne to Carol Hermstadt Shulman, July 12, 1973.

[65]Skidmore v. Shamrock Independent School Dist., 464 F.2d 605 (5th Cir. 1972). *See also* Lukac v. Acocks, 466 F.2d 577 (6th Cir. 1972).

[66]464 F.2d at 606.

These unpredictable results in contract nonrenewal cases may lead institutions without an explicit tenure system either to develop such a system or to adopt form contracts and an institutional policy that are very clear on the terms and conditions of employment. Such institutions may profit from Odessa College's unhappy example. Following the Supreme Court's decision in *Sindermann,* Odessa settled with Sindermann for $48,000 in back pay and court fees.[67] It has also, however, replaced its old statement of policy and contract system[68] with a formal tenure policy.[69]

III. IMPLICATIONS OF THE COURT'S TREATMENT OF THE FREE SPEECH QUESTION

In *Sindermann,* the Court did not rule on the allegation that nonrenewal was in reprisal for the exercise of free speech rights, since the district court had granted summary judgment for Odessa College. Thus, *Sindermann* does not directly speak to the question of pretermination proceedings on charges of free speech violations. But when *Sindermann* is read with *Roth,* it is evident that direct violations of free speech rights would require such pretermination hearings. In *Sindermann,* the Court noted:

> The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. . . . We have rejected this approach in *Board of Regents v. Roth, ante* . . . .[70]

This reference is to an extensive footnote in *Roth,* which states in part: "Whatever may be a teacher's right of free speech, the interest in holding a teaching job at a state university, *simpliciter,* is not itself a free speech interest."[71] In *Sindermann,* however, the Court found that the "allegations represent a bona fide constitutional claim. . . . For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper."[72]

Summary judgment was also held to be improper in a later case in which it was claimed that first amendment rights were

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[67]Telephone conversation with Richard J. Clarkson (attorney for Robert Sindermann) in Odessa, Texas, Aug. 22, 1973.

[68]*See* text accompanying note 28 *supra.*

[69]Policy Statement on Academic Freedom, Tenure, and Responsibility of Odessa College, adopted by Board of Regents of Odessa College, March 27, 1972.

[70]408 U.S. at 599 n.5 (citation omitted).

[71]408 U.S. at 575 n.14.

violated. In *Chitwood v. Feaster*[73] nontenured teachers at a state college claimed that their contracts were not renewed because of their free speech activities and that they were entitled to a statement of reasons for nonrenewal. The court of appeals reversed the lower court decision that granted summary judgment for the college, holding that while the teachers were not entitled to a statement of reasons under *Roth,* their free speech claims, "although unsupported by hard evidence," must be heard.[74] The court of appeals noted:

> The concurrence of protected speech, which may be unpopular with college officials, and the termination of the employment contract seem to be enough, in the view of the Supreme Court, to occasion inquiry to determine whether or not the failure to renew was in fact caused by the protected speech.[75]

Not all speech by teachers is protected, however. For example, in *Duke v. North Texas State University*[76] a teaching assistant was not rehired because she had used profane language when criticizing the university and its administration. The university claimed that such language impaired her effectiveness as a teacher. The court of appeals held that:

> As a past and prospective instructor, Mrs. Duke owed the University a minimal duty of loyalty and civility to refrain from extremely . . . offensive remarks aimed at the administrators of the University. By her breach of this duty, the interests of the University outweighed her claim for protection.[77]

A similar decision was reached in another case involving similar issues, although the employee was not a teacher. In *Tygrett v. Washington*[78] the court also found for the employer, here the District of Columbia police force. Tygrett, a probationary officer, was dismissed after he announced that he would falsely call in sick, organize, and lead a "sick-out" unless certain personnel benefits were implemented. In finding for the employer, the district court noted: "[T]he First Amendment Right of Free Speech, whether in the context of employment or any other legitimate activity, is not absolute. Frequently the right to speak freely

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[72]408 U.S. at 598.
[73]468 F.2d 357 (4th Cir. 1972).
[74]*Id.* at 361.
[75]*Id.*
[76]469 F.2d 829 (5th Cir.), *cert. denied,* 412 U.S. 932 (1973).
[77]*Id.* at 840.
[78]346 F. Supp. 1247 (D.D.C. 1972).

must be balanced against legitimate conflicting interests."[79]

These cases demonstrate that teachers cannot be assured of success in court when seeking relief on the ground that their first amendment rights have been violated.

One significant effect of *Roth* and *Sindermann* may be to inhibit the bringing of such first amendment cases to court when contracts are not renewed. Roth's attorneys argued that if institutional proceedings were foreclosed to probationary teachers,

> few professors, faced with non-retention decisions, will seek judicial relief. Litigation and the attendant public exposure may be costly both in terms of money and personal embarrassment. Moreover, without a statement of reasons, the professor has only two alternatives: quietly acquiesce in the non-retention or begin a major law suit based on his suspicion that the reasons behind the non-retention were constitutionally impermissible.[80]

The National Education Association and Robert P. Sindermann, in their amici curiae brief in *Roth,* presented a similar argument about the "chilling effect" which results when litigation is the only available alternative in a nonretention dispute.[81] Their comments are directed to an opposing amicus argument of the Commonwealth of Massachusetts that a teacher has an adequate remedy in nonrenewal cases under section 1983.[82] Massachusetts appears to advocate this position in the belief that institutional proceedings in every nonrenewal case would be more burdensome

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[79] *Id.* at 1250, *citing* Pickering v. Board of Educ., 391 U.S. 563 (1968). In *Pickering,* a teacher was dismissed by his school board because of his criticism of the board's activities. The Court, while finding for the teacher, also noted that

> it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568.

[80] Brief for Respondents at 8, Board of Regents v. Roth, 408 U.S. 564 (1972).

[81] Brief for National Education Association and Robert P. Sindermann as Amici Curiae at 3, Board of Regents v. Roth, 408 U.S. 564 (1972).

[82]
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action by law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983 (1970).

than occasional court proceedings.[83]

IV. Policy Implications of *Roth* and *Sindermann*

The Supreme Court decisions in *Roth* and *Sindermann* establish the "constitutional boundary lines around the territory covered by procedural due process."[84] If institutions work within these "boundary lines," they will find that they have wide discretion in renewing the contracts of probationary teachers. On the other hand, probationary teachers confronted with the limits imposed by the Court's decisions will find that seeking relief through the courts is costly and yields unpredictable results.

Because there is a surplus of qualified college teachers,[85] *Roth* and *Sindermann* come at a time when institutions desire great flexibility in hiring, retaining, and dismissing faculty members. New concepts and needs in higher education in areas such as curricula, organization, and time spent in obtaining a degree also require colleges and universities to maintain flexibility in their programs. Under these circumstances, colleges and universities want to maintain a balance between tenured and nontenured faculty which will provide flexibility as well as stability.[86] If the Court had held that the mere fact of contract nonrenewal required a statement of reasons and an institutional hearing, institutions might have been overburdened with the work required for processing a substantial number of nonrenewal cases. They might then have been tempted to retain teachers simply to avoid the nonrenewal procedures, and as a consequence would have heavily tenured faculties with little flexibility. Such a situation might easily have arisen in an institution with a standard tenure policy of a 7-year probationary period after which the teacher must be granted tenure or not rehired, since the institution might have found it difficult to offer satisfactory reasons for nonrenewal after 7 years of continuous employment. In light of *Roth* and *Sindermann,* however, colleges and universities are legally free to develop employment policies that will provide the faculty mix most favorable to their own institutional goals.

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[83]Brief for Massachusetts as Amicus Curiae at 7, Board of Regents v. Roth, 408 U.S. 564 (1972).

[84]Rosenblum, *Legal Dimensions of Tenure*, in Commission on Academic Tenure in Higher Education, Faculty Tenure: A Report and Recommendations 160 (1973).

[85]T. Furniss, Steady-State Staffing in Tenure-Granting Institutions and Related Papers 2 (1973).

[86]*Id.*

As an alternative to tenure policies, colleges might consider the pure contract system of employment. This system was recently implemented by the Virginia community colleges which simultaneously abolished tenure for all faculty members who had not yet attained it.[87] The system's multiple contract plan does not contain any stated or implied promise of continuous employment beyond the term of a particular contract. The plan does, however, detail a procedure for appeal of a decision not to renew a contract. In view of *Sindermann,* institutions adopting this plan should not be found to have created an implied tenure-by-contract system.

In either a formal tenure or a contract system, the refusal of administrators to give reasons for nonrenewal,[88] coupled with the surplus of qualified college teachers, places probationary teachers at an obvious disadvanatage. However, in practice such teachers may not be at as great a disadvantage as these considerations suggest. There are pressures on universities not to adhere rigidly to the legal rights they have under the Court's decisions. First, the Court itself in *Roth* noted that its decision does not set university policy as to the "appropriate" action for a public institution to take in its treatment of employees.[89] It merely made clear that a hearing or statement of reasons would not inevitably be required when a nontenured teacher's contract was not renewed.

Second, it is important to note in this connection that many universities already provide a statement of reasons in nonrenewal cases. A survey conducted in April of 1972 by the American Council on Education's Higher Education Panel found that tenure systems are "nearly universal" in public and private universities and 4-year colleges, and that almost half of these institutions give written reasons for nonrenewal.[90] The survey also found that about 90 percent of these institutions had procedures for appeal following denial of tenure or contract nonrenewal, but that in only about 14 percent of these institutions had more than three appeals been taken during the preceding 30 months.[91]

Third, it is likely that teachers—and perhaps their un-

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[87]Memorandum from Chancellor Dana B. Hamel to the presidents of the Virginia community college system, Sept. 20, 1972.

[88]*See, e.g.*, authorities cited note 57 *supra*.

[89]408 U.S. at 578. *See* note 21 and accompanying text *supra*.

[90]T. FURNISS, *supra* note 85, at 21. *See also* C. SHULMAN, COLLECTIVE BARGAINING ON CAMPUS (ERIC Clearinghouse on Higher Education No. 2, 1973).

[91]T. FURNISS, *supra* note 90.

ions—will exert pressure to continue and extend the probationary teacher's opportunities for redress. In this regard, William Van Alstyne has commented:

> The experience of the AAUP [American Association of University Professors] vividly demonstrates that . . . the lack of *any* intramural opportunity for hearing at all must ultimately undermine the untenured faculty member's constitutional freedom of speech and his academic freedom. Thus, we [AAUP] shall doubtless continue to stand by our own policy statement on this matter, whatever the prevailing fashion on the Court.[92]

The AAUP's position on this issue is, in fact, in opposition to the Court's rulings. But its position is apparently not out of favor with the Court, since the Court referred to the AAUP in its comment that institutional policy need not be limited by the *Roth* decision.[93]

Current AAUP policy classifies the question of nonrenewal under two separate headings: (1) cases in which the probationary teacher claims that his nonrenewal is based upon inadequate consideration of his qualifications; and (2) cases in which the probationary teacher charges that his nonrenewal resulted from considerations in violation of academic freedom or "governing policies on making appointments without prejudice with respect to race, sex, religion, or national origin."[94] In the first situation, the AAUP advises that the teacher be allowed to present his claim charging inadequate consideration of his qualifications to a designated faculty committee that will determine whether the original decision is in accordance with institutional standards. The faculty body may recommend a reconsideration of the decision, but will not "substitute its judgment on the merits for that of the [responsible] faculty body."[95] In the second situation, informal settlement of the teacher's charge should be attempted. If this is unsuccessful, a hearing may be held at which the faculty member has the burden of proof. If he makes a prima facie case, his supervisors must demonstrate the validity of their decision.[96] In either situation, the AAUP urges that a teacher, upon request, should receive a written statement of reasons for nonrenewal.

A more ambitious plan for the protection of nontenured fac-

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[92]Letter from William Van Alstyne, *supra* note 64.
[93]408 U.S. at 579 n.15.
[94]A.A.U.P. POLICY DOCUMENTS AND REPORTS, *supra* note 1, at 19.
[95]*Id.* at 16.
[96]*Id.* at 19.

ulty members is found in a draft statement by the National Education Association (NEA).[97] This statement differs from the AAUP position in three ways: it places the burden of proof for justifying nonrenewal on the institution rather than the teacher; it gives the teacher the right to appeal the institution's decision to a neutral third party, *e.g.*, the American Arbitration Association; and, most significantly, it maintains that "the conferring of the initial annual contract upon a probationary employee does . . . carry with it an expectation of renewal so long as his work meets the predetermined standards of scholarship and teaching."[98] Both the NEA and the AAUP serve as collective bargaining agents for colleges and universities. It is predictable that in their contract negotiations they will press for guarantees to carry out their respective policies.

CONCLUSION

The Supreme Court's decisions in *Roth* and *Sindermann* place conservative interpretations on the fourteenth amendment concepts of liberty and property that limit probationary teachers' opportunities to obtain a statement of reasons and institutional due process hearings when their contracts are not renewed. Such teachers can, of course, resort to the courts, but success in court is unlikely if their institutions have acted knowledgeably in light of the Court's discussion of what will or will not constitute a violation of liberty or property interests.

In addition, when nontenured teachers allege that their nonretention was in retaliation for their exercise of first amendment rights, institutions are not, in general, legally required to offer due process hearings under the *Roth* and *Sindermann* decisions. *Sindermann* does provide, however, that allegations of contract nonrenewal for exercise of free speech rights must be heard in court without summary judgment against the teacher.[99] On the question of a property interest in continued employment, *Sindermann* holds that proof of an objective expectancy of de facto tenure entitles the teacher to an intramural hearing and a statement of reasons for contract nonrenewal.[100]

[97] National Education Association, *Due Process and Tenure in Institutions of Higher Education*, Today's Education, Feb. 1973, at 60.

[98] *Id.* at 61.

[99] 408 U.S. at 598.

[100] *Id.* at 603.

The courts, therefore, are a nontenured teacher's first and last source of redress in most cases of violations of liberty and property interests and violations of first amendment rights. However, commentators have questioned whether it is desirable for higher education to rely so heavily on the courts for adjudication of its disputes. The Commission on Academic Tenure in Higher Education (the "Keast Commission") criticizes such dependence on the courts, because it demonstrates that an institution has not implemented satisfactory standards and procedures.[101] In addition, it claims that "frequent resort to court determination of personnel questions will surely erode institutional and faculty autonomy, thus jeopardizing the ability of faculties and institutions to govern themselves in the interest of their students and society generally."[102] Therefore, the commission recommends that colleges and universities develop policies and procedures for handling faculty personnel problems which will "minimize reliance on the courts."[103]

Much of the adverse effect of *Roth* and *Sindermann* on nontenured teachers may disappear as faculty collective bargaining units clarify in their contracts the rights of represented nontenured teachers to institutional hearings and statements of reasons in the event of contract nonrenewal. It remains to be seen, however, how the national pressures of the faculty labor market and the several professional faculty organizations will in fact affect institutional policies and practices in the nonrenewal of faculty contracts.

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[101]The "Keast Commission" was established in 1971 under the sponsorship of the Association of American Colleges and the American Association of University Professors with a grant from the Ford Foundation. The commission examined the full range of issues concerning tenure: current status, criticisms, alternatives, and improvements. William R. Keast, chairman of the commission, is professor of English and Director of the Center for Higher Education of the University of Texas at Austin. The commission's report is COMMISSION ON ACADEMIC TENURE, FACULTY TENURE: A REPORT AND RECOMMENDATIONS (1973).

[102]*Id.* at 33.

[103]*Id.*