Due Process Restriction on the Employment Power and the Teaching Profession

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Comment

DUE PROCESS RESTRICTIONS ON THE EMPLOYMENT POWER AND THE TEACHING PROFESSION

A teacher should be appointed solely on the basis of teaching ability and competence in his professional field without regard to such factors as sex, race, nationality, creed, religious or political belief or affiliation, or behavior not demonstrably related to the teaching function. Continuation of appointment and the granting of tenure after a reasonable probationary period should depend upon performance as a teacher and scholar.¹

Such is the statement of position of the American Civil Liberties Union in regard to the issues properly considered in the decision to hire or fire a teacher. Whether these standards are met is questionable. This comment is concerned with a particular aspect of the problem. The basic proposition is that a teacher has a right to be free from arbitrary and capricious action on the part of the state when it exercises its power over employment.

First it is necessary to indicate what is to be excluded from discussion. Section 1983 of the United States Code² under which these issues would normally arise provides some limits. The action which is to be reviewed must be "under color of law," and there must be a denial of "life, liberty, or property" to bring the Due Process or Equal Protection Clauses into play. The bounds of the phrase "color of law" will not be considered here. In addition, certain distinctions will not be made or discussed. For example, whether non-retention, as opposed to dismissal, can be made a ground for an action under section 1983 will not be considered.³ Nor will there be any extended

² 42 U.S.C. § 1983 (1964): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of 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 at law, suit in equity, or other proper proceeding for redress."
consideration of the distinction between tenured and non-tenured faculty, since the problems considered below appear in either situation.\(^4\)

Judicial thinking has developed to the position that if a teacher is able to allege that a specific constitutional right such as freedom of speech, freedom of religion or the right to equal protection has been violated, then redress is available.\(^5\) If the court agrees that action of the state infringes upon such a right, its attention then turns to the issue of procedural due process; that is, in the face of the competing interests involved, did the actions of the state comport with what the courts have defined as due process?\(^6\) This procedural due process may include such things as right to notice of the charges, right to a hearing, and right to confront witnesses. However, if the individual is unable to allege, or is unsuccessful in alleging the infringement of a specific constitutional right, the courts have been singularly reluctant to enter the controversy and extend relief to the injured party.\(^7\) It is submitted that the courts should extend relief in such a situation because it would protect important policy interests, policy interests which outweigh those supporting any interest the state may have in the possession of unfettered dismissal power. Though it is evident that some courts have felt this to be the case, there has been a failure to adequately develop and define a rationale for granting such relief.\(^8\)

I. EVOLUTION FROM "PRIVILEGE" TO "PROTECTION"

Initially, it is necessary to define the problem and to place it in the proper historical context. The general problem is determining what redress is available to a teacher who is either dismissed or not retained in his teaching position for reasons, or through the use of procedures, which he feels are arbitrary or capricious. For many years the courts held the position that a teacher was merely a

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\(^4\) For example, though a statute may provide certain procedural protections, if these do not comport with those requirements recognized under the Due Process Clause, the statutes cannot stand. Also, if tenure laws require a showing of something as tenuous as "good cause" for dismissal, and a court does not wish to invalidate the statute for overbreadth, a court could overturn a palpably arbitrary dismissal on due process grounds. Cf. section V infra.


\(^7\) Comment, supra note 5, at 734.

government employee in a typical master-servant relationship and pursuant to such status his employment was "a privilege to be commenced, continued and terminated on such terms and conditions as the government may determine, even though these terms may deny public employees constitutional rights generally enjoyed by other citizens." This was the so-called "privilege doctrine," which received its authoritative statement from Mr. Justice Holmes in *McAuliffe v. Mayor of New Bedford*, and as recently as 1950 was still operative:

It has been held repeatedly and consistently that Government employ is not "property" and that in this particular it is not a contract. We are unable to perceive how it could be held to be "liberty". Certainly it is not "life". So much that is clear would seem to dispose of the point. In terms the due process clause does not apply to the holding of a Government office.

The doctrine saw wide application. The reason for this, particularly in the instance of teachers' rights, might be explained in terms of judicial reluctance to enter an area not susceptible, or at least considered by the courts not to be susceptible, to judicial guidance, coupled with a reluctance on the part of the members of the teaching profession to actively press claims in the litigation process. Additionally, there might be the problem of a public attitude unfavorable to judicial vindication of the rights of a persona non grata. The forces behind the development of this theory of privilege may also be difficult to explain. It may have grown from

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10 155 Mass. 216, 29 N.E. 517 (1892).
12 Id. at 57 (footnotes omitted).
13 In *Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968), there is a discussion of the rise of the privilege doctrine and the perhaps unwarranted extension of its effects to the area of private activities. The author also notes that although the doctrine had in the past been extended and used to prevent recovery in a variety of situations, nevertheless "the ... distinction has not in fact removed all restraints from the government in the public sector. ... Increasingly, when the petitioner's primary interest in the public sector could not be characterized as a 'right' entitled to protection on grounds of substantive due process, courts have nonetheless found some other implicated right to sustain the claim." Id. at 1442.
14 Murphy, *supra* note 9, at 448–50. The author places no emphasis on the possibility of judicial reluctance, but it seems likely that this factor played at least as important a role as those he mentions. Cf. Comment, *supra* note 5.
a 19th century viewpoint of employment in general\textsuperscript{15} and from a largely undeveloped theoretical and statutory framework for the consideration of civil rights problems.\textsuperscript{16}

In recent years judicial treatment of the issues involved has expanded for employees of all kinds, and teachers in particular. In \textit{Wieman v. Updegraff},\textsuperscript{17} the Supreme Court was concerned with the refusal of Oklahoma state officials to pay the salaries of certain school teachers who had refused to subscribe to a loyalty oath. The Court held that the oath was indiscriminate in that it did not differentiate between knowing and unknowing membership in subversive organizations. For our purposes, the case is important in two respects: its refusal to apply the privilege doctrine to public employment; and its view of society's interest in protecting the integrity of the teaching profession. The majority opinion noted:

\begin{quote}
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.\textsuperscript{18}
\end{quote}

These same themes appeared in \textit{Sweezy v. New Hampshire}\textsuperscript{19} which concerned the contempt conviction of a professor at a state university for failure to answer questions in a hearing before the state attorney general. There was no majority opinion, but Chief Justice Warren's opinion, with Justices Brennan, Douglas, and Black concurring, contained a statement inconsistent with the privilege rationale:

\begin{quote}
The State Supreme Court thus conceded without extended discussion that petitioner's right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through this investigation. These conclusions could not be seriously debated... These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of \textit{petitioner's liberties in the}
\end{quote}

\textsuperscript{15} Witness, for example, the development of the tort doctrine of "fellow servant."

\textsuperscript{16} Murphy, \textit{supra} note 9, at 447 et seq.

\textsuperscript{17} 344 U.S. 183 (1952).

\textsuperscript{18} \textit{Id.} at 192. This language has further ramifications; see section IV \textit{infra}. A concurring opinion written by Mr. Justice Frankfurter foreshadowed issues appearing later: "[I]n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation." \textit{Id.} at 195.

\textsuperscript{19} 354 U.S. 234 (1957).
areas of academic freedom and political expression—areas in which
government should be extremely reticent to tread.\textsuperscript{20}

These members of the Court seem to have made an assumption
that a teacher in government employ does not relinquish his consti-
tutional rights. This assumption is in no way reconcilable with the
privilege doctrine, although the Court did not indicate its position
in this respect. However, later decisions such as \textit{Pickering v. Board
of Education}\textsuperscript{21} show that this is the effect of \textit{Sweezy}:

\begin{quote}
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 unequivocally rejected in nu-
merous prior decisions of this Court.\textsuperscript{22}
\end{quote}

\textit{Pickering} involved a teacher who had written to a local newspaper
criticizing the school's administrative body for certain of its de-
cisions. Though the decision was ultimately one of First Amendment
rights, another aspect of the opinion is of particular importance. The
Court felt that in order to determine whether the school board was
correct in firing Pickering on the grounds that his letter resulted
in undermining the school's morale, it would be necessary to review
the record and consider the effect of the letter and its contents on
the everyday operation of the school. Thus, in a large measure the
decision turned on two points, the state interests involved and the
procedures used to determine the facts. This illustrates what might
be termed the contemporary judicial manner of dealing with dis-
missal cases. The courts will review the record to determine
whether a substantive right has been abridged, and then will deter-
mine whether the due process standard has been met by balancing
the competing interest involved. This decisional method, as indi-
cated by \textit{Pickering}, is well established when the basis of the claim
is an alleged violation of a specific constitutional provision, such as
First Amendment freedom of speech.\textsuperscript{23} Another decisional method,
invoked whenever possible to avoid reaching constitutional ques-
tions, is to use statutory and contractual provisions as a basis for
redress; this approach may be necessary when state action is not

\begin{footnotes}
\item[20] Id. at 249-50 (emphasis added).
\item[21] 391 U.S. 563 (1968). Cf. Davis, \textit{The Requirement of a Trial-Type Hear-
\item[23] E.g., Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970); Keefe v.
Geanakos, 418 F.2d 359 (1st Cir. 1969); Franklin v. County School
Bd., 360 F.2d 325 (4th Cir. 1966); Braxton v. Board of Pub. Instruction,
\end{footnotes}
present. When an injured party is unable to predicate his claim on one of these bases there is less willingness on the part of the courts to extend relief, a situation reminiscent of the reticence noted earlier during the prevalence of the privilege doctrine.

II. COMPETING POLICY INTERESTS

Any discussion of the right of a teacher to due process must begin with the policy interests involved since judicial opinions often reflect those interests. Then the adjudicative principles used by the courts to reflect these interests will be discussed, and an attempt will be made to determine what is an acceptable approach to the issues.

First, there are essentially three policy interests considered in protecting a teacher from an arbitrary dismissal or non-retention: the protection of an individual's interest in a profession, protection of the social interest in excellence of the profession, and protection of other constitutional rights which may be violated in a proceeding not subject to judicial scrutiny.

That dismissal or non-retention is traumatic and may have varying effects on the teacher is obvious. One commentator has characterized the situation in this manner:

25 Comment, supra note 5, at 734. Professor William Van Alstyne, in The Constitutional Rights of Teachers and Professors, 70 Duke L.J. 841, 859-63 (1970), enumerates the barriers to litigation designed to vindicate the violation of a specific constitutional right: (1) cost; (2) plaintiff's burden of proof; (3) time required for litigation; (4) to sue and lose adversely affects a teacher's record; (5) to sue and win will expose any proven shortcomings of the teacher and may inhibit future employment opportunities. The author also summarizes sources available to a teacher on which to base a claim of a right to procedural due process: (1) specific constitutional rights cannot be violated; (2) statutes, administrative orders and the common law; (3) "[W]hen the proposed action of the government would do more than terminate the individual [sic] and would, in addition, inflict an injury on some aspect of his personal liberty of which he may not be deprived without due process;" (4) "[A]n independent right to procedural due process may be found in the accumulating judicial recognition that one's status in the public sector is itself a form of 'liberty' or 'property' which, while subject to forfeiture as any other aspect of liberty pursuant to strict procedural safeguards, nevertheless is an interest not to be divested without adequate procedural safeguards to minimize unreasonable risks of error or prejudice." Under this formulation, the sources listed in the last two categories are considered here.
Certainly, the non-retention of a teacher is a matter of most serious consequence to his career and . . . is a very serious impediment to a successful teaching career. Unlike purely political appointees whose non-retention with changes in policy or administration is a matter of custom, teachers are normally retained unless they are guilty of incompetence or some other serious failure of desirability for their position.26

A teacher has a great stake in his profession, having invested time and money. Not only does termination of employment cause normal disruption of life and financial expenditures involved in the search for a new job and in moving to a new location, but it may also preclude the attainment of future financial gain, inhibit the teacher's ability to gain a prestigious position, and perhaps force him to abandon his profession entirely.

Society also has an interest in maintaining excellence of education. This can be done by insuring that teaching remain a profession where one is "free to inquire, to study, and to evaluate," unhindered by fear of reprisal for any indication of independence. The United States Supreme Court has repeatedly recognized the need to explore and expound new ideas as an element of academic development.28

It is also possible that a dismissal may have an effect on specific constitutional rights when the proceedings are essentially nonreviewable. If the state is free to act arbitrarily, it may actually infringe upon one of these rights under the guise of exercising its unfettered right to control employment. If the process is not subject to review, the injured party has no right to prove the impermissible nature of the action:

26 Frakt, supra note 3, at 35. The problem has not escaped the attention of professional associations. The American Association of University Professors and the Association of American Colleges have approved a Statement on Procedural Standards in Faculty Dismissal Proceedings. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ACADEMIC FREEDOM AND TENURE 40 (Joughin ed. 1969).

27 Cf. Byse, Academic Freedom, Tenure, and the Law: A Comment on Worzella v. Board of Regents, 73 HARV. L. REV. 304 (1959): "The unique responsibilities of colleges and universities in the United States are to extend the frontiers of knowledge, to make available to students the wisdom and knowledge of the past, and to help them to develop their capacities for critical, independent thought. If these vital tasks are to be performed with any degree of success, teachers in institutions of higher learning in this country must be as free as possible from restraints and pressures which inhibit independent thought and action. They must . . . be free to pursue truth wherever it may lead."

Moreover, [the teacher] might find that he had evidence that could be used to support a claim that he was not rehired for constitutionally impermissible reasons. Even if the reasons assigned [for the dismissal] were false ones, demonstrating their falsity would have probative value in a claim that the real reasons lie elsewhere. 29

The state interests involved in the claim for substantially unrestricted power to dismiss are efficiency of school administration, the need for local autonomy and economy, and the untoward effects of restrictions on hiring practices. 30 These interests must be considered in greater detail.

In considering the advisability of restricting dismissal it is necessary to consider whether this will hinder efficient operation. For an organization to operate efficiently, and in some cases at all, discord must be kept at a minimum. The purpose of a school system is to provide an adequate education for the members of the community, and this purpose may be jeopardized both from continued disruption which arises in conflicts over dismissal of individual teachers and from the retention of substantial numbers of dissident faculty members within the system. Thus, school administrative boards should have a large measure of discretion in the area of employment.

The need for local autonomy is actually based on a particular philosophical outlook as to the respective responsibilities of different governmental entities. The court in Freeman v. Gould Special School District 31 exhibited this outlook in discussing the question of a school board's power when it stated: "Local autonomy must be maintained to allow continued democratic control of education as a primary state function, subject only to clearly enunciated legal and constitutional restrictions." 32

Economy is a standard justification and, indeed, presents a compelling problem. A school's budget should be oriented toward presenting an acceptable education program. The imposed necessity of expanded procedural requirements in order to meet legal standards would lead to greater expense and, if adequate funding were

31 405 F.2d 1153 (8th Cir.) (Gibson & Blackmun, J. J.), cert. denied, 396 U.S. 843 (1969).
32 Id. at 1157.
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not forthcoming, would result in a reduction of funds available to meet educational needs.

Finally, a system designed to provide protection of the teaching profession might actually lead to an adverse result by preventing the hiring of an innovative teacher when the body with responsibility for hiring knows of the burdensome hearing requirements.\(^3\) It could also mean the perpetuation of teachers in positions for which they are not suited, and thereby a less effective school system, because a dismissal might be ruled out due to the burdensome hearing requirements.\(^4\)

III. LEGAL PRINCIPLES AVAILABLE FOR TEACHER PROTECTION

There are three possible rationales available to a court desirous of protecting the personal and societal interests of the arbitrarily dismissed teacher. One of the most obvious approaches is asserting a right to teach. In *Meyer v. Nebraska*,\(^5\) the appellant had been convicted of teaching the German language in a private school in contravention of a state statute. The Nebraska Supreme Court held this was a valid exercise of the police power. The United States Supreme Court overturned the decision, reasoning that personal liberties may be restricted by the police power unless the legislative action is "arbitrary or without reasonable relation to some purpose within the competency of the State to effect."\(^6\) The right which the Court felt was protected by the Due Process Clause of the Fourteenth Amendment was "his right ... to teach,"\(^7\) on the ground that this was a liberty within the language of the amendment. It then held that there was no adequate reason for this interference with a recognized right. Subsequently, however, the courts have been re-

\(^3\) Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970).
\(^4\) There is an additional justification for unfettered dismissal power when a non-tenured teacher is affected, since any restrictions on such power would obviate tenure laws. Schultz v. Palmberg, 317 F.Supp. 659 (D. Wyo. 1970). This reasoning appears of limited moment for three reasons: first, it is not absolutely certain that procedural requirements for valid dismissals of non-tenured teachers would have to be the same as those presently imposed by permissible tenure laws for tenured faculty; second, such reasoning makes the existence of tenure laws the legal justification for arbitrary dismissals; third, the mere existence of tenure laws settles no constitutional questions.
\(^5\) 262 U.S. 390 (1923).
\(^6\) Id. at 400.
\(^7\) Id.
luctant to raise this particular right and the concept has received little support in later cases.\textsuperscript{38}

Another approach, somewhat broader than the right to teach, would be to make public employment a substantive right. This reasoning would denote such employment as property within the language of the Fourteenth Amendment; this was the position taken by Justice Brennan in his dissent in Cafeteria Workers \textit{v. McElroy}\textsuperscript{39} when he indicated that loss of governmental employment was the loss of a valuable property right. The court in \textit{Freeman v. Gould Special School District}\textsuperscript{40} discussed and rejected this contention. \textit{Freeman} dealt with school teachers seeking to compel reinstatement by the school board. One authority used in the petitioner's argument was \textit{Schware v. Board of Bar Examiners},\textsuperscript{41} a case which arose from the exclusion of an applicant for admission to the New Mexico bar on grounds of undesirable moral character. The United States Supreme Court had examined an extensive record and concluded that the finding was not justified. Justice Black stated: "Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."\textsuperscript{42} The majority in \textit{Freeman} felt \textit{Schware} was inapposite, on the ground that it dealt with a "right to practice a profession and did not deal with the narrower question of a right to specific employment."\textsuperscript{43} That is, dismissal of a teacher does not preclude that same teacher from employment in the same profession elsewhere, whereas denial of a license to practice law may; this was the same distinction made by the Supreme Court in Cafeteria Workers \textit{v. McElroy}. Yet it is possible to raise the opposite assumption that teaching involves the right to practice a profession, and construct the argument that \textit{Schware} represents the principle that governmental employment is property under the Fourteenth Amendment. However, as in the case of the right to teach, the Supreme Court has avoided pronouncing this as constitutional doctrine, as shown earlier in \textit{Wieman}.\textsuperscript{44}


\textsuperscript{39} 367 U.S. 886, 899 (1961).

\textsuperscript{40} 405 F.2d 1153 (8th Cir.), \textit{cert. denied}, 396 U.S. 843 (1969).

\textsuperscript{41} 353 U.S. 232 (1957).

\textsuperscript{42} \textit{Id.} at 239.

\textsuperscript{43} 405 F.2d at 1159.

\textsuperscript{44} 344 U.S. 183 (1952).
The one adjudicative principle which has been neither expressly accepted nor rejected by the Supreme Court is a general due process right, the right to be free from arbitrary and capricious action by the state. A decision which takes great pains to deal expressly with the general due process question is Roth v. Board of Regents of State Colleges.\textsuperscript{45} In Roth a non-tenured teacher was not offered a new contract for the next academic year; the teacher brought an action for declaratory and injunctive relief, alleging violations of First and Fifth Amendment rights. The court indicated that it wished to consider "whether the Fourteenth Amendment permits non-retention on a basis wholly without factual support, or wholly unreasoned,"\textsuperscript{46} where the claim of a petitioner was not based on an alleged denial of a specific constitutional right. On the basis of Greene v. McElroy\textsuperscript{47} the presence of a general due process right was held to depend upon which side of the dismissal controversy appeared to have the paramount interests. The state interest in the continuance of unrestricted dismissal power was considered to be the danger of preventing an institution from ridding itself of teachers whose "inadequacies are promptly sensed and grave but not easily defined."\textsuperscript{48} However, in light of the strength of the personal interests of the injured party, the court held that any dismissal is restricted by the Due Process Clause:

As against this danger, however, there is to be set the interest of the individual new professor. To expose him to non-retention because the deciding authority is utterly mistaken about a specific point of fact, such as whether a particular event occurred, is unjust. To expose him to non-retention on a basis wholly without reason, whether subtle or otherwise, is unjust. There can be no question that, in terms of money and standing and opportunity to contribute to the educational process, the consequences to him probably will be serious and prolonged and possibly will be severe and permanent. "Badge of infamy" is too strong a term, but it is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career.\textsuperscript{49}

Though the general due process right has never been expressly rejected by the Supreme Court, it has not escaped attack from other quarters. There are basically four arguments against the

\textsuperscript{45} 310 F.Supp. 972 (W.D. Wis. 1970).
\textsuperscript{46} Id. at 976.
\textsuperscript{47} 360 U.S. 474 (1959).
\textsuperscript{48} 310 F.Supp. at 979.
right. The first two are merely resurgent forms of the privilege doctrine within the logical framework of either the general due process right or the governmental employment right. An example of the former is the argument that unfettered dismissal must be given to school boards in view of the state interest in administering and promoting the educational system. An example of the latter is the position that the type of employment involved, including that of the teacher, is merely specific, and is not analogous to decisions dealing with state licensing in order to carry on a profession, as in Schware.\textsuperscript{50} Though these criticisms purport to negate the general due process theory they actually represent, respectively, differences of opinion as to the relative weight to be given certain considerations in the balancing process, and differences of opinion as to the placement of the teaching profession in the general-specific employment scheme.

The remaining two criticisms go more directly to the validity of the due process doctrine.\textsuperscript{51} The first raises the question of precedent. Granted, certain procedural safeguards are required pursuant to statute or contract in regard to a hearing, such as maintaining a record, notifying the teacher and giving him a chance to defend himself. In addition, dismissal cannot infringe a specific constitutional right. However, these are the only restrictions on the power; no Supreme Court decision has gone so far as to insist that all actions of any governmental body terminating the employment of a person engaged in a public occupation are subject to the proviso that they not be arbitrary or capricious. The second criticism of the doctrine deals with a purported conceptual weakness. Any postulation of a general due process right acts in a dual capacity; that is, substantively it is the measure of the right which has been denied, and procedurally it is the measure of the extent of that denial. The relative merits of these criticisms rate more extended discussion in the next section.

IV. ANALYSIS OF THE RIGHT TO BE FREE FROM ARBITRARY AND CAPRICIOUS ACTION.

Thus far we have considered the decline of the privilege doctrine, the establishment of protection for specific constitutional rights of teachers, and slowly expanding restrictions on the dismissal power beyond those provided by the protection of specific constitutional rights. The question remains as to which mode of analysis should


\textsuperscript{51} Cf. 81 HARV. L. REV. 1045, 1079 (1968).
be and will be accepted. The right to teach has gained little favor, though it has the virtue of emphasizing the personal interests of the individual teacher and the societal interests in preserving the academic process. The right to government employment, on the other hand, broadens the narrow basis of the right to teach theory, and perhaps places more emphasis on a balancing of interests, yet it too has been denied enthusiastic support. The general due process right seems to have two virtues: it has not been expressly or tacitly rejected by the Supreme Court, and it is stated in terms familiar to constitutional analysis.

The principles required for application of the general due process right appear in contemporary case law, and indeed, they may be seen as almost compelling such a result. In the Wieman case, though an employment right was rejected as a basis of the Court's conclusion, it was held that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." It is true that the Court spoke in terms of limitation on the legislature ("pursuant to a statute"), but there seems little justification for treating the executive power any differently than the legislative, since similar interests are present. In the case of state governments, Money v. Holohan indicates, as Judge Lay pointed out in his dissent in Freeman, that the Fourteenth Amendment "governs any action of a state, 'whether thorough its legislature, through its courts, or through its executive or administrative officers.'"

Other instances where the language of the Court is not limited as it was in Wieman can also be found. Mr. Justice Brennan, in his dissent in Cafeteria Workers v. McElroy, supported not only the proposition that government employment was "property," but in addition strongly advocated what has been termed the general due process right:

[I]f [the employee's] badge had been lifted avowedly on grounds of her race, religion, or political opinions, the Court would concede that some constitutionally protected interest—whether "liberty" or

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53 344 U.S. at 192.
54 Cf. Comment, supra note 5.
55 294 U.S. 103 (1935).
56 405 F.2d at 1164.
57 294 U.S. at 113 (quoting Carter v. Texas, 177 U.S. 442, 447 (1900)).
“property” it is unnecessary to state—had been injured. . . . [This Court] holds that the mere assertion by government that exclusion is for a valid reason forecloses further inquiry. . . .

Such a result in effect nullifies the substantive right—not to be arbitrarily injured by Government—which the Court purports to recognize.

In Birnbaum v. Trussell, the petitioner had been discharged from a New York City hospital. He alleged that the dismissal resulted from false charges of prejudice toward Negro personnel, and that the Department of Health prevented his employment in any other city hospital. His section 1983 action was grounded on a denial of property without due process. Though the court rejected his due process argument based on an employment right, it reversed the lower court’s dismissal of the action on grounds similar in content to those voiced by Mr. Justice Brennan in Cafeteria Workers:

The principal to be extracted . . . is that, whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without procedure calculated to determine whether legitimate grounds do exist.

The court raised this right to due process from a consideration of the crucial personal interests involved measured against the state interests in an unlimited dismissal power. The personal interests, it recognized, were “reputation and the ability to pursue a profession effectively.” These assertions in Cafeteria Workers and Birnbaum are strongly supportive of the general due process argument. If they can be justified in Supreme Court case law development, then it would appear that the argument has validity in light of present constitutional principles.

The basic line of reasoning arises from the cases dealing with the general and specific employment distinction. In regard to government employment the Supreme Court has recognized, in Greene v. McElroy, the presence of constitutional issues in situations where the action of a governmental body might result in a stigma on a person’s reputation. This stigma could possibly impair that person’s ability to pursue a chosen field of employment. 

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59 Id. at 900 (1961) (emphasis added).
60 371 F.2d 672 (2d Cir. 1966).
61 Id. at 678 (emphasis added) (footnote omitted).
62 Id. at 678 n. 13.
governmental action seriously injures an individual, and the reason-
ablenss of the action depends on fact findings, the evidence used
to prove the Government's case must be disclosed to the individual
so that he has an opportunity to show that is untrue. How is
the relative weight of this injury to be measured? A reasonable
conclusion is that the Court will use the same method of balancing
interests that it indicated in Wieman when considering actions
"pursuant to statute," and that the term "governmental action"
will not be construed as limiting only the legislature, since, as one
commentator has phrased it, "the blanket denial of the power to
review executive action seems anomalous against a background
of asserted power to control the action of the legislature." The
question remains whether this rationale is of any help to
the teacher if, as Freeman held, a teaching position merely involves
specific employment. The real question is whether the employment
is closer in kind to that in Cafeteria Workers v. McElroy, where a
waitress was excluded from working on a military base for security
reasons, or Greene v. McElroy, where an executive of a defense
contractor was denied security clearance. As indicated earlier, the
dismissal or non-retention of a teacher may have an extremely
adverse effect on future employment possibilities within the pro-
fession; this may be substantial justification in itself for declaring
teaching analogous to general employment. But it also seems that
if we are to give full import to the Supreme Court statements that
"[t]he vigilant protection of constitutional freedoms is nowhere
more vital than in the community of American schools," and that
"[s]cholarship cannot flourish in an atmosphere of suspicion and
distrust," then the question of which interests should prevail must
be answered favorably for the teaching profession. This reasoning
gives weight to an overriding policy concern of insulating the
teaching process from pressures to conform by viewing skeptically
unsubstantiated claims upon which dismissals may be based. It is

64 Id. at 496.
65 Comment, supra note 5, at 737 (footnote omitted). This, of course,
pertains to the situation where dismissal power is viewed as a ques-
tion of administrative discretion.
66 The argument for the existence of a right to be free from arbitrary
and capricious action is even stronger if Cafeteria Workers v. McElroy
is limited by the facts of the case, that is, the grounds for the decision
may have been "the traditional and historic power of military com-
manders to exclude civilians from military installations." Murphy,
supra note 9, at 478.
noteworthy in this respect that courts have found compelling private interests in occupations which have not received the solicitous language of the Supreme Court noted above.\textsuperscript{69}

This would seem to answer the objection that the Supreme Court has never gone so far as to restrict dismissals beyond the prohibitions of specific constitutional rights and statutory or contractual provisions. The reliance that the Court has placed on specific rights, and the avoidance of constitutional issues where the case may be satisfactorily disposed of on other grounds, does not indicate that other constitutional protections do not exist.\textsuperscript{70} Even more important, the Court has used principles of decision which are consistent with the due process protection sought. Nor does the assertion that the general due process right is conceptually weak present overburdening obstacles to its application. The mere assertion of conceptual weakness does not make it so, nor does judicial reluctance to utilize the theory necessarily lead to that conclusion. Support for the general due process right can be seen as merely construing the term "due process" as a limitation on the arbitrary exercise of governmental action, and the double duty which the phrase must serve may be viewed as a necessary concomitant of this construction.

In summary, under any one of the three theories used, the crucial questions are the existence and the strength of the state's interests in an unfettered right to hire and fire, the detrimental effects of dismissal or non-retention on a teacher in the pursuit of a career, and the societal interests in preserving the academic process.\textsuperscript{71} The major legal arguments or principles supporting this type of protection are similar no matter what term we give the right of a teacher. The essence of due process is freedom from arbitrary action on the part of the state. In any given case the private and societal interest may outweigh the state interest, and thus, theoretically, the former should prevail. Therefore, it is no justification to say that an action is taken pursuant to legislative


\textsuperscript{71} Mr. Justice Frankfurter phrased this last interest quite well in his concurring opinion in Wieman: "Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." 344 U.S. at 195.
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authorization or executive power if the exercise of such authority
or power is itself limited by the existence of substantive rights of
an individual.

V. INCIPIENT PRINCIPLES OF PROTECTION

This analysis of possible due process relief is not meant to sug-
gest that there are not other ways in which the courts may protect
an individual teacher from unreasonable action. Other rationales
exist which could be applied in fact situations similar to those in
which the due process theories appear. These other rationales are
indicated here only to suggest lines of judicial reasoning which may
expand in the future. These include the void for vagueness and
overbreadth principles, the Ninth Amendment, and the Equal
Protection Clause.

The reasoning behind application of the void for vagueness and
overbreadth theories has particular relevance to the question of the
validity of tenure laws. Tenure laws are designed to provide
teachers who have completed a specified number of years as pro-
bationary teachers with certain types of procedural rights. The
problem arises from the language of these tenure statutes: "A
tenure teacher may only be discharged for specific statutory mis-
deeds. These are typically quite broadly described in such terms
as 'incompetency,' 'immorality,' 'continued failure to comply with
regulations' or merely 'good cause.'" Even if procedural safeguards
are present, if what must be proven is one of these violations, the
protection provided by the tenure laws may be largely illusory.
Although in comparison with statutory schemes which have been
declared vague or overbroad a statute allowing dismissal for the
above reasons is a prime candidate for vociferous objection, it is
probably unrealistic to believe that this theory will become prom-
inent in judicial thinking:

Because of the practical difficulty of structuring a satisfactorily
specific statute for protecting students from exposure to an unfit
teacher, it would seem unlikely that the courts will ever be receptive
to the vagueness aspect of the due process clause as a defense to
dismissal.

72 Cf. Graham, Freedom of Speech of the Public School Teacher, 19
73 U.S. CONST. amend. IX.
74 U.S. CONST. amend. XIV.
75 Frakt, supra note 3, at 28 (footnote omitted).
76 Graham, supra note 72, at 386.
The Ninth Amendment is an unused tool in the decisional process. It would, however, be possible to extend identical protection to an individual under this amendment as under the Due Process Clause; for example, the right to be free from arbitrary governmental action could be posited as a right "retained by the people." It has been suggested that "[t]here would appear to be no significant difference between judicially created substantive rights under the fifth amendment and the open-ended use of the ninth and tenth amendments to achieve the same results."\(^{77}\) As yet, any consideration of the Ninth Amendment must be largely speculative due to the paucity of opinions on the subject.

Another avenue which may hold more promise is the Equal Protection Clause. Its application in the dismissal situation is based upon the language of \textit{Wieman} prohibiting "exclusion pursuant to a statute [which] is patently arbitrary or discriminatory."\(^{78}\) That is, even if a state may have the power of dismissal over an employee, it may not exercise this power in a manner that would result in discrimination by arbitrary action against the employee dismissed, since this would amount to treating differently a certain member of the class of public employees. The dismissal would be allowable only when the state has a valid interest in treating the particular employee differently, which means that it must be based upon valid reasons. Professor William Van Alstyne has verbalized the theory which may be derived from \textit{Wieman}:

\begin{quote}
It may well be that no one has a right to secure or to maintain public employment. In determining whom to admit or whom to continue in public employment, however, government may not classify individuals as eligible where the basis of classification is "arbitrary or discriminatory." A regulation which restricts the continuing eligibility of employees to the class willing to conform to an unreasonable rule of conduct ipso facto establishes an arbitrary classification. Such a regulation denies equal protection and is therefore unconstitutional.\(^{79}\)
\end{quote}

As far as faculty members are concerned, the result of the application of the equal protection argument would be a forced tenure, as in the due process argument, since there would of necessity have to be adequate procedural devices for determining whether a dismissal were arbitrary. In addition, in determining what is an "unreasonable rule of conduct," it would again be necessary to balance the private and public interests. It appears, then, that application of the Equal Protection Clause would provide substantive and

\(^{77}\) Comment, \textit{supra} note 5, at 735 n. 79.

\(^{78}\) 344 U.S. at 192.

\(^{79}\) Van Alstyne, \textit{supra} note 13, at 1455 (footnote omitted).
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procedural protection similar to the rights to teach, to public employment, or to general due process.

VI. PROCEDURAL DUE PROCESS-SUMMARY

It must be emphasized that this discussion has been mainly concerned with the issue of substantive rights. The question does not stop here, since a substantive right unaccompanied by a procedural remedy is, in effect, no right at all. Procedural due process questions will be only briefly discussed because of the relatively stable nature of these questions in present day case law.80

The extent of procedural requirements in situations involving the infringement of a substantive right is measured in the same manner as the general due process right, that is, balancing the competing interests involved.81 The recent decision of Goldberg v. Kelly82 is a pertinent example. There the Court was concerned with whether a pretermination hearing was mandatory in the case of contemplated withdrawal of welfare benefits, and, if so, what form it should take. The right of the welfare recipient to receive welfare benefits, if she should qualify, was granted. The Court, noting the often desperate situation of welfare recipients, decided that a pretermination hearing was necessary because of the importance of the private interest, and delineated the elements of the required hearing from the one "fundamental requisite of due process . . . the opportunity to be heard":83

In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

. . . .

The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.84

Goldberg's analysis is quite clear: the extent and complexity of the process is tied to the particular fact situation before the Court.

81 Of course, the ultimate result will depend upon what interests are put on the scales. Cf. Barenblatt v. United States, 360 U.S. 109, 134 (1959) (Black, J., dissenting).
83 Grannis v. Ordean, 234 U.S. 385, 394 (1914).
84 397 U.S. at 267-69 (emphasis added; footnote omitted).
As far as the academic environment is concerned, *Ferguson v. Thomas*, sets an example of the type of requirements which might apply in the teacher dismissal situation. The court stated that the following matters would be required where a teacher wished to oppose termination (taking the common sense approach that in many cases the instructor would not oppose termination in his desire to have the charges left unsaid): (a) Notice of the cause or causes for termination in sufficient detail to fairly enable him to show any error that may exist; (b) Notice of the names and the nature of the testimony of witnesses against him; (c) At a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense; (d) A hearing before a tribunal possessing some academic expertise and an apparent impartiality toward the charges.

VII. CONCLUSION

The rights of teachers, long ignored by the courts through the use of the privilege doctrine, are now receiving vindication, especially through action grounded upon 42 U.S.C. § 1983. The theory of privilege now appears to be of little or no importance. However, this new protection has been limited in some cases by the interpretation of section 1983, which requires allegations of denials of specific constitutional rights, although when such a right is involved redress has been extended liberally. The problem arises when a dismissal or non-retention decision is based upon an unreasoned and arbitrary decision and the individual is unable to allege a violation of a specific right. Three theories have been advanced to extend protection to the individual in this situation. Two of them, the right to teach and the right to public employment, have gained only minor judicial support. The general due process right appears to be the direction in which the courts are now moving. This movement seems likely to expand since the basic elements of the right are consistent with established adjudicatory principles. This may be warranted not only by the virtue of consistency, but also by the desire to promote certain personal and societal policy interests when the competing interests of the state are subordinate. Finally, there are alternative modes of analysis, as yet unused. These modes offer similar protection to the teacher faced with an arbitrary and unreasonable dismissal or non-retention decision, and may become the apposite judicial principles of the future if the due process rationale should prove unacceptable.

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85 430 F.2d 852 (5th Cir. 1970).
An acknowledgement of the validity of the theories discussed above would be of little practical significance if courts were to determine that in any event the state's interests in maintaining its unfettered power over employment outweigh all other considerations. Of course, it is the author's conclusion that at least insofar as the teaching profession is concerned this is not the case. However, it is submitted that one need not concede that recognition of the existence of a teacher's right to be free from arbitrary and capricious action would necessarily be detrimental to the state's interests. As has been indicated, the procedural steps associated with the review process are neither complex nor inordinately burdensome. Since educational authorities retain the ability to terminate the employment of inefficient faculty members without unacceptable disruption, the major objections to the system of procedural protection lack compelling force. It should also be emphasized that these procedural requirements represent only a necessary minimum. Therefore, an established and acceptable tenure system could remain unaffected. Perhaps, then, the only real obstacle to the proposals presented in this comment is inertia.

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