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Public Employee's Right to a Pre-Termination Hearing Under the Due Process Clause

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PUBLIC EMPLOYEES' RIGHT TO A PRE-TERMINATION HEARING UNDER THE DUE PROCESS CLAUSE

In two recent cases[1] involving the non-retention of untenured faculty members,[2] the Supreme Court has established an important new policy for determining a person's due process right to a hearing. The two decisions have implications far beyond the academic area, suggesting (1) that all public employees may be entitled to a hearing prior to dismissal and (2) that a hearing may be required before governmental benefits other than employment may be terminated or refused.

The plaintiff in *Perry v. Sinderman*,[3] after having taught in the Texas state university system for ten years, was told by the state Board of Regents that his year-to-year contract would not be renewed. The Board's decision was allegedly influenced by the fact that Professor Sinderman had been a strong proponent of converting the junior college in which he taught to a four-year institution—a position which the Board vigorously opposed.

In his complaint, Sinderman claimed first, that his non-retention abridged his first amendment right of free speech and secondly, that the Board's refusal to provide a hearing constituted a denial of his right to due process. The Supreme Court affirmed the Fifth Circuit Court of Appeals' decision[4] to remand the first amendment issue for further findings of fact.[5] More importantly, the Court stated that a hearing would be granted if, on remand, the District Court found that "de facto" tenure

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1. Perry v. Sinderman, —— U.S. ——, 92 S. Ct. 2694 (1972); Board of Regents v. Roth, —— U.S. ——, 92 S. Ct. 2701 (1972).

2. These cases resolved a long-standing controversy among the circuit courts as to whether untenured faculty have a right to an administrative hearing in the absence of violations of specific constitutional rights. According to some courts, a hearing was never necessary. Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969). Others decided that a hearing was necessary only when an expectancy of re-employment existed. Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). For a discussion of *Roth* and *Sinderman*, see Van Alstyne, *The Supreme Court Speaks to the Untenured*, 58 AAUP BULLETIN 267 (1972). *See also* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841 [hereinafter cited as *Teachers' Rights*]; Note, 40 FORDHAM L. REV. 342 (1971); Note, 85 HARV. L. REV. 1327 (1972); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

3. —— U.S. ——, 92 S. Ct. 2694 (1972).

4. Sinderman v. Perry, 430 F.2d 939 (5th Cir. 1970).

5. The Court stated that "[the 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." —— U.S. at ——, 92 S. Ct. at 2697. Among the cases cited to support this statement were: Shapiro v. Thompson, 394 U.S. 618 (1969) (denial of welfare); Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment compensation);

existed.[6]

In presenting his case, Sinderman was hindered by the fact that Texas, unlike most states,[7] has no statutory provision regarding tenure.[8] Consequently, Sinderman was forced to rely upon portions of the university's faculty guide[9] and a Board of Regents' policy paper[10] to show the existence of "de facto" tenure in the Texas system.

The same constitutional issues treated in *Sinderman* were also involved in *Board of Regents v. Roth.*[11] Mr. Roth was a first-year instructor at Wisconsin State University-Oshkosh. The terms of his contract did not guarantee reemployment. Unlike Texas, Wisconsin has a statutory tenure provision[12] which includes both a requirement that written

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Shelton v. Tucker, 364 U.S. 479 (1960) (denial of employment); Speiser v. Randall, 357 U.S. 513 (1958) (denial of tax exemptions); Wieman v. Updegraff, 344 U.S. 183 (1952) (denial of employment). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) [hereinafter cited as *Right-Privilege Distinction*].

6. —— U.S. at ——, 92 S. Ct. at 2700 n.7.

7. Most state statutes concerning tenure provide that teachers may be dismissed only "for cause." Some statutes specify that "cause" includes such things as insubordination, immorality, inefficiency, incompetency, disability or neglect of duties. *See, e.g.*, N.Y. EDUC. LAW § 3012.2 (McKinney 1970). Other statutes phrase the cause requirement in more general terms. For example, WIS. STAT. ANN. § 37.31(1) (b) (Supp.1971), provides that "[t]he employment of a teacher who has become permanently employed under this section may not be terminated involuntarily, except for causes upon written charges."

8. Prior to *Roth* and *Sinderman*, the absence of statutory tenure provisions meant that a teacher's procedural rights were governed by his contract. Even then, however, a teacher could be dismissed only "for cause" during the term of the contract. Parker v Board of Educ., 237 F. Supp. 222 (D. Md. 1965), *aff'd*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S 1030 (1966). *Cf.* Board of Regents v. Roth, —— U.S. ——, ——, 92 S. Ct. 2701, 2709 (1972).

9. The Faculty Guide stated:

> *Teacher Tenure*: 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 his teaching services are satisfactory and as long as he displays a co-operative attitude toward his co-workers and his superiors.

Perry v. Sinderman, —— U.S. ——, ——, 92 S. Ct. 2694, 2699 (1972).

10. The Board Policy Paper provided:

> In the Texas public colleges and universities, this tenure system should have these components: (1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period full-time service in all institutions of higher education. . . . (3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities.

—— U.S. at ——, 92 S. Ct. at 2699 n.6.

11. —— U.S. ——, 92 S. Ct. 2701 (1972).

12. All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior, after appointment and acceptance thereof for a sixth consecutive year in the state university system as a teacher.

WIS. STAT. ANN. § 37.31(1)(a) (Supp. 1971).

charges be presented[13] and a provision for a hearing in cases of dismissal.[14] However, this tenurial protection is effective only after six continuous years of service.[15] When Roth was notified that his one-year contract was not being renewed he brought suit in federal court claiming that such a dismissal would cause a deprivation of his first amendment rights. Roth further alleged that he had a due process right to a hearing before dismissal.[16] The district court retained the first amendment issue for further hearing,[17] while the due process issue was appealed to the Supreme Court.

Justice Stewart, writing in *Roth,* set the framework on which the hearing issue would be analyzed. He first stated that the requirements for fourteenth amendment procedural due process applied only to deprivations of liberty or property interests.[18] Moreover, he stated that the determination of procedural due process was not to be made by applying the traditional balancing test,[19] which weighed an individual's interest in a hearing against the burden on the state in providing one. Instead, Stewart examined the nature of the interest to determine whether liberty or property was involved.[20] Stewart then examined Roth's protectible interests under the due process clause. He first determined that no deprivation of

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13. WIS. STAT. ANN. § 37.31(1)(b) (Supp. 1971).

14. Upon request, "[t]he board of regents shall hear the case and provide such teacher with a written statement as to its decision." WIS. STAT. ANN. § 37.31(1)(b) (Supp. 1971).

15. WIS. STAT. ANN. § 37.31(1)(a) (Supp. 1971). At the time *Roth* was decided Wisconsin provided tenure after four continuous years. *Id.* § 37.31(1).

16. Roth's action was brought pursuant to 42 U.S.C. § 1983 (1964). This is the procedure most commonly used by teachers dismissed in violation of specific constitutional rights or due process. The jurisdictional counterpart of § 1983, which is 28 U.S.C. § 1343(3), was the subject of a recent case, Lynch v. Household Finance Corp., 405 U.S. 538 (1972). In *Lynch,* the Court interpreted the language of § 1343(3) to include property rights as well as personal rights.

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

18. —— U.S. at ——, 92 S. Ct. at 2705.

19. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961), is usually cited as the source of the balancing test. In *Cafeteria Workers,* the Court stated that

> consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action.

Id. at 895.

The balancing test was eliminated in Morrissey v. Brewer, —— U.S. ——, 92 S. Ct. 2593 (1972), where the Court stated:

> The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment.

Id. at ——, 92 S. Ct. at 2600.

20. —— U.S. at ——, 92 S. Ct. at 2705-06.

liberty had occurred, reasoning that permitting a contract to lapse can affect one's liberty only if one's name, reputation, or integrity is at stake,[21] or, if non-retention imposes a stigma which forecloses an individual's freedom to pursue similar employment elsewhere.[22]

Justice Stewart next turned to the question of whether Roth had a property interest in his job sufficient to require a hearing under the due process clause. He noted that property interests can be created by statute, as in *Goldberg v. Kelly*,[23] where a state law created a right to welfare benefits which would be safeguarded by a hearing in case of termination. Stewart cited statutory tenure as an example of a property interest in employment created by the state.[24] A property interest can also be created by contract, express[25] or implied.[26] The Court held, however, that Roth did not have a sufficient property interest and stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it.[27]

In order to determine what constitutes a legitimate claim of entitlement, absent any express guidelines, one must turn back to the *Sinderman* case. Sinderman alleged that a binding understanding had been created by statements and policies of the Board of Regents which entitled him to a type of "de facto tenure."[28] The Court's acceptance of this argument is evidenced by the following statement:

> A person's interest in a benefit is a "property" interest for due

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21. —— U.S. at ——, 92 S. Ct. at 2707. For similar holdings, see Wisconsin v. Constantineau, 400 U.S. 433 (1971); Peters v. Hobby, 349 U.S. 331 (1955); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); United States v. Lovett, 328 U.S. 303 (1946).

22. —— U.S. at ——, 92 S. Ct. at 2707. Using this analysis, the *Roth* Court also determined that no deprivation of liberty had occurred in *Sinderman*. The Court noted that neither *Roth* nor *Sinderman* would incur greater hardship in obtaining another position than any other employee who must explain the reasons surrounding the termination of his previous employment. —— U.S. at ——, ——, 92 S. Ct. at 2698, 2707.

23. 397 U.S. 254 (1970). Citing *Goldsmith v. United States Tax Board of Appeals*, 270 U.S. 117 (1926), the *Roth* Court also stated that administrative standards create property interests. —— U.S. at ——, 92 S. Ct. at 2708 n.15.

24. —— U.S. at ——, 92 S. Ct. at 2709, *citing* Slochower v. Board of Educ., 350 U.S. 551 (1956) In *Slochower*, the Court held that a New York professor could not be dismissed for his failure to answer questions regarding Communist party membership.

25. —— U.S. at ——, 92 S. Ct. at 2709, *citing* Wieman v. Updegraff, 344 U.S. 183 (1952), where the Court invalidated a state statute prohibiting the payment of salary to state employees refusing to sign a loyalty oath.

26. —— U.S. at ——, 92 S. Ct. at 2709.

27. *Id.* at ——, 92 S. Ct. at 2709.

28. *See* Johnson v. Fraky, 41 U.S.L.W. 2290 (4th Cir. Nov. 20, 1972), which held that a teacher who had been continuously employed for 29 years was entitled to a hearing.

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. . . .

[A]bsence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in reemployment.[29]

When determining Sinderman's legitimate expectations, the Court examined all the facts, customs, and surrounding circumstances of the case rather than applying a rigid formula or requiring the presence of a single characteristic such as an explicit statutory tenure provision.[30]

SINDERMAN, ROTH AND PUBLIC EMPLOYEE CASES

Cases in which a discharged public employee brings suit under the fourteenth amendment[31] to demand reinstatement pose perplexing prob-

29. Perry v. Sinderman, —— U.S. ——, ——, 92 S. Ct. 2694, 2699-2700 (1972).

30. The Court remanded to the District Court for a determination of whether an understanding on tenure could be implied from the policies and practices of Odessa College. If such an understanding is found, Sinderman will have a property interest in his job which assures him of an administrative hearing prior to discharge. —— U.S. at ——, 92 S. Ct. at 2700. If a hearing is allowed, there is the additional problem of what form it should take. The *Roth* Court recognized that this issue is to be decided in a different manner than the issue of whether a hearing should take place at all:

> [a] weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake.

Id. at ——, 92 S. Ct. at 2705-06.

In the welfare area, the Court has stated that both notice and an administrative hearing involving confrontation are required to satisfy the due process clause. Goldberg v. Kelly, 397 U.S. 266, 269 (1970). It has been suggested that these requirements should also apply in teacher dismissal cases. Pettigrew, *"Constitutional Tenure:" Toward a Realization of Academic Freedom*, 22 CASE W. RES. L. REV. 475 (1971). An administrative hearing benefits the dismissed employee because it tends to expose deception by the governmental employer. It is also less costly to the discharged employee than judicial processes in terms of money and time. *See Teachers' Rights, supra* note 2, at 858-60. Obviously, however, conflicts can arise when the institution responsible for the discharge also conducts the hearing. K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 12.01-12.06 (3d ed. 1972) [hereinafter cited as DAVIS].

31. In addition to these cases, there are those involving deprivation of specific constitutional guarantees. In the past, the notion that employment was a revocable privilege prevented the Court from invalidating conditions of employment which might have infringed such guarantees. The most pithy statement of the privilege philosophy came from Justice Holmes, who told a discharged policeman, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. City of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892). The privilege theory in the employment area was first enunciated by the Supreme Court in Baily v. Richardson, 341 U.S. 918 (1951).

Beginning with a decision that a state cannot attach an unconstitutional condition to

lems for courts because of the wide discretion granted their employers. If a meaningful hearing is provided by custom or statute, as in the case of statutory tenure, the problem for the courts is the familiar one of reviewing an administrative body's action for abuse of discretion.[32] If not, the question is whether due process requires an administrative hearing prior to the employee's dismissal. Before *Roth* and *Sinderman* this task was difficult since it was hard for courts to perceive exactly how the plaintiff had been deprived of "life, liberty or property."[33]

Various legal theories have been developed to circumvent this problem.[34] The most common one shifts the focus from the employee's right

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the "privilege" of using its roads, Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 (1926), the Supreme Court has cut away at the privilege doctrine in cases involving specific constitutional rights. In Pickering v. Board of Educ., 391 U.S. 563 (1968), the Court stated that a public employee cannot be forced to give up his right to free speech as a condition of employment. However, the Court stated that the degree of protected speech might vary from case to case according to the interests of the individual and the state. *Id.* at 573. *See* also Meehan v. Macy, 392 F.2d 822, *modified,* 425 F.2d 469 (1968), *aff'd,* 425 F.2d 472 (D.C. Cir. 1969).

Further erosion of the privilege theory occurred in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (the "right" to attend school cannot be conditioned on the relinquishment of the right to free speech); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation may not be conditioned on the giving up of freedom of religion); Slochower v. Board of Educ., 350 U.S. 551 (1956) (public employment cannot be conditioned on the relinquishment of fifth amendment rights). *See also Right-Privilege Distinction, supra* note 5; Note, *Unconstitutional Conditions,* 73 HARV. L. REV. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions,* 117 U. PA. L. REV. 144 (1968).

32. DAVIS, *supra* note 30, §§ 28.01-28.07. For the courts' handling of cases arising under the Civil Service Act, see Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963), *cert. denied,* 379 U.S. 951 (1964); Norden v. Royall, 90 F. Supp. 834 (D.D.C. 1949). *See also* Note, *Dismissal of Federal Employees—The Emerging Judicial Role,* 66 COLUM. L. REV. 719 (1966).

33. The leading case illustrating this point is Baily v. Richardson. 182 F.2d 46 (1950), *aff'd by an equally divided Court,* 341 U.S. 918 (1951). There Baily was discharged from her governmental position for alleged disloyalty. The court stated that "[d]ue process of law is not applicable unless one is being deprived of something to which he has a right." 182 F.2d at 58. *See also* Vitarelli v. Seaton, 359 U.S. 535 (1959). Some courts have gone so far as to state that an employer has an absolute right to dismiss an employee in the absence of violations of specific constitutional guarantees. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir. 1969).

34. Some writers have argued that there is a constitutional right to be free from arbitrary action. *See* Frakt, *Non-Teachers and the Constitution,* 18 KAN. L. REV. 27 (1969) [hereinafter cited as Frakt]; Note, *Constitutional Rights of Public Employees: Progress Toward Protection,* 49 N.C. L. REV. 302 (1971). There is dicta to support these writers' views:

> Fairness of procedure is "due process in the primary sense" . . . It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair-play enshrined in the Constitution.

to a job to some other right or interest.[35] In cases involving arbitrary action, the courts have, as yet, been unwilling to protect an individual's job, but under a due process analysis they have protected other substantial interest.[36] For example, in *Schware v. Board of Examiners*[37] the petitioner was refused admission to the New Mexico bar primarily because of his former membership in the Communist Party. The Supreme Court concluded that Schware's interests were protectible under the due process clause. The disastrous effect of disqualification on the future career of the applicant was sufficient reason to overturn the determination of the state bar examiners.[38] In other words, whenever an entire field of endeavor is foreclosed, the consequence is more akin to a loss of liberty, than merely if a specific job is lost.

Birnbaum v. Trussell[39] is another example of a substantial interest protected by due process. In that case, a white physician was dismissed without a hearing from a New York City Hospital due to alleged bias against blacks. The Court of Appeals, emphasizing the injury to both the physician's reputation and his ability to pursue his career, stated:

> [W]henever there is a substantial interest, other than employment by the state, invoked in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist.[40]

Courts in similar cases have consistently shown a willingness to protect

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Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring).

By confining due process protection to liberty or property interests under the Fourteenth Amendment, *Roth* and *Sinderman* destroyed the possibility of expanding the "arbitrary action" doctrine. As Justice Stewart stated, "[w]hen protected interests are implicated the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." Board of Regents v. Roth, —— U.S. ——, ——, 92 S. St. 2701, 2705 (1972).

35. For example, in employment cases involving deprivation of specific constitutional rights, the Court focuses on such rights rather than the "right" to a job. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968). *See also Right-Privilege Distinction, supra* note 5.

36. *See* Meredith v. Allen County Mem. Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966).

37. 353 U.S. 232 (1957). *See also* Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 LAW IN TRANSITION 155 (1961).

38. 353 U.S. at 238-39. *See also* Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

39. 371 F.2d 672 (2d Cir. 1966).

40. *Id.* at 678.

individuals whose name or reputation is at stake.[41] Again, this interest can be protected despite the fact that the job itself is not.

In the absence of either an injury to one's reputation or the foreclosure of an entire field of endeavor, the courts have been less solicitous of dismissed employees. In *Cafeteria Workers v. McElroy*,[42] petitioner worked as a cook in a private food concession within a military base. On orders from the commanding officer she was discharged without a hearing, purportedly for security reasons. The Court distinguished this case from *Schware* by pointing out that the private interest in this case was not the right to pursue a profession, but simply the right to a particular job.[43] The Court went on to say that while an employee cannot be dismissed arbitrarily, if the causes are unstated but could be reasonable the Court will not require a hearing.[44] Therefore, in few cases will an employee's interest in a specific job be so important that it entitles him to the procedural protection of a hearing.

The Court in *Roth* and *Sinderman* followed the pattern of these cases by retaining the "substantial interest" concept. However, this concept was further developed by requiring the petitioner to identify a liberty or property interest under the fourteenth amendment. For example, the cases dealing with admission to the state bar are cited by Justice Stewart in *Roth* to indicate that foreclosure of a field of endeavor is an abridgment of liberty,[45] hence protectible by due process requirements. Moreover, the fact that the Court cited *Cafeteria Workers* twice during its discussion of what constitutes liberty implies that the Court still does not regard the dismissal of an employee from a specific job as a protectible interest.[46] Thus, in those cases where dismissal takes place in circumstances involv-

41. *See* note 21 *supra* & text accompanying.

42. 367 U.S. 886 (1961).

43. *Id.* at 895-96.

44. We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary. . . . It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was . . . entirely rational.

367 U.S. at 898.

Justice Brennan pointed out the contradiction in the Court's analysis:

In sum, the Court holds that petitioner has a right not to have her identification badge taken away for an "arbitrary" reason, but no right to be told in detail what the reason is. . . . That is an internal contradiction to which I cannot subscribe.

Id. at 901 (Brennan, J., dissenting). As Frakt wrote, the result is that "an administrator can do whatever he wants with a non-tenured and non-protected employee as long as he doesn't state the reason why he is doing it." Frakt, *supra* note 34, at 34.

45. Board of Regents v. Roth, —— U.S. ——, ——, 92 S. Ct. 2701, 2707 (1972).

46. *Id.* at ——, 92 S. Ct at 2707.

ing a deprivation of liberty, *Roth* and *Sinderman* provide little change from former case law.

Whether the Court's discussion of protectible property interests will expand due process protections to all public employees remains to be seen. The Court states that "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interest that a person has already acquired in specific benefits."[47] Clearly the Court's language is applicable to all forms of property, and there seems little reason for this rationale to be limited to the interests of teachers. If a teacher can show the legitimacy of his expectations without reliance on a statutory tenure provision, other public employees should be permitted to exhibit similar expectancies.[48]

APPLICATION OF THE SINDERMAN-ROTH TEST TO OTHER AREAS

Roth and *Sinderman* have implications for those due process cases which involve governmental benefits other than employment.[49] Welfare cases are one category which will probably be affected. In *Goldberg v. Kelly*,[50] certain welfare recipients sought a hearing prior to the cessation of benefits in order to assure the validity of any possible termination order. The Court balanced the interests of both the recipients and the state, placing much emphasis on the "brutal need" facing the welfare recipients whose aid was, or would be cut off.[51] Thus, although the Court did not label welfare payments as property, it did grant the hearing.[52]

In light of *Roth* and *Sinderman*, if the fact situation existent in *Goldberg* presented itself now, the case would be decided in a methodologically different manner. *Roth's* explicit reference to *Goldberg* as a case involving a state-created property interest[53] clearly means that the Court now regards welfare benefits as property. Therefore, the welfare statute vests the recipient with a property interest in welfare payments, eliminating the

47. *Id.* at ——, 92 S. Ct. at 2708.

48. In its discussion of the creation of property interests, the Court analogizes to the doctrine of "implied contract." In *Sinderman*, the Court stated:

> [A]bsence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreemments, though not formalized in writing, may be "implied."

Perry v. Sinderman, —— U.S. ——, ——, 92 S. Ct. 2694, 2699-2700 (1972).

49. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

50. 397 U.S. 254 (1970).

51. *Id.* at 261.

52. *Id.*

53. Board of Regents v. Roth, —— U.S. ——, ——, 92 S. Ct. 2701, 2709 (1972).

requirement of a balancing test to determine whether hearings are required before termination can take place. Statutory entitlement, moreover, pertains not only to those presently receiving benefits, but also to those wishing to prove their eligibility.[54]

In other types of cases involving statutes and administrative standards, one effect of *Roth* and *Sinderman* will be to rest the granting of hearings on firmer, more predictable ground since courts need not engage in an imprecise balancing test. The difficulties many lower courts have encountered in ruling upon hearing requests will thus be avoided. An example of such past difficulty is *Torres v. New York State Department of Labor*[55] where plaintiff was initially deemed eligible for unemployment compensation pursuant to a state statute. Some time after the first payment, the employer protested that the plaintiff had been discharged for good cause, making him statutorily ineligible for compensation. This prompted review of the petitioner's unemployment application, which resulted in termination of payments. A three-judge federal court held, two to one, that a full hearing prior to termination was unnecessary since the importance of these payments to the individual did not outweigh the governmental interest in conserving agency time and expense.[56] The dissenting judge argued that unemployment insurance recipients were normally low-income persons who would be faced with a "brutal need" in the absence of unemployment payments.[57] After *Roth* and *Sinderman,* such

54. Referring to *Goldberg,* the Court in *Roth* stated: "The recipients had not yet shown that they were, in fact, within the statutory terms of eligibiliy. But we held that they had a right to a hearing at which they might attempt to do so." —— U.S. at ——, 92 S. Ct. at 2709.

55. 321 F. Supp. 432, *aff'd on rehearing,* 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd,* —— U.S. ——, 92 S. Ct. 1185 (1972).

56. 321 F. Supp. at 437.

57. *Id.* at 438-40. "Indeed, such evidence as exists in the record of this case establishes that for the year 1967, 42 per cent of the claimants for unemployment benefits had an annual income of less than $3,000 and 75 per cent an annual income of less than $5,000." *Id.* at 439.

Torres was eventually affirmed without opinion by the Supreme Court. —— U.S. ——, 92 S. Ct. 1185 (1972). Prior to this affirmance, however, the Court had remanded *Torres* for a rehearing, 402 U.S. 968 (1971), to take account of California Department of Human Resources v. Java, 402 U.S. 121 (1971); in *Java,* the Court had held that automatic termination of unemployment payments upon notice to the state unemployment agency was contrary to the spirit of the Social Security Act, which required prompt payment of benefits. On remand, the District Court in *Torres* reaffirmed its previous decision, distinguishing *Java* by saying that it involved automatic termination, whereas the New York statute in *Torres* provided for termination only after an interview. This was the District Court decision affirmed by the Supreme Court.

Since *Java* was not decided on constitutional grounds, one can only speculate as to whether the Supreme Court's affirmance involved a determination of a constitutional issue. If it did, one still does not know whether the Court was affirming the now out-

difficulties in balancing can be avoided since the focus has now shifted to the nature of the individual's interest rather than its weight, and thus an analysis of a plaintiff's "brutal need" is no longer necessary.[58]

CONCLUSION

Sinderman and *Roth* establish a new definition of property which recognizes statutory, administrative, and contractual entitlements as interests requiring a hearing under the due process clause. This new concept affects all governmental benefits created in these ways. As a result, a state-created interest like welfare will be treated as property for due process purposes, thus necessitating a hearing prior to the termination of benefits.

Furthermore, by introducing the concept of legitimate claim of entitlement, the Court has presented the possibility of extending the notion of property. *Sinderman,* for example, secured a hearing by showing that a mutually explicit understanding existed between himself and the university administration. This provided him with a legitimate claim to employment. Although there is no particular reason to limit the case's application, it is uncertain how far the Court will extend this notion of property.[59] At the very least, *Roth* and *Sinderman* establish a new way of examining the concept of property under the due process clause of the fourteenth amendment.

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moded balancing test, or whether it was stating that the New York procedure met minimal standards of due process.

58. Prior to *Roth* and *Sinderman,* the Supreme Court had encouraged an analysis of "brutal need." For example, in Goldberg v. Kelly, 397 U.S. 254 (1970), the Court had stated:

> [T]he crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate.

Id. at 264. *See also* Note, *The Growth of Procedural Due Process Into New Substance,* 66 NW. L. REV. 502 (1971).

The Supreme Court has now indicated that its past decisions had "little or nothing to do with the absolute 'necessities' of life." Fuentes v. Sevin, —— U.S. ——, ——, 92 S. Ct. 1983, 1998 (1972).

59. In his concurring opinion, Chief Justice Burger attempted to limit the holding:

> The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract.

Perry v. Sinderman, —— U.S. ——, ——, 92 S. Ct. 2694, 2717 (1972).