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DUE PROCESS PROTECTION FOR NONTENURED FACULTY IN PUBLIC INSTITUTIONS OF HIGHER EDUCATION: LONG OVERDUE

The value of the tenure system is one of the most important and controversial issues in contemporary academia. The perceived teacher surplus, greater budget restrictions, and growing demands for minority hiring are among the forces that are pressuring colleges and universities to examine closely their traditional promotion policies. Moreover, increasing litigation involving Constitutional guarantees, state statutes, and institutional contracts has recently intensified the debate over both the efficacy and ethics of this unique employment system. Is tenure a progressive device, preserving academic freedom and encouraging scholarly initiative, or is it a harmful, anachronistic force, protecting entrenched ideas and fostering incompetency?

The system of tenure in American higher education has been advanced as necessary to protect academic freedom and to encourage faculty innovation and independence of judgment. The system has not been immune from attack. Whether or not the

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1 Scoles, Bauman, Gilman, Northridge & Sowell, Motivating the Law School Faculty in the Twenty-First Century: Is There Life in Tenure?, 30 J. LEGAL EDUC. 1, 1 (1979) [hereinafter cited as Scoles].

2 "Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability." AMERICAN ASS'N OF UNIVERSITY PROFESSORS, Academic Freedom and Tenure: 1940 Statement of Principles—Proposed Interpretive Comments, 56 A.A.U.P. BULL. 26, 27 (1970).

3 "Academic freedom and tenure do not exist because of a peculiar solicitude for the human beings who staff our academic institutions. They exist, instead, in order that society may have the benefit of honest judgment and independent criticism which otherwise might be withheld because of fear of offending a dominant social group or a transient social attitude." BYSE & JOUGHIN, TENURE IN AMERICAN HIGHER EDUCATION (1959), quoted in Academic Tenure at Harvard University, 58 A.A.U.P. BULL. 62, 63 (1972).

4 See, e.g., Worzella v. Board of Regents, 77 S.D. 447, 448, 93 N.W.2d 412, 412 (1958); Scoles, supra note 1, at 8-11; Lanzarone, Teacher Tenure—Some Pro-
reasons for the tenure system are sound and its purposes laudatory, tenure has resulted in a classification scheme for faculty members which has had profound effects on their legal and constitutional rights. It is this issue regarding tenure which is to be examined here.

This Note will consider the constitutional rights of nontenured faculty in public colleges and universities, as interpreted in recent United States Supreme Court decisions. It will also analyze the rules and regulations of the West Virginia Board of Regents and a recently enacted statute in West Virginia affecting the rights of nontenured faculty. However, the rights of nontenured teachers in public schools, insofar as these rights differ from those of faculty in higher education, and the issues with respect to dismissal for cause of tenured faculty are beyond the scope of this Note.

I. PROCEDURAL DUE PROCESS

A. The Right-Privilege Dichotomy

Until the early 1970's the right of public employees to procedural due process was controlled by the right-privilege dichotomy.


The fourteenth amendment to the United States Constitution has procedural and substantive connotations. Substantive due process deals with questions of deprivation by a state of a substantive right, i.e., freedom of speech, freedom of association, or freedom to wear a hair or dress style, etc. Procedural due process, on the other hand, deals with questions as to whether a state follows a fair procedure when it attempts to interfere with life, liberty, or property.

See note 19 infra and accompanying text.
Justice Holmes in *McAuliffe v. Mayor of New Bedford* succinctly expressed the distinction in the doctrine: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." This distinction was used to justify the denial of constitutional protection to a federal employee discharged because of alleged disloyalty. In *Joint Anti-Fascist Committee v. McGrath*, another loyalty case, the Court began to question the viability of the dichotomy as evidenced by the statement of Justice Jackson: "The fact that one does not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally." The right-privilege dichotomy gained support in *Cafeteria & Restaurant Workers Union v. Melroy* in which Justice Stewart, writing for the majority, noted the well-settled principle that "government employment, in the absence of legislation, can be revoked at the will of the appointing officer," and where the private interest affected is such a privilege, notice and hearing are not required. The opinion did admit, however, that characterization of a private interest as a privilege may be an oversimplification. The lack of standards for determining whether the affected interest is a right or a privilege subsequently persuaded the Court not to rely on the distinction. Arguing that public assistance benefits, for example, are a privilege and not a right, reasoned the Court, does not meet the constitutional challenge.

The Supreme Court officially ratified this significant change in its analysis of claims of entitlement to due process in *Board of Regents v. Roth* where the Court explicitly and emphatically stated that it "has fully and finally rejected the wooden distinc-

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9 155 Mass. 216, 29 N.E. 517 (1892).
10 Id. at 220, 29 N.E. at 517.
13 Id. at 185.
15 Id. at 896.
16 Id. at 898.
17 Id. at 895.
19 408 U.S. 564 (1972).
tion between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."\(^{20}\)

**B. Analysis of the Decisions in Roth and Sindermann**

*Board of Regents v. Roth*\(^{21}\) and *Perry v. Sindermann*,\(^{22}\) two Supreme Court cases decided on the same day, are especially significant since they both directly concerned the rights of nontenured faculty. In *Roth*, an assistant professor at Wisconsin State University-Oshkosh who had been hired for his first teaching job on a one-year probationary appointment\(^{23}\) was notified without a statement of reasons in January of that year that his contract would not be renewed for the subsequent academic year. Prior to notification of non-renewal Roth had openly criticized the university administration during a period of conflict on campus. Roth brought suit in federal district court\(^{24}\) claiming that his rights of free speech and due process under the fourteenth amendment had been violated because his publicly expressed views were the reasons for nonrenewal of his contract. He claimed further that he was entitled to a pretermination hearing.\(^{25}\) The district court, agreeing with this latter claim, granted partial summary judgment ordering the University to provide Roth with a statement of reasons and a hearing.\(^{26}\) The court of appeals affirmed.\(^{27}\) In its review of *Roth*, the Supreme Court addressed only the procedural due process rights of Roth under the fourteenth amendment and did not consider the first amendment claim upon which the district court based its denial of summary judgment\(^{28}\) for the University, since the evidence for this claim had to be developed at

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\(^{20}\) *Id.* at 571.

\(^{21}\) 408 U.S. 564 (1972).

\(^{22}\) 408 U.S. 593 (1972).

\(^{23}\) The notice of Roth's faculty appointment specified that his employment would begin on September 1, 1968 and would end on June 30, 1969. Roth technically had no contract of employment. Rather, this formal notice of appointment was the equivalent of a contract of employment.


\(^{25}\) *Id.* at 974.

\(^{26}\) *Id.* at 983-84.

\(^{27}\) *Roth* v. *Board of Regents*, 446 F.2d 806 (7th Cir. 1971).

\(^{28}\) Summary judgment is granted when there are no material facts in the controversy to be litigated and where the party seeking summary judgment is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.
In Sindermann, the companion case to Roth, the fact situation was significantly different. Robert Sindermann had been employed at Odessa Junior College in Odessa, Texas for four years on a series of one-year contracts. At that time Odessa had no tenure system. Sindermann had six years of prior teaching experience in the Texas State College System. In May of his fourth year at Odessa, Sindermann was notified that his contract would not be renewed. Subsequent to notification of nonrenewal, the Board of Regents publicly alleged insubordination by Sindermann yet refused to provide him with an official statement of reasons for nonrenewal or with an opportunity to be heard. Early in that academic year Sindermann had testified before the state legislature expressing a position regarding the status of Odessa College which was opposed by the Board of Regents. In federal district court Sindermann claimed that his nonrenewal was based on his public statements and that the Board of Regents, therefore, infringed upon his right of free speech. He asserted, furthermore, that the Board denied him his fourteenth amendment right to due process by refusing to provide a hearing. The district court granted summary judgment for the College but was reversed by the court of appeals, which felt that a full hearing on the contested facts was necessary. The court of appeals further held that despite Sindermann's nontenured status, his contract nonrenewal would be impermissible if it violated his constitutionally guaranteed right of free speech.

The main issue in both Roth and Sindermann was whether the faculty member concerned had a constitutional right to a statement of reasons and a hearing on a decision not to rehire him. The Court in Roth noted first that the requirements of procedural due process apply only when there has been a deprivation of interests protected by the fourteenth amendment, i.e., liberty and property, and second that the range of interests protected by

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29 Odessa College in March, 1972, following the Supreme Court decision, adopted a formal tenure policy.
30 Sindermann v. Perry, No. MO-69-CA34 (W.D. Tex. Aug. 4, 1969). Since this decision was only several lines long, it was not officially reported.
31 Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970).
32 Id. at 943.
procedural due process is not infinite.\textsuperscript{35} In \textit{Roth} the Court, in what seemed to be a deviation from previous decisions,\textsuperscript{34} employed a two-step analysis to determine whether Roth had a right to a statement of reasons and a hearing. The first step is to determine whether due process requirements apply by looking to the nature of the interest at stake, specifically whether it is a property or liberty interest protected by the fourteenth amendment. It is only after this step has been completed and an interest has been found that the process of weighing the plaintiff's interest in securing his job against the institution's need for unfettered discretion in its employment practices comes into play.\textsuperscript{35} This balancing process is applied in the second step to determine the form of hearing and the extent of procedural due process required.\textsuperscript{36}

To understand the decisions in \textit{Roth} and \textit{Sindermann}, as well as subsequent Supreme Court decisions,\textsuperscript{37} it is necessary to analyze the meanings of \textit{liberty} and \textit{property}. As the Court observed in \textit{Roth}: "[W]hile the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning."\textsuperscript{38}

\textbf{C. The Property Interest}

1. The Supreme Court Rationale

With respect to property interests the Court, citing several of

\textsuperscript{35} 408 U.S. 564, 569-70 (1972).


\textsuperscript{36} 408 U.S. 564, 570-71 (1972). Since the Court did not find a property or a liberty interest in Roth's case, it was not required to address the second step, or the balancing process.


\textsuperscript{38} 408 U.S. 564, 572 (1972).
its previous decisions,\textsuperscript{39} announced the standard to be used in determining the existence of a property interest: "To have a property interest in a benefit, a person clearly must have more than an abstract need or a desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."\textsuperscript{40} The Court further explained that property interests are not created by the Constitution but rather are created and defined by "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."\textsuperscript{41}

In Roth's case a property interest would have to have been created and defined by the terms of his employment, by the state statutes relating to granting tenure at public institutions, or by university rules or policies securing his interest in reemployment or creating any legitimate claim to it. The Court found that the terms of Roth's appointment specifically provided that his employment was to terminate on June 30; and, therefore, they "secured absolutely no interest in re-employment for the next year."\textsuperscript{42} Moreover, the Court found no claim of entitlement by way of any state statute or university rule or policy. "In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment."\textsuperscript{43} Despite Roth's observation that most teachers hired on a year-to-year basis by Wisconsin State University-Oshkosh were, in fact, re-


\textsuperscript{40} Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

\textsuperscript{41} Id. The concurring opinion of Chief Justice Burger in Perry v. Sindermann, 408 U.S. 593, 603-04 (1972), emphasized that the relationship between a state institution and its faculty is primarily a matter of state law. State law determines whether a faculty member has a legitimate entitlement to renewal. Moreover, Chief Justice Burger recommended that a federal court abstain from deciding the procedural due process issue in a case where relevant state law is unclear. 408 U.S. at 604. This view regarding the preeminence of state law is reflected in the majority opinion in Bishop v. Wood, 426 U.S. 341 (1976), where the Court refused to independently examine the state law involved.

\textsuperscript{42} Board of Regents v. Roth, 408 U.S. 564, 578 (1972).

\textsuperscript{43} Id.
hired," the Court noted that the district court had not found anything approaching a "common law" of reemployment strong enough to require procedural due process.

Justice Douglas, dissenting from the majority opinion in Roth, cited several previous Supreme Court cases implicating "'important interests' of the citizen," adding that "nonrenewal of a teacher's contract, whether or not he has tenure, is an entitlement of the same importance and dignity." Justice Marshall even more vigorously dissented, expressing his view that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the 'property' right that I believe is protected by the Fourteenth Amendment and that cannot be denied 'without due process of law.'" Justice Marshall relied on the fourteenth amendment's safeguard against arbitrary government action and its equal protection clause: "[I]t is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action."

2. Other Interpretations

Some interpretations of the Roth and Sindermann decisions

"Only three of 442 nontenured faculty at the University in addition to Roth were notified that their contracts would not be renewed for the 1969-70 academic year. See Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 DUKE L.J. 841, 872.

"In Sindermann, the Court referred to the process by which unwritten agreements may be implied. Agreements supplementing contractual provisions may be implied from the promisor's words and conduct interpreted in light of the surrounding circumstances and past usage. This concept of an unwritten "common law" in a particular university is an extension of the concept as applied to collective bargaining. See Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960). See also Fiskin, Toward a Law of Academic Status, 22 BUFFALO L. REV. 575 (1973).

"408 U.S. 564, 584 (1972).

"Id. at 588.

"Id. at 589. As one writer, commenting on Roth, stated: "Since fairness of procedure is the underlying issue, however, the Court's firm stand on the nonexistence of a property or liberty interest seems questionable in view of the forceful and logical argument of the dissenters." Seitz, Due Process for Public School Teachers in Nonrenewal and Discharge Situations, 25 HASTINGS L.J. 881, 886 (1974)."
seem to imply that there is a tenure system, only faculty members who have attained tenure status\(^49\) or those entitled to tenure have a property interest.\(^{50}\) If this accurately summarizes the concept of a property interest in educational employment, the decision in Roth would have been easy. Roth in his first one-year contract certainly had no right to tenure. Even Roth himself would never have claimed that. But that is not the issue in Roth. The issue is rather whether Roth had any claim or entitlement to renewal of his contract or to reappointment.

In an institution with a formal tenure policy, there are usually several types of contracts, each one denominated and described differently, e.g., limited or special contract, terminal contract, probationary contract, and tenure contract. Institutions may specify that all contracts are for a one-year term only,\(^{51}\) ostensibly to limit their legal liabilities upon termination. However, what most people do not realize, and apparently what the United States Supreme Court did not realize, is that the common duration of these contracts does not make them identical or even equivalent in the minds of either faculty or administrators. Different expectations, not unilaterally but mutual, attach to the different categories of contracts. For example, it is mutually understood that a terminal contract is for a period of one year and will not be renewed in any case. A limited or special contract, although for a specific duration, usually one year, explicitly or impliedly provides that the institution, at its discretion, may extend the contract. A probationary contract is usually one entered into by the institution and the faculty member with the common understanding that the position which the faculty member holds is a tenure-track position\(^{52}\) and if the faculty member lives up to the

\(^{49}\) See note 98 infra and accompanying text. "While many issues surrounding tenure await resolution, the essential doctrine of Roth and Sindermann remains: Tenure grants to an individual a property interest that cannot be violated without the procedural protections of due process." Winn, Teacher Nonrenewal In North Carolina, 14 Wake Forest L. Rev. 739, 753 (1978).

\(^{50}\) McLendon v. Morton, 249 S.E.2d 919 (W.Va. 1978). See text accompanying note 98 infra. See also Haimowitz v. University of Nev., 579 F.2d 526 (1978) (no reasonable expectation of employment for nontenured faculty where there is a formal tenure code).

\(^{51}\) Even tenured faculty are often issued one-year contracts with regard to salary and other negotiable terms.

\(^{52}\) Tenure does not inhere in every teaching position; faculty members can
expectations the institution had when it hired him, then he should be awarded tenure. This is certainly what a typical faculty member accepting such a position believes.53 Moreover, if one is not to attach different expectations to different types of contracts, there would be no reason for the contracts to have different names, different qualifications for the position, different applicable institutional procedures, and different customs and practices.54 Any penetrating analysis of contracts at an institution with a formal tenure system would compel the conclusion that the contracts are not all mere one-year contracts with no claim of entitlement to renewal. If they are simply one-year contracts, there is no need for more than two types of contracts—tenure and non-tenure. The Court in Roth makes no mention of the meaning of a probationary contract as opposed to a simple one-year contract. Whether the Court was simply unaware of this distinction, or chose to ignore it, is not known. Perhaps Roth did not argue this distinction, although it certainly would have strengthened his position.

An unfortunate aspect of the Roth decision is the particular set of facts through which the Court chose to interpret the Constitution. Had Roth been into his second or third year and had he argued a legitimate expectation of continued employment as a

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53 In fact, this representation of a tenure-track position is what attracts most teachers to positions in a college or university. Furthermore, the probationary period sets an outer limit, in most cases, for duration of employment without tenure since an institution which follows AAUP guidelines must terminate an individual if it does not confer tenure. It is ludicrous to think that teachers expect (or administrators expect them) to move with their families to a place, settle down, teach one year, and then pick up stakes and move on for another year, etc. A strict construction of these one-year contracts would imply just that. See Frakt, Non-Tenure Teachers and the Constitution, 18 Kan. L. Rev. 27, 35 (1969): "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."

54 For example, a faculty member on a probationary contract is normally evaluated during the year, whereas there is no evaluation of a faculty member on a terminal contract.
probationary teacher, the results might have been different. As Professor Van Alstyne notes, the Court made its finding of no legitimate expectation of continued employment under the state statutes or university regulations in the absence of any evidence to the contrary. As he suggests further, there may be situations in which, "on a better record, under more compelling circumstances where the faculty member is well along the tenure track under policies explicitly encouraging reliance and practices consistent with that reliance, peremptory notice of nonreappointment may not be enough to quench the constitutional claim to more specific consideration than none at all." This suggestion is supported by language in Roth: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." This reliance concept appears even more strongly in Sindermann. As Justice Stewart, speaking of Sindermann, stated: "He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years: . . ."

Roth and Sindermann, as the most important cases in the area of teachers' rights in a decade, are deficient in one major

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56 Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (emphasis added).
58 Perry v. Sindermann, 408 U.S. 593, 600 (1972) (emphasis added). The provision 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 cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.
respect: they do not speak directly to the typical, nontenured teacher nonrenewal situation. Instead, they represent two extremes—a first-year contract and de facto tenure. It is difficult to disagree with the results in these two instances. The first year is a special time in the employer-employee relationship. It is the time when obvious errors in hiring come to the forefront and when dissatisfactions on the part of the institution or the teacher manifest themselves. But what about the situation in between these two? This is the one case which would clarify the Court’s position.

The Court reversed the holding of the court of appeals in Sindermann that procedural due process protects “a mere subjective expectancy” and indicated in Roth that a unilateral expectation was not sufficient. But this is not to say it ruled out all expectations. The Court explicitly stated in Sindermann that a nontenured teacher must be given an opportunity to prove a legitimate claim of entitlement to continued employment based on “the existence of rules and understandings, promulgated and fostered by state officials” and “in light of ‘the policies and practices of the institution.’” The Court seemed to be defining the lower and upper limits in the area of public employment of faculty and to be challenging faculty to present an intermediate situation in which the practices and policies of the institution and state officials entitle the faculty member to more than a mere one-year term of appointment. Surely, the experience of most college and university faculty members compels the conclusion that this intermediate situation is more typical.

These decisions should be read in conjunction with the Supreme Court decisions involving due process rights of other groups. It seems unlikely that the Court intended to “[mark]

80 408 U.S. 593, 603 (1972). At least one writer has argued for the preference of the expectancy doctrine over the Roth-Sindermann rule because “it more clearly identifies the minimum property interests to be protected by due process [and] . . . gives more adequate protection to the substantive rights of public employees.” Ground, Due Process and the Untenured Teacher: A Review of Roth and Sindermann, 10 URS. L. ANN. 283, 296 (1975).

81 Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

82 408 U.S. 593, 602-03 (1972) (quoting Sindermann v. Perry, 430 F.2d 939, 943 (5th Cir. 1970)).

teachers as a singularly unfavored group in our society” as one commentator has suggested. Although, as stated by this commentator, “[i]t is simply not debatable that Roth has ended any claim on the part of the nontenured teacher that there is a Fourteenth Amendment right to a statement of reasons and/or a hearing inherent in every nonrenewal.” However, it still is debatable whether Roth has ended such a claim in any nonrenewal.

D. The Liberty Interest

The Supreme Court in Roth and Sindermann addressed not only the property interest issue but also the issue of a liberty interest. While not attempting to define liberty exactly, the Court did state:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.

The Court noted that the meaning of liberty must be broad and that a case in which the state refused to reemploy a person under certain circumstances could implicate interests in liberty, but Roth is not such a case.

The Court proceeded to further define the liberty interest by example in the context of Roth. A nonrenewal decision making a charge against the teacher which “might seriously damage his standing and associations in the community,” such as “that he had been guilty of dishonesty, or immorality,” would implicate his liberty interest. Likewise, if the state through nonrenewal

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64 Id. (emphasis added).
65 Board of Regents v. Roth, 408 U.S. 564, 572 (1972).
66 Id. at 572-73.
67 Id. at 573. See Stevens, Evaluation of Faculty Competence as a “Privileged Occasion,” 4 J.C. & U.L. 281 (1977), for a discussion of a damage suit in defamation against a college or university for a statement critical of a faculty member’s competence.
imposes on the teacher "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," a claim of deprivation of liberty would be valid. To exemplify this deprivation, the Court cited a hypothetical situation where the state invokes a regulation to bar a teacher from all other public employment in state universities. Summarizing the majority opinion concerning Roth’s interest in liberty, Justice Stewart 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 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.

Dissenting from this majority opinion and supporting Roth’s liberty interest, Justice Douglas noted: “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.” Justice Marshall, also dissenting, emphasized, “it is also liberty—liberty to work—which is the ‘very essence of the personal freedom and opportunity’ secured by the Fourteenth Amendment.”

Although the Court found no deprivation of a liberty interest in Roth, it does not appear that the Court has ruled out the possibility of such a deprivation in a situation like Roth’s. As a matter of fact, the Court seemed to set the stage for a record which would implicate a liberty interest in the nonrenewal of a probationary teacher’s contract. Referring to lower court opinions in

68 408 U.S. 564, 573 (1972).
69 Id.
70 Id. at 575.
71 Id. at 585. Moreover, as one writer has indicated, “[t]he current oversupply of teachers at every educational level in most parts of the nation may well mean that the stigma of nonrenewal will jeopardize a teaching career as much as dismissal during the year does.” Note, Procedural Due Process Protection for Probationary Teachers’ First Amendment Rights: Bekiaris v. Board of Education, 24 Hastings L.J. 1227, 1249-50 (1973) (footnote omitted) [hereinafter cited as First Amendment Rights].
72 408 U.S. 564, 589 (1972).
Roth, the Supreme Court observed:

But even assuming, arguendo, that such a 'substantial adverse effect' under these circumstances would constitute a state-imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might affect a respondent's future employment prospects. Mere proof, for example, that his 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. 73

It seems fairly obvious that here the Court is indicating, evidentiary support for imposition of a stigma or limitation of future employment opportunities by nonrenewal is what the Roth case lacked, and a case which provides such support would make all the difference in the decision. The type of evidence or proof which could potentially accomplish what Roth apparently failed to accomplish falls into two categories. First, one could offer proof of actual events or acts involving the particular faculty member which demonstrates either stigma or limitation of employment opportunities. Examples in this category of proof are a file folder full of employment rejections, statements made in interviews implicating the nonrenewal decision and the rejection, or evidence of uncomplimentary letters of recommendation or negative responses to inquiries. Second, if it is difficult to procure evidence in the particular case, evidence of the current job market, faculty supply and demand, experiences of others in similar circumstances, and, perhaps, a scientific survey or expert testimony of representative hiring officials as to how prior nonrenewal affects their hiring decisions would support the "assumptions" of which Justice Stewart spoke in Roth.

The discussion in the majority opinion of liberty interests has apparently caused some confusion. Some commentators have read this discussion very narrowly inferring that the damaged reputation depends on the particular manner in which or methods by which reasons for nonrenewal are announced. 74

73 Id. at 574 n.13.
74 See, e.g., Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972) (concurring opinion); Seitz, Due Process for Public School Teachers in Nonrenewal and Discharge Situations, 25 Hastings L.J. 881, 890-91 (1974); First Amendment Rights, supra
situation argues against this narrow interpretation. Such an interpretation implies that deprivation of liberty based on damage to reputation can only occur when the state has given reasons for nonrenewal. But this is what Roth was seeking—a statement of reasons. Is the decision to be read as saying that when no reasons for nonrenewal have been given, the teacher automatically has no claim to a deprivation of liberty or to a liberty interest from damage to reputation? On the contrary it appears obvious that the decision must be read as implying that a decision of nonrenewal in the absence of stated reasons can be shown by adequate proof to impose a stigma on the teacher or to damage his reputation. The absence of stated reasons in some cases can do as much or more harm to reputation than stated reasons because it allows the rumor mill to run wild.

II. Substantive Due Process

A major issue presented in both Roth and Sindermann dealt with the abridgement of free speech or rights under the first amendment, although the Supreme Court did not, in fact, devote much of its opinion to it and did not decide it. Roth alleged that the reason underlying his nonrenewal was the exercise of his first amendment rights. The Court indicated that this allegation was not before it in Roth because the district court stayed proceedings on this issue; however, the Court did address itself to the court of appeals’ argument that a statement of reasons and a hearing were required here “as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights.” Although

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71 West Virginia Law Review, Vol. 83, Iss. 1 [1980], Art. 8

72 "[Roth] alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law." 408 U.S. at 569.

73 Alternatively the decision may serve to add fuel to already existing rumors in a case where false gossip of the faculty member’s private life or groundless rumors about his teaching actually contributed to the decision. “[A]ll too often non-reten tion is equated with dismissal for cause. Such an equation limits any teacher’s opportunity and likelihood of obtaining future employment in education.” Comment, Procedural Due Process Protection of Liberty Interests in Probationary Teacher Re-Employment, 22 S.D.L. Rev. 180, 198 (1977).

74 Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

75 Roth v. Board of Regents, 446 F.2d 806, 810 (7th Cir. 1971), quoted in Board of Regents v. Roth, 408 U.S. 564, 575 n.14 (1972).
it has "on occasion" held that a hearing prior to state action which would directly impinge upon free speech or press rights is necessary, the Court indicated that in this case:

[T]he State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.\(^7\)

While one may not disagree with this latter statement, it is difficult to see how it is relevant to Roth's claim since Roth did not claim that his free speech interest was in holding a teaching job.

Furthermore, the Court's vigorous reaffirmation of the inviolability of first amendment rights in Sindermann seems to contradict this attitude of the Court regarding a hearing in Roth. The Court stated in Sindermann:

For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly". . . Such interference with constitutional rights is impermissible.\(^8\)

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\(^7\) Id.

\(^8\) Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citation omitted). The prohibition against restricting first amendment freedoms is not absolute. The Supreme Court has established a balancing test for determining when the state has a legitimate right to interfere with these freedoms. The interests of the faculty member, as a citizen, in commenting upon matters of public concern must be weighed against the interests of the state, as an employer, in promoting the efficient functioning of the institution. Pickering v. Board of Educ., 391 U.S. 563 (1968). California has established guidelines for judicially determining the legality of governmental restrictions upon public employees' rights: (1) the political restraints must rationally relate to the enhancement of the public service; (2) the benefits which the public gains by the restraints must outweigh the resulting impairment of constitutional rights; and (3) there must be no available alternative
The Court cited extensively to prior decisions noting that it had "applied the principle regardless of the public employee's contractual or other claim to a job" and had "specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights." The Court in Sindermann held that summary judgment against Sindermann was improper because he must be given the opportunity "to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech." However, in a footnote to the opinion in Sindermann, the Court reaffirmed its rejection in Roth of a right to a hearing for a teacher who simply asserts that his nonrenewal is based on a constitutionally impermissible reason.

In Mt. Healthy Board of Education v. Doyle, the Court promulgated a test for determining whether there has been a violation of constitutionally protected rights sufficient to justify remedial action. In this case of nonrenewal of a nontenured teacher, the district court found that the teacher's exercise of free speech contributed substantially to the decision not to rehire him. The Supreme Court held that the fact that constitutionally protected conduct played a substantial part in the decision did not necessarily amount to a constitutional violation justifying remedial action. The test which should have been applied, according to the Court, is whether the governing body showed by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. The rationale for this test is that an employee ought not to be able, by engaging in protected conduct, to prevent his employer from assessing his performance and reaching a decision not to rehire which is supported


408 U.S. 593, 598 (1972) (emphasis added).

Id. at 599 n.5.


Id. at 287. But see Megill v. Board of Regents, 541 F.2d 1073 (5th Cir. 1976).
by that assessment.\textsuperscript{87}

The rationale of this Court poses a major dilemma for a college or university, nontenured teacher who has good reason to believe that his nonrenewal is in retaliation for his exercise of constitutional rights. On the one hand, he must establish a liberty or property interest in a court of law before he is entitled to a statement of reasons and an administrative hearing where he can challenge the alleged impermissible basis of the nonrenewal. On the other hand, if he chooses not to claim entitlement to procedural due process or if he has no claim of entitlement, he must prove in a court of law that the decision was based on impermissible reasons\textsuperscript{88} and had no other basis in fact. Thus he is forced to engage in a guessing game as to the reasons the administration will assert so that he may effectively refute them in order to establish his contention of impermissible reasons.\textsuperscript{89} By effectively making it arguable in any nontenured case whether the teacher is entitled to a statement of reasons and a hearing, the Supreme Court has forced every nontenured teacher faced with nonrenewal either to file a lawsuit with its attendant costs in time and money or to give up the fight altogether and move on (to another job, if one exists, or out of the profession\textsuperscript{90}). It is difficult to believe that this is what the Supreme Court intended.

In \textit{Bekiaris v. Board of Education},\textsuperscript{91} the California Supreme Court attempted to close this loophole "in the constitutional pro-

\textsuperscript{87} 429 U.S. 274, 286 (1977).

\textsuperscript{88} See text accompanying notes 81-84 supra.

\textsuperscript{89} Although there are liberal discovery rights available to the faculty member, most institutions are careful not to put in permanent form in intramural memoranda and records any reason which can be used against them. Memoranda and institutional records will probably contain quotes taken directly from the faculty manual, from applicable state laws, or from rules and regulations which they know will be acceptable as reasons whether or not they represent the true reasons. Furthermore, although the faculty member has the right to discovery once he files the lawsuit, this may be his first opportunity to find out the reasons the college alleges for the decision. This is too late for the faculty member to use such information in assessing whether he has a good enough case to file a lawsuit in the first place. If he finds at this point that the college has a supportable reason, he is faced with the decision whether to drop the case and suffer embarrassment at least or to pursue it and probably lose.

\textsuperscript{90} The Wall Street Journal, Mar. 13, 1979, at 1, col. 1.

\textsuperscript{91} 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16 (1972).
tections of public employees.” 92 The Court held that a probationary teacher has a right to an administrative and judicial hearing to ascertain the true reasons for his nonrenewal when he alleges the reason was his exercise of his constitutional rights. 93 This appears to be the only reasonable solution to the problem — the only way to substantially reduce the ability of an administration to couch unconstitutional nonrenewal decisions behind unjustified reasons. As one writer has suggested, “California’s broadened understanding of the procedural due process required to protect a probationary teacher’s constitutional rights against covert attacks should encourage judges and legislators in other states to develop similar procedural safeguards.” 94

III. THE RIGHTS OF NONTENURED FACULTY IN WEST VIRGINIA

A. Court Decisions

Both the West Virginia Supreme Court of Appeals and the Fourth Circuit have applied the standard for a legitimate claim of entitlement established in Roth. 95 The West Virginia court has held that a state civil service classified employee has a property interest arising out of statutory entitlement to continued employment. 96 Furthermore, the West Virginia court has found a sufficient property interest to require procedural due process for a university student facing expulsion. 97 In terms of contract re-

92 First Amendment Rights, supra note 71, at 1245.
94 First Amendment Rights, supra note 71, at 1227.
niewal, the Fourth Circuit has drawn the line at tenure and has consistently maintained that position. 98

Recently, the West Virginia Supreme Court of Appeals in *McLendon v. Morton* 99 held that a faculty member who had satisfied the objective eligibility standards for tenure adopted by a state college had a sufficient entitlement such that she could not be denied tenure on the issue of professional competency without procedural due process. 100 In *McLendon* an assistant professor at Parkersburg Community College claimed that she was denied a due process hearing on the college's decision not to grant her tenure. 101 She based her claim on the ground that the Board of Regents' tenure standards established objective criteria which, if met, created property interests sufficient to require a due process hearing after the denial of tenure. 102 In considering whether McLendon had such a property interest, the West Virginia court cited both *Roth* and *Sindermann*. 103 In addition the court cited its previous recognition 104 that an analysis of property and liberty interests is to be supplemented by the West Virginia Constitution's due process standards. 105 The court noted that it was not constrained by "the teachings of the United States Supreme Court in its due process cases" 106 as long as the state standard did not drop below the federal standard.

The court in *McLendon* likened the nontenured teacher's sit-

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Carter, 310 F. Supp. 465, 470 (W.D. Wis. 1970): "[W]ith respect to the right to procedural due process, the protection to be afforded a professor can hardly be less than that afforded a student, and probably should be greater." See also Note, *Teacher Tenure In Connecticut: Due Process Rights and "Do Process" Responsibilities*, 8 CONN. L. REV. 690, 693-94 (1976).

98 Sheppard v. West Virginia Bd. of Regents, 516 F.2d 826 (4th Cir. 1974); Kota v. Little, 473 F.2d 1 (4th Cir. 1973); Chitwood v. Feaster, 468 F.2d 359, 360 (4th Cir. 1972) ("These teachers were not tenured and there was no basis for any reasonable expectancy of permanent employment.").


100 Id. at 925.

101 Id. at 920.

102 Id.

103 Id. at 922.


105 W. VA. CONST. art. III, § 10 reads in full: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

uation to application for state-derived benefits where the applicant has met the eligibility requirements. The West Virginia court had held that action with respect to applications for licenses cannot be arbitrary or capricious.\(^{107}\) Although the concept of property entitlement was not specifically used in finding a lack of procedural due process in these licensing cases, this basic principle was involved.

In *McLendon* the West Virginia court found the nontenured teacher had met the eligibility criteria to make application for tenure.\(^{108}\) However, she was not entitled to automatic tenure status because the regulations of the Board of Regents and of the college established teaching competency as a further criterion for tenure.\(^{109}\) Competency, or an evaluation of the teacher's profes-

\(^{107}\) Beverly Grill, Inc. v. Crow, 133 W. Va. 214, 57 S.E.2d 244 (1949) (application for beer license); Hoffman v. Town of Clendenin, 92 W. Va. 618, 115 S.E. 583 (1923) (pool hall license).

\(^{108}\) **WEST VIRGINIA BOARD OF REGENTS, POLICY REGARDING ACADEMIC FREEDOM AND RESPONSIBILITY, OPPORTUNITY, PROMOTION, TENURE AND TERMINATION OF EMPLOYMENT OF PROFESSIONAL PERSONNEL, AMENDED POLICY BULLETIN NO. 36, adopted June 11, 1974 [hereinafter referred to as BULLETIN] contains the following provisions regarding tenure:

8. **Tenure**

. . .

C. Tenure status may be attained by all full-time employees who hold faculty rank of Assistant Professor or above and whose major assignment is of an academic nature and shall not be contingent upon promotion in rank. . . .

9. **Probation**

. . .

C. The maximum period of probation shall not exceed seven years; and at the end of six years any non-tenured faculty member will be given notice in writing of tenure, or offered a one-year written terminal contract of employment. Any reduction in this period may be determined at the discretion of the president of each institution within the following guidelines:

. . . .

(2) An Assistant Professor may be eligible for consideration for tenure at the end of three years in that rank and at that institution.

(3) An Associate Professor or Professor may be eligible for consideration for tenure at the end of two years in these ranks and at that institution.

\(^{109}\) *McLendon* v. Morton, 249 S.E.2d 919, 925 (W. Va. 1978). Courts seem reluctant to interfere with the tenure decision as such, recognizing the need of schools and universities to make their own faculty
sional skills, becomes the basic substantive issue once the eligibility criteria are fulfilled.\textsuperscript{110} McLendon, therefore, requires procedural due process after tenure is denied in all cases where the objective eligibility criteria have been satisfied.

**B. Legislative Action**

The legislature in 1969 created the West Virginia Board of Regents, a corporation with the responsibilities of “general determination, control, supervision and management of the financial, business, and educational policies and affairs of all state colleges and universities.”\textsuperscript{111} In so doing, the legislature abolished the Board of Governors of West Virginia University\textsuperscript{112} and subsequently the State Commission on Higher Education\textsuperscript{113} and transferred the powers, duties, and authorities of the West Virginia Board of Education with respect to colleges and universities to the Board of Regents.\textsuperscript{114}

Section 8, article 26, chapter 18 of the West Virginia Code authorizes and empowers the Board of Regents to make, promulgate, modify, amend, and enforce rules and regulations regarding employment, tenure, and nonreemployment of faculty members at state colleges and universities\textsuperscript{115} and to set standards for the hiring, tenure, and dismissal of faculty.\textsuperscript{116} In execution of this authorization the Board of Regents promulgated its policy

determinations in the best interests of the institution. Courts have not granted tenure to teachers when the institutions clearly did not want them tenured, even when an interpretation of the language (statutes or regulations) suggesting that tenure was appropriate, was possible.

Winn, \textit{supra} note 49, at 753.


\textsuperscript{110} McLendon v. Morton, 249 S.E.2d 919, 925 (W. Va. 1978).

\textsuperscript{111} W. VA. CODE § 18-26-1 (1977 Replacement Vol.).

\textsuperscript{112} W. VA. CODE § 18-26-11 (1977 Replacement Vol.).

\textsuperscript{113} W. VA. CODE § 18-26-13 (1977 Replacement Vol.).

\textsuperscript{114} W. VA. CODE § 18-26-12 (1977 Replacement Vol.).


bulletin.\textsuperscript{117}

The Bulletin contains a statement regarding academic freedom and responsibility\textsuperscript{118} as well as a statement regarding tenure.\textsuperscript{119} As is common among colleges and universities, the Board

\textsuperscript{117} \textit{Bulletin, supra} note 108.

\textsuperscript{118} Id. at 2-3.

\textsuperscript{119} Id. at 7.

8. Tenure:

\begin{itemize}
  \item a. Tenure is a system designed to protect academic freedom and to provide professional stability for the experienced faculty mem-
\end{itemize}
of Regents limits every appointment of academic personnel at any institution in West Virginia to one fiscal year and requires that the written appointing document contain the terms and conditions of the appointment with the restriction that "any special understandings stated therein shall be subject to the approval of the Board of Regents, or otherwise such special understandings shall be void." The purpose of this restriction is, apparently, to protect the Board of Regents from any inadvertent language in an appointing document on which a nontenured faculty member could base a claim of entitlement.

With regard to probationary appointments, the Bulletin fixes the maximum period of probation at seven years with the tenure decision to be made at the end of the sixth year. At this time the faculty member is to be given written notice of tenure or is to be offered a one-year terminal contract. In any case, the Bulletin specifies that tenure is not granted automatically but must result from action by the Board of Regents. Section 9.H. of the Bulletin specifies when notice of renewal or nonrenewal must be given.

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ber. It is a means of protection against the capricious dismissal of an individual who has served faithfully and well in the academic community. Continuous self-evaluation as well as periodic evaluation by peer and administrative personnel is essential to the viability of the tenure system. Tenure should never be permitted to mask irresponsibility, mediocrity, or deliberate refusal to meet academic requirements or professional responsibilities. Tenure applies to those faculty members who qualify for it and is a means of making the teaching and research profession attractive to persons of ability.

121 Id. at 4-5.
122 Id. at 8.
9. Probation:

. . . . H. The president of each college or university shall give written notice to nontenured faculty concerning their retention or non-retention as
Prior to May, 1979 the Bulletin provided that probationary appointments “may be terminated with or without cause at the end of any contract year. During such probationary period no reason for nonretention or nonreappointment need be given.” The only protection afforded nontenured faculty in the Bulletin was in section 9.G. which provided:

An appeal from the president’s decision as to non-retention may be made by the non-tenured faculty member to the Board of Regents, which will review the decision of the president to determine whether the same has afforded *procedural due process* and was not in violation of the constitutional rights of the non-tenured faculty member.

It is not clear to what the phrase *procedural due process* referred since the Bulletin specifically provided that no statement of reasons need be given and did not provide a hearing for nontenured faculty. Perhaps, this phrase referred to the procedures established by the college and university as well as the Board of Regents concerning notice and faculty evaluation. The only “constitutional rights” to which this section could have referred are the rights of free speech and free association. If such is the case, the only function of the review would have been to consider whether the decision was in retaliation for the exercise of a protected constitutional right. If the Board found that the decision did abridge such a right, it remained unclear what action it was to take since the Bulletin did not provide any procedures beyond this review. The Bulletin seemed to imply that the Board could overturn the decision or, at the least, remand it to the president for reconsideration.

The Bulletin was revised in May 1979 to reflect a 1979 legislative enactment which requires that probationary faculty no-

follows:

(1) Not later than March 1 of the first academic year of service.
(2) Not later than December 15 of the second academic year of service.
(3) At least one year before the expiration of an appointment after two or more years of service in the institution.

125 Id. at 9.
126 Id. (emphasis added).
127 Id.
129 W. VA. CODE § 18-26-8c (Cum. Supp. 1980) reads:
tified of nonrenewal be provided with a statement of reasons and a hearing, upon request, before either an unbiased committee of the Board or a hearing examiner with the right to be represented by counsel. Section 8c further provides that "if the committee of the board or the hearing examiner shall conclude that the reasons for nonretention are arbitrary or capricious or without a factual basis, the faculty member shall be retained for the ensuing academic year." 130

This section of the code has not, as yet, been tested in the

The president of each state college, university or community college shall give written notice to probationary faculty members concerning their retention or nonretention for the ensuing academic year, not later than the first day of March for those probationary faculty members who are in their first academic year of service; not later than the fifteenth day of December for those probationary faculty members who are in their second academic year of service; and at least one year before the expiration of an appointment for those probationary faculty members who have been employed two or more years with the institution. Such notice to those probationary faculty members who will not be retained shall be by certified mail, return receipt requested. Upon request of the probationary faculty member not retained, the president of the state college, university or community college shall within ten days, and by certified mail, inform the probationary faculty member of the reasons for nonretention. Any probationary faculty member who desires to appeal the decision may request a hearing from the board of regents within ten days after receiving the statement of reasons. The board of regents shall publish appropriate rules to govern the conduct of the appeal herein allowed. The board of regents shall, by such rules, prescribe either an unbiased committee of the board or appoint a hearing examiner to hear such appeals. Such hearing shall be held at the employing institution and within thirty days of the request. The rules of evidence shall not strictly apply. The faculty member shall be accorded substantive and procedural due process, including the right to produce evidence and witnesses and to cross-examine witnesses, and to be represented by counsel or other representative of his or her choice. If the committee of the board or the hearing examiner shall conclude that the reasons for nonretention are arbitrary or capricious or without a factual basis, the faculty member shall be retained for the ensuing academic year. The decision shall be rendered within thirty days after conclusion of the hearing. The term "probationary faculty members," shall be defined according to regulations promulgated by the board of regents.

The rights herein provided to probationary faculty members are in addition to, and not in lieu of, other rights afforded them by other rules and regulations of the board of regents.

130 Id.
courts. Thus, for example, it is not clear whether the section would cover a decision denying tenure at the end of the probationary period. Since there is a maximum period of probation which must end by either the granting of tenure or termination of the appointment, a denial of tenure at this time is equivalent to nonretention. Therefore, one could argue that the statute covers the denial of tenure. However, the statute makes no reference whatsoever to tenure or to a tenure decision. Although interpretation of the statute will undoubtedly concern this issue, it will not significantly affect the due process rights of faculty members faced with denial of tenure because the West Virginia Supreme Court of Appeals has established the right to due process in such a case.\footnote{McLendon v. Morton, 249 S.E.2d 919 (W. Va. 1978).}

The West Virginia court by its decision in McLendon\footnote{Id.} expanded the due process protection to include the nontenured teacher eligible for tenure. The West Virginia Legislature completed this expansion by including all nontenured, probationary faculty within due process protection. For several reasons, these actions of the West Virginia court and the West Virginia Legislature extending procedural due process to nontenured faculty represent the optimum solution to the problems which have arisen in the aftermath of Roth and Sidermann. First, these actions recognize the fundamental unfairness in the Supreme Court decisions. Even the Supreme Court, although unable or unwilling to extend procedural due process, seemed to implicitly recommend such a move in the following statement from the majority opinion in Roth:

Our analysis of the respondent's constitutional rights in this case in no way indicates the 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. For it is a written Constitution that we apply. Our role is confined to an interpretation of that Constitution.\footnote{408 U.S. 564, 578-79 (1972).}

An opportunity for a statement of reasons and an administrative hearing not only protects the faculty member from arbitrary, capricious, or unfounded nonrenewal, but also protects the institu-
tion from making a decision based on inaccurate or incomplete information.

Second, the statute, while improving job security for nontenured faculty, does not obviate tenure. Tenure will still be vigorously sought by probationary faculty because it is the only way they can remain at institutions in West Virginia for more than seven years and because it represents increased job security. The statute protects nontenured faculty from termination for reasons which are "arbitrary, capricious, or without a factual basis."\(^\text{134}\) This still leaves a wide diversity of reasons for nonretention which are in the best interests of the institution and in furtherance of its goals. The appropriate reasons for dismissal of a tenured faculty member have been limited to a few, select causes,\(^\text{135}\) and the statute does not disturb this. Furthermore, the burden of proof requirements continue to separate the tenured from the nontenured faculty member.\(^\text{136}\) The burden of proof is on the nontenured faculty member to show that the reason for nonrenewal is arbitrary, capricious, unsubstantiated, or impermissible.\(^\text{137}\) However, in the case of the dismissal of a tenured faculty

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\(^\text{135}\) BULLETIN, supra note 108, at 10.

11. Dismissal and Termination of Employment of Tenured Personnel:

a. Causes for Dismissal: The dismissal of a faculty member with tenure, or of any faculty member before the end of a specified period of appointment, shall be effected only pursuant to the procedures provided in these policies, and only for any of the following causes:

1. Demonstrated incompetence or dishonesty in the performance of professional duties.
2. Personal conduct which substantially impairs the individual's fulfillment of institutional responsibilities.
3. Insubordination by refusal to abide by legitimate reasonable directions of the administration or of the Board of Regents.
4. Physical or mental disability making the faculty member unable, within a reasonable degree of medical certainty and by reasonably determined medical opinion, to perform assigned duties.
5. Substantial and manifest neglect of duty.


\(^\text{137}\) See, e.g., Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 206 (5th Cir. 1971). See also Frazier v. Curators of Univ. of Mo., 496 F.2d 1149, 1153 (8th Cir. 1974).
member, the burden of proof shifts to the Board of Regents, or relevant state agency, to show cause why the faculty member should not be retained. Thus, probationary status and tenure status have not been merged into one by this statute as some had feared would happen if nontenured faculty were guaranteed due process.

Third, the statute further supports the institution's commitment to academic freedom. Although all institutions zealously protect academic freedom for all faculty, this protection has been illusory for nontenured faculty. There has been no protection against termination for the exercise of academic freedom by a nontenured faculty member. As a result probationary faculty have been compelled to remain guarded in the expression of their academic views and in the manner in which they conduct classes and research. As one writer noted in reaction to Roth and Sindermann:

A teacher's probationary years are the years when his teaching competency is examined, but too often they are also the years when controversial teachers are weeded out of the educational system by their more conventional superiors. By failing to protect all probationary teachers, the Supreme Court has failed to protect a diversity of viewpoints and, assuming that such diversity is an ingredient of quality education, excellence in education may suffer markedly.

Fourth, providing procedural due process to all nontenured faculty does not place too great a burden on the institutions or


139 Even the United States Supreme Court has taken a stand for academic freedom:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendental value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.


140 See Part II supra.

141 First Amendment Rights, supra note 71, at 1259.
state agencies. As Justice Marshall stated in his dissenting opinion in Roth, "it is not burdensome to give reasons when reasons exist. . . . As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary."

Moreover, it must be recognized that not every faculty member denied renewal will request a hearing, particularly if the institution involved adequately specifies the reasons for its decision and the information on which the decision was based. The institution will be protected by a well-reasoned and well-documented nonrenewal decision. The burden placed on the institution is one of making each decision regarding the renewal of nontenured faculty carefully and on the basis of the most complete and most valid data and information available to it. This may require colleges and universities to review their faculty evaluation criteria and procedures. However, these are not additional burdens imposed on the institutions but responsibilities which they should already have recognized.

Finally, the extension of procedural due process at the administrative level will enable disputes to be resolved within the institution rather than in the courts which is the more desirable course for all concerned. The courts are reluctant to interfere with decisions which require any academic expertise because they do not want to substitute their judgments for those of academics. A lawsuit is costly both to the state and to the faculty member in terms of time and money, and invariably, although there is a judgment, neither side wins. It is a losing proposition for all. The institution, if it prevails, takes a giant step backward in terms of faculty-administration relations which affects faculty morale and ultimately the academic enterprise. If the faculty member prevails, he may gain the right to an administrative hearing, but there is no guarantee of reemployment. An institution forced by a judicial order to provide a statement of reasons and a hearing may not be very receptive to a long term relationship with the faculty member concerned. Thus, although the faculty member may gain in the short run, he almost certainly loses in

142 408 U.S. 564, 591 (1972).
143 See, e.g., Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978). See also cases cited note 109 supra.
the long run.

IV. Conclusion

The United States Supreme Court, interpreting the procedural due process clause of the fourteenth amendment to the Constitution, has denied nontenured faculty at public institutions of higher education the right to a hearing and a statement of reasons upon notice of nonreappointment or contract nonrenewal unless the faculty member can show a legitimate property or liberty interest. These Supreme Court decisions have left unanswered many questions concerning the requirements for the property and liberty interests and, therefore, have only added fuel to the controversy surrounding the issue of whether tenure should be retained in higher education.

Rather than attempt to resolve this intensely debated issue, the West Virginia Legislature wisely chose to improve the situation for nontenured faculty without disturbing the tenure system by extending procedural due process protection to probationary faculty. One can only hope that other state legislatures will respond with similar enactments in an effort to preserve academic freedom and scholarly creativity in higher education for all faculty—nontenured as well as tenured.

Donna P. Grill