Hastings Law Journal

Volume 24 | Issue 3 Article 11

1-1973

The First Amendment and Teacher Reinstatement: The Remedy

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THE FIRST AMENDMENT AND TEACHER REINSTATEMENT: THE REMEDY

Almost overnight the Glorious Loyalty Oath Crusade was in full flower. . . . Every time they turned around there was another loyalty oath to be signed.

[P]eople who were loyal would not mind signing all the loyalty oaths they had to. . . . The more loyalty oaths a person signed, the more loyal he was. . . .

"The important thing is to keep them pledging. . . . It doesn't matter whether they mean it or not."

—Joseph Heller, Catch-22

Loyalty oaths have been a prolific source of litigation, especially in the wake of the McCarthy hysteria of the early 1950's. Early cases upheld oaths for public employees which proscribed knowing membership in organizations advocating the violent overthrow of the government.[1] When the oath excluded all members of an alleged subversive group from public jobs, due process prohibited the arbitrary inclusion of the innocent with the knowing members.[2] Later cases limited loyalty oath disqualification to knowing members who specifically intended to further the organization's unlawful aims.[3] Since the substantive issues of loyalty oaths have been thoroughly discussed by others,[4] they will not be considered here in detail.

Although the constitutional limitations on the content of loyalty oaths have been settled, there remain problems in fashioning a proper remedy for a free speech claim. *Monroe v. Trustees of the California*

1. Garner v. Board of Public Works, 341 U.S 716 (1951). *Cf.* Adler v. Board of Educ., 342 U.S. 485 (1952); Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (per curiam).

2. Wieman v. Updegraff, 344 U.S. 183 (1952).

3. Elfbrandt v. Russell, 384 U.S. 11 (1966); *see, e.g.*, Whitehill v. Elkins, 389 U.S. 54 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Speiser v. Randall, 357 U.S. 513 (1958); *cf.* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

4. *E.g.*, Israel, *Elfbrandt v. Russell: The Demise of the Oath?*, 1966 SUPREME CT. REV. 193; Morris, *Academic Freedom and Loyalty Oaths*, 28 L. & CONTEMP. PROB. 487 (1963); 50 MICH. L. REV. 467 (1952); 32 NOTRE DAME LAW. 524 (1957); 25 TEMP. L.Q. 207 (1951). *See also* Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEGAL HIST. 97 (1969).

State Colleges,[5] a 1971 California Supreme Court decision, posed some interesting practical questions involving the statute of limitations and the scope of the remedy in a situation where the legality of the loyalty oath in question previously had been resolved.[6] The statute of limitations section of the opinion closely followed precedent, and this note therefore will summarize that issue without extended discussion. The court also considered the mechanics of reinstatement in greater detail than prior cases[7] and concluded that title 5, section 43550 of the California Administrative Code should control the discharged teacher's reinstatement.[8] This note will test the adequacy of *Monroe's* remedy against the principles enunciated in other free speech cases. The note will conclude that unless section 43550 is strictly construed, the remedy is inadequate in a free speech context. An alternative remedy will be suggested.

The Factual Background of Monroe

In 1950, Albert Monroe was discharged from his tenured academic position as full professor and chairman of the Language Arts Division at San Francisco State College for refusing to sign the anti-

5. 6 Cal. 3d 399, 491 P.2d 1105, 99 Cal. Rptr. 129 (1971).

6. Vogel v. County of Los Angeles, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967) (loyalty oath held unconstitutional).

7. The decisions holding dismissals unwarranted usually state that the dismissal was improper and reverse, often with direction for further proceedings consistent with the opinion. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968); Shelton v. Tucker, 364 U.S. 479 (1960); Lerner v. Board of Educ., 59 Cal. 2d 382, 380 P.2d 97, 29 Cal. Rptr. 657 (1963). Fountain v. State Bd. of Educ., 157 Cal. App. 2d 463, 320 P.2d 899 (1958), contained the most detailed reinstatement order of any case cited in *Monroe*. There, an appellate court affirmed the trial court order "that he is entitled to be restored to his employment . . . and to all rights under his contract of employment, including tenure, promotion, salary increases and contract renewals. . . ." *Id.* at 467, 320 P.2d at 902.

The United States Supreme Court has dealt with specific remedy problems in the more recent school desegregation cases. In United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (faculty and staff desegregation), the Court approved a lower court order setting a specific minimum ratio of minority to majority staff members. *Id.* at 232-35. In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the Court discussed remedies at length and affirmed the lower court's detailed integration plan. *Id.* at 22-32.

8. 6 Cal. 3d at 410-11, 491 P.2d at 1112-13, 99 Cal. Rptr. at 136-37. Section 43550 was adopted by the trustees pursuant to California Education Code sections 22604, 22607 and 24201. *Id.* California Administrative Code title 5, section 43550 provides: "Employees Leaving With Reinstatement Rights. The appointing power shall reinstate any employee, who meets all employment requirements, and who left his classification with reinstatement rights as prescribed by law or by these rules, to a position in the classification which he left or the equivalent thereof. Such employees shall not lose any benefits or credit for prior service enjoyed at the time of separation."

subversive Levering Oath[9] then required of all state employees. During the time he pursued his administrative remedies, the constitutionality of the oath was upheld in *Pockman v. Leonard.*[10] Consequently, Monroe sought no judicial redress for his dismissal.

Because of intervening United States Supreme Court decisions, the California Supreme Court in 1967 declared the Levering Oath unconstitutional in *Vogel v. County of Los Angeles.*[11] Immediately after this decision, Monroe requested reinstatement, but his request was refused without a hearing by the Trustees of the California State Colleges. He then turned to the courts seeking a writ of mandate compelling the trustees to reinstate him to his former position, to restore pension rights upon payment of his contribution, and to reimburse him for $79,000 in lost salary. He further alleged that there was a need for teachers with his qualifications and that no dismissals or demotions would result from his reinstatement.[12] The trial court sustained a general demurrer on statute of limitations grounds, the appellate court affirmed[13] and the California Supreme Court granted a hearing.

Statute of Limitations

The trustees contended that the statute of limitations prohibited Monroe from challenging their action. The supreme court answered this defense by referring to its previous decision in *Lerner v. Los Angeles City Board of Education*[14] and concluded that the statute of limitations had in fact run on any action for wrongful discharge. However, the court found that a cause of action for reinstatement was timely.[15]

In *Lerner,* a tenured instructor's teaching credential was revoked by the State Board of Education. The revocation was pursuant to a statute enacted six years after the sex offense Lerner committed. Since the revocation of his credential rendered him no longer qualified to teach, Lerner was dismissed by the local board. He did not resort to the courts at that time.[16] However, a later decision, *Fountain v. State Board of Education,*[17] held on similar facts that automatic credential revocation on the basis of an offense committed prior to the enactment of

9. CAL. CONST. art. XX, § 3, *formerly* Cal. Stat. 1950, 3rd Ex. Sess., ch. 7, § 1 at 15.

10. 39 Cal. 2d 676, 249 P.2d 267 (1952), *appeal dismissed,* 345 U.S. 962 (1953).

11. 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967).

12. 6 Cal. 3d at 402-04, 491 P.2d at 1106-08, 99 Cal. Rptr. at 130-32.

13. Monroe v. Trustees of the Cal. State Colleges, 95 Cal. Rptr. 704, *rev'd,* 6 Cal. 3d 399, 491 P.2d 1105, 99 Cal. Rptr. 129 (1971).

14. 59 Cal. 2d 382, 380 P.2d 97, 29 Cal. Rptr. 657 (1963).

15. 6 Cal. 3d at 409, 491 P.2d at 1112, 99 Cal. Rptr. at 136.

16. 59 Cal. 2d at 387, 380 P.2d at 99, 29 Cal. Rptr. at 659.

17. 157 Cal. App. 2d 463, 320 P.2d 899 (1958).

the statute was improper.[18] Subsequent to this decision the State Board of Education voluntarily restored Lerner's credential, but the local board summarily refused to reinstate him to his former teaching position. Lerner then sued for reinstatement, and the California Supreme Court held that the three-year statute of limitations was no bar to the cause of action which accrued from the date of the local board's refusal to reinstate.[19]

The court held that Monroe's petition involved both the initial discharge and the later "wrongful refusal to reinstate."[20] Applying the *Lerner* rule to Monroe's situation, the court concluded that the new action for wrongful refusal to reinstate had accrued in 1968 and therefore was not barred by the three-year statute of limitations.[21] The *Monroe* court reasoned that the decision holding the loyalty oath unconstitutional removed the sole basis for Monroe's termination and continued separation. Thus he was qualified for re-employment in the same sense that Lerner had been again qualified and entitled to a hearing on present fitness once his credential was restored.[22]

Monroe's Remedy

The California Supreme Court clearly recognized the fact that Monroe's refusal to sign the loyalty oath was the expression of a First Amendment right. The court characterized the Levering Oath as "invalid because it bars persons from public employment for a type of association that may not be proscribed consistently with First Amendment rights."[23] While these rights never have been recognized as absolute, the courts have accorded them a preferred status.[24] These rights have been deemed binding on the states through the Fourteenth Amendment due process guarantee,[25] and the United States Supreme Court has closely guarded against their infringement by disregarding

18. *Id.* at 473, 320 P.2d at 905-06.

19. 59 Cal. 2d at 396, 380 P.2d at 105, 29 Cal. Rptr. at 665.

20. 6 Cal. 3d at 408, 491 P.2d at 1111, 99 Cal. Rptr. at 135.

21. *Id.* at 409, 491 P.2d at 1112, 99 Cal. Rptr. at 136.

22. *Id.*

23. *Id.* at 411, 491 P.2d at 1113, 99 Cal. Rptr. at 137, *quoting* Vogel v. County of Los Angeles, 68 Cal. 2d 18, 22, 434 P.2d 961, 964, 64 Cal. Rptr. 409, 412 (1967).

24. *See* McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

25. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937); *see* Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporation assumed without deciding). It is also clear, although the issue has not received much attention in comparison with Fourth, Fifth and Sixth Amendment protections, that federal standards apply. "It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (free exercise of religion clause); *accord*, Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (establishment of religion clause).

the presumption of constitutionality usually accorded state legislation and substituting a "compelling state interest" test.[26] The California courts have also applied the "strict scrutiny" test when fundamental rights conflict with state objectives.[27]

Since statutes which impinge upon the right of free speech are subject to strict scrutiny, it follows that the remedy prescribed judicially for a claimant who relies on the valid exercise of a First Amendment right should be subject to an equally stringent test. The remedy of the free speech claimant must be fashioned carefully to guard against further infringement of the freedom of expression. Any condition imposed upon the remedy must be tested to determine whether the condition is required by a compelling governmental interest. In the following sections, the remedy prescribed by the *Monroe* court will be measured against the standards enunciated in *Vogel v. County of Los Angeles.*[28] The *Vogel* opinion is chosen as a yardstick not only because it is a careful statement of the constitutional formulae to be applied, but also because the opinion tested the same oath that Monroe refused to sign.[29] Therefore, the *Vogel* opinion provides a particularly appropriate guideline for determining whether, in fashioning Monroe's remedy, the California Supreme Court has met its own standards.

Vogel v. County of Los Angeles

While some regulations of First Amendment rights have withstood the compelling governmental interest test,[30] *Vogel* makes it clear that the Levering Oath did not meet these strict standards.[31] The *Vogel* court summarized the applicable California law as follows. First, public employment or other publicly conferred benefits cannot be conditioned upon an arbitrary deprivation of constitutional rights. Second, if conditions are annexed to a publicly conferred benefit, "the utility of

26. *E.g.*, Cohen v. California, 403 U.S. 15 (1971) (freedom of speech); Sherbert v. Verner, 374 U.S. 398 (1963) (free exercise of religion); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) (freedom of association).

27. *E.g.*, Zeilenga v. Nelson, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971) (five-year residency requirement for holding local elective office voided); Huntley v. Public Util. Comm'n, 69 Cal. 2d 67, 442 P.2d 685, 69 Cal. Rptr. 605 (1968) (identification requirement for recorded phone messages voided).

28. 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967).

29. 6 Cal. 3d at 411, 491 P.2d at 1113, 99 Cal. Rptr. at 137.

30. *E.g.*, Canon v. Justice Court, 61 Cal. 2d 446, 393 P.2d 428, 39 Cal. Rptr. 228 (1964) (source disclosure requirement on publications personally attacking political candidates); Gage v. Allison, 22 Cal. App. 3d 85, 99 Cal. Rptr. 95 (1971) (one-year residency requirement for holding local elective office); Eisen v. Regents of the Univ. of Cal., 269 Cal. App. 2d 696, 75 Cal. Rptr. 45 (1969) (disclosure of membership in registered campus organization). For a general review of permissible restrictions on speech see Cohen v. California, 403 U.S. 15, 19-21 (1971).

31. 68 Cal. 2d at 22, 434 P.2d at 964, 64 Cal. Rptr. at 412.

imposing the conditions must manifestly outweigh the impairment of constitutional rights."[32] Finally, the court stated:

> Even where a compelling state purpose is present, restrictions on the cherished freedom of association protected by the First Amendment and made applicable to the states by the Fourteenth Amendment must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected wherever possible. When government seeks to limit those freedoms on the basis of legitimate and substantial governmental purposes, such as eliminating subversives from the public service, those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of our most precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective.[33]

The Remedy Prescribed

When the *Monroe* court's treatment of the petitioner's reinstatement remedy is measured against the strong and unequivocal language of *Vogel*, certain problems emerge. In considering Monroe's remedy the court again looked to *Lerner*. Both tenured teachers were terminated under statutes which were later invalidated, both were denied reinstatement after the only bar to their employment was removed, and in both cases the employer did not comply with statutory requirements of notice and hearing.[34] The *Lerner* decision, however, did not discuss the petitioner's remedy in detail but simply held that he could not be barred without a hearing.[35]

The *Monroe* court observed that California Administrative Code section 43550 provided a proper remedy in this situation.[36] That section had been adopted by the trustees pursuant to several Education Code sections[37] to provide administrative guidelines for one of the many functions enumerated in section 24201.[38] Thus, the Administrative Code parallels Education Code section 24201.[39] Detailed re-

32. *Id.* at 21, 434 P.2d at 963, 64 Cal. Rptr. at 411.

33. *Id.* at 22, 434 P.2d at 963, 64 Cal. Rptr. at 411.

34. 6 Cal. 3d at 410, 491 P.2d at 1112, 99 Cal. Rptr. at 136.

35. 59 Cal. 2d at 385, 380 P.2d at 98, 29 Cal. Rptr. at 658.

36. 6 Cal. 3d at 410, 491 P.2d at 1112, 99 Cal. Rptr. at 136. See note 8 *supra.*

37. 6 Cal. 3d at 410, 491 P.2d at 1112, 99 Cal. Rptr. at 136. *See* CAL. EDUC. CODE §§ 22604, 22607, 24201 (West 1969).

38. *See id.* § 24201 which provides that "[t]he Trustees shall provide by rule for the government of their appointees and employees, pursuant to the provisions of this chapter and other applicable provisions of law, including, but not limited to, appointment, classification, terms, duties, pay, leave of absence, tenure, vacation, layoff, dismissal, demotion, suspension and reinstatement." *Cf.* Stanton v. Dumke, 64 Cal. 2d 199, 203, 411 P.2d 108, 111, 49 Cal. Rptr. 380, 383 (1966).

39. *Compare* CAL. ADM. CODE tit. 5, §§ 42700-43800 *with* CAL. EDUC. CODE § 24201 (West 1969).

instatement sections[40] are provided under general articles regulating paid leave of absence[41] and changed status of disabled employees.[42] Section 43550 comes within the general article for reinstatement,[43] presumably covering all situations not otherwise governed by a specific reinstatement section.[44]

In the light of the *Vogel* admonition that precision of regulation is required so that the exercise of First Amendment freedoms will not be unduly curtailed, the *Monroe* court's choice of section 43550 as a proper remedy is open to question. The section cannot fairly be said to be drawn with narrow specificity. It is by its very nature flexible and designed to cover a broad spectrum of reinstatement problems. Its application as a remedy to a free speech claim may be inadequate.

Testing the Remedy

On the one hand, the *Monroe* court recognized the delicacy of the remedy question in a free speech context by applying the standards normally governing statutes which affect First Amendment rights.[45] First, the court observed that continued exclusion would be continued punishment for the exercise of First Amendment rights by stigmatizing Monroe and preventing him from pursuing his chosen profession.[46] Second, the court found that the exclusion could have a "chilling effect" on sensitive First Amendment rights which hold a position of special importance in schools and colleges.[47] Finally, the court observed that the academic community would be enriched and broadened by the presence of individuals "with conscientiously held beliefs and ideals," thereby avoiding an undesirable "pall of orthodoxy."[48]

On the other hand, despite this recognition that a failure to reinstate Monroe could have a chilling effect on First Amendment rights, the *Monroe* court proceeded to qualify his remedy in a manner which appears inconsistent with principles enunciated in *Vogel*. The *Vogel* case had stated that "the utility of imposing the conditions must manifestly outweigh the impairment of constitutional rights."[49] Yet, in applying section 43550 the *Monroe* court detailed two conditions to Mon-

40. CAL. ADM. CODE §§ 43006, 43407, 43408.

41. *Id.* §§ 43000-08.

42. *Id.* §§ 43400-10.

43. *Id.* §§ 43550, 43551.

44. *See* Respondent's Petition for Rehearing at 5, Monroe v. Trustees of the Cal. State Colleges, 6 Cal. 3d 399, 491 P.2d 1105, 99 Cal. Rptr. 129 (1971).

45. *See* 6 Cal. 3d at 411-12, 491 P.2d at 1113, 99 Cal. Rptr. at 137.

46. *Id.* at 411, 491 P.2d at 1113, 99 Cal. Rptr. at 137.

47. *Id.*

48. *Id.* at 412, 491 P.2d at 1113, 99 Cal. Rptr. at 137.

49. 68 Cal. 2d at 21, 434 P.2d at 963, 64 Cal. Rptr. at 411. See text accompanying notes 32 & 33 *supra.*

roe's reinstatement.[50] First, the trustees were free to inquire into his present fitness, apart from grounds for prior termination, and reorder a dismissal if, after notice and hearing, justifiable grounds existed for discharge from the tenured position.[51] Second, the court discussed the administrative problems which would occur if, for example, someone else occupied the position to which the discharged employee would otherwise be entitled. The *Monroe* court concluded that "practical considerations will certainly justify a reasonable accommodation of the various interests at stake, and the reinstated employee can properly be offered a reasonable alternative position."[52]

Inquiry Into Present Fitness

When the first condition imposed upon Monroe's reinstatement is tested against the standards of *Vogel*, the balancing of interests appears justified. The utility of permitting the trustees' inquiry into Monroe's present fitness clearly outweighs the possible impairment of his constitutional rights.[53] A state certainly has a vital interest in maintaining the quality of its educational system. When a teacher, such as Monroe, has been absent from the profession this objective can be fully attained by testing the discharged instructor to determine his continued proficiency.[54] Therefore, the first qualification to Monroe's reinstatement[55] is consistent with the *Vogel* requirement of a legitimate and substantial governmental purpose which achieves a narrow end and does not broadly stifle personal liberties.[56]

A Reasonable Accommodation of Interests

By contrast, the second condition imposed on Monroe's remedy does not appear to meet the tests of *Vogel*, which admonished that precision of regulation is required so that the exercise of our freedoms will not be curtailed. It follows that a remedy fashioned for a free speech claimant must also be precise. The *Monroe* court's conclusion that practical considerations would justify a reasonable accommodation of interests does not seem to meet this standard of precision.

Moreover, it is difficult to reconcile the *Monroe* court's concern for the avoidance of administrative problems with the concern for im-

50. *See* 6 Cal. 3d at 412-13, 491 P.2d at 1114, 99 Cal. Rptr. at 138.

51. *Id.* at 412, 491 P.2d at 1114, 99 Cal. Rptr. at 138.

52. *Id.* at 412-13, 491 P.2d at 1114, 99 Cal. Rptr. at 138.

53. See note 32 and accompanying text *supra*.

54. *See* Shelton v. Tucker, 364 U.S. 479, 485 (1960); Lerner v. Los Angeles City Bd. of Educ., 59 Cal. 2d 382, 400, 380 P.2d 97, 107, 29 Cal. Rptr. 657, 667 (1963); Wilson v. City of Los Angeles, 54 Cal. 2d 61, 65, 351 P.2d 761, 765, 4 Cal. Rptr. 489, 493 (1960).

55. 6 Cal. 3d at 412, 491 P.2d at 1113, 99 Cal. Rptr. at 138.

56. See note 33 and accompanying text *supra*.

pairment of fundamental First Amendment rights expresed in *Vogel*[57] and other First Amendment cases.[58] Considering the vigorous concern for Monroe's First Amendment rights expressed earlier in the opinion, this apparent retreat is surprising. Once the compelling state interest in the quality of the profession is satisfied by testing present fitness, the appropriate remedy should be unequivocal reinstatement to the status and salary to which the discharged employee would have been entitled had he not been discharged.[59] Anything less than full reinstatement would undermine the court's stated objective of avoiding a continued "stigma" on Monroe, and a "chilling effect" and "pall of orthodoxy" on the profession.[60] A *reasonable* accommodation of interests might result in a reduction of salary or status. As a practical matter, this would constitute a continuing punishment of Monroe for exercising his First Amendment rights and thereby deter other public employees from expressing unpopular views. This result is hardly consistent with protections of First Amendment rights mandated by *Vogel.*

What Is a Reasonable Alternative Position?

In concluding that Monroe could be offered a reasonable alternative position, the California Supreme Court undermined what might otherwise have proved an acceptable remedy for a free speech claim. Section 43550 itself provides for a teacher's reinstatement "to a position in the classification which he left or the equivalent thereof."[61] Had the California Supreme Court construed the section strictly, the remedy would have been adequate for a claim arising under the First Amendment. A strict construction of section 43550 would permit no reduction in status or salary since this would not be "equivalent" to the position left. However, the *Monroe* opinion's "reasonable alternative" language[62] and an additional footnote reference[63] to nonconstitutional reinstatement cases[64] cast doubt on the question of whether section 43550

57. *Id.*

58. *Compare* 6 Cal. 3d at 412-13, 491 P.2d at 1114, 99 Cal. Rptr. at 138 *with* Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957) (dictum): "We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in [academic freedom and political expression] fields."

59. *Cf.* CAL. EDUC. CODE § 24212 (West 1969). See text accompanying notes 94-96 *infra.* It also should be kept in mind that the statute of limitations would still preclude most of Monroe's monetary recovery. 6 Cal. 3d at 414, 491 P.2d at 1115, 99 Cal. Rptr. at 139.

60. See notes 45-48 and accompanying text *supra.*

61. 6 Cal. 3d at 413, 491 P.2d at 1114, 99 Cal. Rptr. at 138; CAL. ADMIN. CODE tit. 5 § 43550 quoted at note 8 *supra.*

62. 6 Cal. 3d at 412-13, 491 P.2d at 1114, 99 Cal. Rptr. at 138.

63. *Id.* at n.8.

64. Mass v. Board of Educ., 61 Cal. 2d 612, 394 P.2d 579, 39 Cal. Rptr. 739 (1964) (reinstatement seven years after dismissal); DiGenova v. State Bd. of Educ.,

has been strictly construed in this First Amendment context. Rather, the section appears to have been interpreted as applicable in the same manner as in other tenure and reinstatement cases such as *Lerner*.[65]

If Administrative Code section 43550 is loosely applied in defining the scope of the remedy for a tenured teacher wrongfully discharged for the exercise of First Amendment rights, the problem of status or salary reduction is hardly illusory. Salary is a well-litigated aspect of tenure. *Kacsur v. Board of Trustees*[66] emphasized that although tenure adds some legal consequences to the primarily contractual relationship between the teacher and the employer, a teacher has no vested right to a particular salary.[67] The tenured teacher has protection in that "the fixing of salaries must not be discriminatory, arbitrary or unreasonable."[68] Later cases have upheld the discretionary power of school boards to raise and lower salaries subject to the standards of review announced in *Kacsur*.[69]

A 1970 California appellate court case, *Gilbaugh v. Bautzer*,[70] involved a salary reduction authorized under California Education Code section 22607.[71] Gilbaugh was transferred from his $21,960 per year administrative position to a $16,212 per year teaching position. Section 22607 specifically authorizes the reassignment of an administrative employee to an academic position "commensurate with his qualifications at the salary fixed for that position. . . ."[72] Gilbaugh argued that the new position was not commensurate with his qualifications. The court allowed the transfer since he was also qualified for the lower paying position and cited *Kacsur* as authority for allowing the salary reduction.[73]

The *Monroe* case is clearly distinguishable since Monroe was not an administrative employee[74] subject to such a transfer. However, because of *Gilbaugh*, precedent exists for a large salary reduction under

57 Cal. 2d 167, 367 P.2d 865, 18 Cal. Rptr. 369 (1962) (reinstatement nine years after dismissal).

65. See notes 14-19 and accompanying text *supra*.

66. 18 Cal. 2d 586, 116 P.2d 593 (1941).

67. *Id.* at 591, 116 P.2d at 596.

68. *Id.* at 592, 116 P.2d at 596; *accord*, Rible v. Hughes, 24 Cal. 2d 437, 443-45, 150 P.2d 455, 458 (1944).

69. *E.g.*, Brown v. Hanford Elem. School Bd., 263 Cal. App. 2d 170, 172-74, 69 Cal. Rptr. 154, 156-58 (1968) (statutory authority to fix salaries authorizes both raises and reductions); San Diego Fed'n of Teachers v. Board of Educ., 216 Cal. App. 2d 758, 762, 31 Cal. Rptr. 146, 148 (1963).

70. 3 Cal. App. 3d 793, 83 Cal. Rptr. 806 (1970).

71. CAL. EDUC. CODE § 22607 (West 1969).

72. *Id.*

73. 3 Cal. App. 3d at 796-97, 83 Cal. Rptr. at 808.

74. *See* CAL. ADM. CODE tit. 5, § 42700(m).

one of the three statutes authorizing section 43550.[75] Thus, the application of *Gilbaugh* and other salary adjustment cases[76] to the "reasonable accommodation of the various interests at stake"[77] in *Monroe* is an open question. That Monroe's free speech remedy should be subject to such imprecise guidelines is within neither the spirit nor the letter of the *Vogel* opinion.

An Alternative Remedy

As already discussed, section 43550 is by nature flexible and designed to cover a broad variety of reinstatement problems.[78] Had the section been strictly construed, Monroe's remedy might have withstood the tests of *Vogel*. Yet a strict construction of the section would be inconsistent with its application to a non-free speech claim where a reasonable accommodation of interests may be justified. The suggestion that 43550 be strictly construed in a free speech context places the court in the awkward position of reading the section one way for one purpose and a different way for another. Because of this difficulty, it is important to explore alternative remedies which may be available to the court should it be faced with a similar claim in the future.

Tenure Rights Distinguished from Free Speech Rights

Before the nature of an available alternative remedy can be described, it must be understood that the rights of tenure are distinct from those rights which accrue when a teacher is discharged solely on the basis of a valid exercise of First Amendment rights. Two teacher reinstatement cases decided by the United States Supreme Court shortly after *Monroe* illustrate this point. *Perry v. Sindermann*[79] held that a teacher who proved that he had attained de facto tenure was entitled to a hearing at which he could assert a free speech defense to his firing.[80] *Board of Regents v. Roth*[81] held that a teacher was not entitled to such a hearing upon nonrenewal of his first one year contract simply because his defense was also based on free speech.[82] Nonetheless, both cases recognized and reaffirmed the principle that free speech rights are independent of rights of tenure:

> [L]ack of a contractual or tenure 'right' to re-employment for the 1969-1970 academic year is immaterial to [the petitioner's] free

75. CAL. EDUC. CODE §§ 22604, 22607, 24201 (West 1969). See note 8 *supra*.
76. See notes 66 & 69 and accompanying text *supra*.
77. 6 Cal. 3d at 412, 491 P.2d at 1114, 99 Cal. Rptr. at 138.
78. See text accompanying notes 37-44 *supra*.
79. 408 U.S. 593 (1972).
80. *Id.* at 602-03.
81. 408 U.S. 564 (1972).
82. *Id.* at 568-69.

> speech claim. Indeed, twice before, this Court has 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.[83]

Of course, Monroe was tenured and entitled to a hearing and protection under section 43550 and applicable tenure rules.[84] Yet, *Perry* and *Roth* suggest a right to re-employment in this First Amendment context that is independent of section 43550 and its general guidelines. Thus, since Monroe was discharged solely for his refusal to sign an unconstitutional oath, it appears that he would have been entitled to reinstatement even had he not been tenured. Therefore, the trustees' duty to reinstate Monroe arose independently of tenured status and of section 43550. The duty is one imposed by the Constitution: noninterference with the valid exercise of a free speech right.[85]

Reinstatement on Mandamus

Once it is established that the trustees' duty to reinstate a free speech claimant arises independently of the duty to reinstate a tenured teacher, the scope of the remedy available to the California court becomes clear. The nature of mandamus,[86] a procedure properly followed by Monroe to establish his right of reinstatement to public employment,[87] suggests no limitation on the power of the court to provide more specific guidelines than those set out in section 43550. Mandamus may properly compel the trustees to perform a law imposed, nondiscretionary or ministerial duty toward a person establishing a right to performance of that duty.[88] The duty to reinstate a person so entitled may normally be discretionary to some extent in its execution, but the discretion of administrative bodies is subject to the court's control when First Amendment rights are involved.[89] Thus the court would

83. Perry v. Sindermann, 408 U.S. 593, 597-98; *accord*, Board of Regents v. Roth, 408 U.S. 564, 575 n.14.

84. *See* 6 Cal. 3d at 410, 491 P.2d at 1112, 99 Cal. Rptr. at 136.

85. Rosenfield v. Malcolm, 65 Cal. 2d 559, 562, 421 P.2d 697, 698, 55 Cal. Rptr. 505, 506 (1967) (mandamus to compel reinstatement of provisional county employee). "The ultimate boundaries of plaintiff's rights are set not by the rules of the Alameda County Civil Service Commission but by the Constitution of the United States." *Id.*

86. CAL. CODE CIV. PROC. §§ 1084-97 (West 1955) *as amended* (Supp. 1972).

87. *Id.* § 1085 provides in part: "[Mandamus] may be issued . . . to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded. . . ." *See* Thornton v. Board of Trustees, 262 Cal. App. 2d 761, 763, 68 Cal. Rptr. 842, 843-44 (1968); Titus v. Lawndale School Dist., 157 Cal. App. 2d 822, 830, 322 P.2d 56, 61 (1958).

88. *See* E. FRANK, CALIFORNIA CIVIL WRITS § 5.7 (Cal. Cont. Educ. Bar 1970); 5 B. WITKIN, CALIFORNIA PROCEDURE 3838 (2d ed. 1971).

89. *See* Los Angeles Teachers Union v. Board of Educ., 71 Cal. 2d 551, 557,

not be ordering the trustees to do more than the law commands.[90] Rather, the court would be defining the applicable law in this special situation.

Had the *Monroe* court wished to provide its own detailed reinstatement order, mandamus requirements would have been fulfilled without reference to section 43550 or to California Education Code section 24201[91] which provides a statutory reinstatement duty on the part of the trustees.[92] Monroe's right to reinstatement is not merely statutory nor is it predicated solely upon section 43550 or tenured status. Since the Constitution of the United States also defines that right,[93] it was within the power of the California court to fashion a mandamus remedy which would meet the precise requirements of *Vogel*. Had the California court exercised this power, the problems of possible reduction in status or salary which follow from the application of section 43550 might have been avoided. A carefully drafted mandamus would have made the court a more effective guardian of free speech.

Had the court not relied on section 43550, the drafting of reinstatement guidelines would not have been difficult. An example of the specificity with which the mandamus might have been drafted is provided by California Education Code section 24212[94] which covers reinstatement following an employee's military or Red Cross service during a national emergency or "any war" in which the United States is engaged. This section is very explicit in requiring reinstatement "to the position held by him at the time of his entrance into such military service, at the salary to which he would have been entitled had he not absented himself from his duties."[95] This is the type of "narrow specificity" advocated in *Vogel*[96] and available to the *Monroe* court as an example of the precise regulation so often demanded in the First Amendment context.

Conclusion

Monroe properly relied on *Lerner* to conclude that the statute of limitations eliminated any pre-1968 remedy related to the initial dis-

455 P.2d 827, 831, 78 Cal. Rptr. 723, 727 (1969); Rosenfield v. Malcolm, 65 Cal. 2d 559, 563, 421 P.2d 697, 699, 55 Cal. Rptr. 505, 507 (1967).

90. CAL. CODE CIV. PROC. § 1094.5(e) (West 1955) provides in part: "[The court] may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent." *See generally* Wood v. Strother, 76 Cal. 545, 548-54, 18 P. 766, 768-71 (1888).

91. CAL. EDUC. CODE § 24201 (West 1969) quoted at note 38 *supra*.

92. *See id.*

93. See notes 83-85 and accompanying text *supra*.

94. *See* CAL. EDUC. CODE § 24212 (West 1969).

95. *Id.*

96. See text accompanying note 33 *supra*.

charge, and that new rights accrued upon the improper summary refusal by the trustees to reinstate Monroe in 1968. *Monroe* goes beyond *Lerner* as the first California Supreme Court case to discuss teacher reinstatement in detail and to prescribe Administrative Code section 43550 as a remedy. Recognizing that the actual remedy provided is the real measure of relief granted, the court discussed the remedy in some detail.[97] The *Monroe* court properly based the prescription of section 43550 on First Amendment considerations[98] as distinct from considerations of tenure.

However, while the court did not base the remedy of section 43550 on the principles of tenure, the opinion may be susceptible to that interpretation due to a lack of clarity in that part of the opinion. Section 43550 was applied as a remedy at the end of a long discussion dealing primarily with tenure.[99] This area of the opinion is a source of potential confusion because it does not adequately distinguish the issue of tenure from the free speech issue. In view of these references to tenure[100] and the "reasonable accommodation" language,[101] the remedy of section 43550 could be interpreted in the context of tenure rather than free speech.

If the distinction between tenure rights and free speech rights is observed and section 43550 is strictly construed as a remedy in a First Amendment context, the court's desired "ultimate vindication of the redoubtable right of free expression"[102] will be possible. If, however, the discussion of tenure rights immediately preceding the prescription of section 43550 and the later qualifications concerning present fitness and reasonable alternative positions imply that Monroe is to be reinstated according to tenure principles, the court's desired result is less likely to be achieved. Such an interpretation would allow considerably more flexibility than a First Amendment construction of section 43550, as illustrated by the salary adjustment cases. This could lead to an undesirable chilling of freedom of expression.

Because of this possibility, it is hoped that the opinion will be interpreted to add the stated First Amendment principles to the implementation of section 43550 in this special situation, and that "reasonable alternatives" do not imply that any reduction of status or salary is authorized. This latter interpretation seems proper and consistent with the development of the law in this area. Thus, administrators and lower

97. See notes 45-48 and accompanying text *supra*.
98. 6 Cal. 3d at 410-11, 491 P.2d at 1112-13, 99 Cal. Rptr. at 136-37.
99. *Id.*
100. *See id.* at 410 & 412, 491 P.2d at 1112 & 1114, 99 Cal. Rptr. at 136 & 138.
101. *Id.* at 412-13, 491 P.2d at 1114, 99 Cal. Rptr. at 138.
102. *See id.* at 414, 491 P.2d at 1115, 99 Cal. Rptr. at 139.

courts should apply section 43550 in the spirit of the First Amendment principles expressed by the court.

Should the California court again be faced with the problem of fashioning a remedy for a teacher discharged because of an exercise of free speech rights, a different approach should be taken. The court should exercise the mandamus power to prescribe reinstatement within narrow boundaries. A carefully drafted mandamus would avoid conferring too much administrative discretion on the reinstating body and would more adequately protect the freedom of expression.

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