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Procedural Due Process Protection for Probationary Teachers' First Amendment Rights: Bekiaris v. Board of Education

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A very stringent set of judicial guidelines\(^1\) guards the First Amendment freedoms of California public employees\(^2\) against abuse by their employers. In *Bekiaris v. Board of Education*,\(^3\) the California Supreme Court recently extended the administrative and judicial procedural protections afforded probationary school teachers. Although this note primarily will discuss the decision's impact in the area of teaching, it is clear that the decision also applies to other public employees.\(^4\)

The court held in *Bekiaris* that a probationary teacher\(^5\) has a right to an administrative and judicial hearing to ascertain the true reason

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1. See text accompanying notes 59-73 infra.
2. California public employers customarily are designated as either statewide or local administrative agencies. Those agencies which exercise jurisdiction throughout the state are known as statewide agencies, whereas "[l]ocal agencies . . . are agencies having less than statewide jurisdiction. This obviously includes all agencies created by counties, cities, and other political subdivisions below the state level . . . . Also included are agencies created by the state legislature that have limited jurisdiction, such as county water districts . . . pest control districts . . . school districts . . . and school boards." W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS § 5.66 (Cal. Cont. Educ. Bar 1966) (citations omitted). The judicial guidelines which guard public employees' First Amendment freedoms apply with equal force to both types of administrative agency.
3. 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16 (1972).
4. See note 25 infra.
5. A probationary teacher has been defined as "a certified employee, other than a substitute or temporary employee, of a given school district, who has not achieved permanent employee status." Coan, *Dismissal of California Probationary Teachers*, 15 Hastings L.J. 284, 287 (1964). In California, the length of probationary service depends upon the size of the school district. In school districts having 250 or more students in average daily attendance (ADA), the teacher can be granted permanent status after three complete consecutive school years and re-election to a fourth year. In school districts with less than 250 ADA, every teacher may be offered a continuing contract for greater than one year but not exceeding four years. In such districts, if the teacher completes three complete consecutive school years and is re-elected to a fourth, the school board may classify the teacher as a permanent employee or may continue to employ the teacher on a year to year basis. In school districts with greater than 60,000 ADA, the school board can grant permanent employee status after only two complete consecutive school years and re-election to a third year. CAL. EDUC. CODE §§ 13304-07 (West 1969).
he was not rehired when he alleges that the reason for his nonrenewal was that he exercised his constitutional rights.\textsuperscript{6} This holding appears to reduce substantially the ability of a local school board to mask unconstitutional dismissal or nonrenewal decisions behind unjustified charges.\textsuperscript{7} Although the possibility that counterfeit grounds might be used to terminate a public employee has troubled some commentators\textsuperscript{8}

This note is concerned primarily with public school teachers. However, the distinction between probationary public school teachers and probationary professors at colleges and universities is not important in the area of First Amendment freedoms. Hence, a section describing and criticizing two recent United States Supreme Court decisions which undoubtedly will affect probationary public school teachers in addition to probationary college and university professors has been included. See text accompanying notes 102-45 infra.

6. 6 Cal. 3d at 588-89, 493 P.2d at 487-88, 100 Cal. Rptr. at 23-24.

7. The grounds on which a permanent teacher may be dismissed include immoral or unprofessional conduct, dishonesty, incompetency, evident unfitness for service, and conviction of a felony. \textit{Cal. Educ. Code} § 13403 (West Supp. 1972). Section 13443(d) states that a probationary teacher can be dismissed “for cause only [that] shall relate solely to the welfare of the schools and the pupils thereof . . . .” Thus, the absence of specific grounds for the dismissal of a probationary teacher obviously would permit the use of any of the grounds delineated in section 13403. What additional grounds arguably might relate “to the welfare of the schools and pupils thereof” is uncertain.

The term “dismissal” customarily is used to designate the termination of either a probationary or permanent teacher’s contract during the school year, while “nonrenewal” refers to decisions to not renew a teacher’s contract for the following school year. In some states, the procedures afforded a probationary teacher who is dismissed during the school year are equivalent to those required whenever a permanent teacher is dismissed. See note 95 and accompanying text infra. The California procedures are unusual because they afford a nonrenewed probationary teacher nearly as much protection as a dismissed permanent teacher. \textit{Compare Cal. Educ. Code} §§ 13401-41 with § 13443 (West 1969, Supp. 1972). See note 25 infra.

When the distinction between nonrenewal and dismissal is not significant, “termination” will be used in this note to indicate the severance of an employment relationship.

8. “Generally, a community is largely apathetic toward the running of a school, but communities may become excited over a controversial teacher and demand his removal for reasons which are impermissible, such as political activities.” Note, \textit{Constitutional Law—Due Process—Fairness of a Hearing Before a School Board on Nonrenewal of a Teacher’s Contract}, 1971 Wis. L. Rev. 354, 360. “The possibility exists that as a result of community pressures against a teacher for activities which are constitutionally protected, a list of reasons will be drawn up which avoids the constitutional problems. [School] Boards and administrators may be willing to do this in order to avoid the community agitation over the teacher since the easiest course is to nonrenew the teacher. The present procedures [in Wisconsin] provide no safeguard against such abuses, and the only recourse is in the courts.” \textit{Id.} n.24. “If ‘no’ reason is sufficient to dismiss a teacher and if a discharge on grounds such as incompetency or insubordination cannot be reviewed and need not be supported by evidence at a hearing, then ‘no’ reasons or an unsubstantiated ‘good’ reason can be used to mask a constitutionally impermissible discharge on the grounds of race or religion.” Note, \textit{Constitutional Law—Fourteenth Amendment—Public School Teachers Claiming Arbi-
and two United States Supreme Court Justices, Bekiaris is the first case in which a state court has required an administrative agency to scrutinize carefully and make findings on the constitutional defenses raised by one of its employees facing termination charges. By requiring an administrative investigation of asserted constitutional defenses and further by providing for the independent judicial review of the administrative decision, Bekiaris adds an important dimension to the protections which California affords its probationary teachers—protections already extensive in comparison with those found in other states. 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.

This note will review the nature of the controversy from which the Bekiaris decision arose, the development of the substantive principles applicable to the controversy, the pre-Bekiaris failure of California's extensive statutory procedures to provide a forum in which to settle constitutional claims, and the new procedures promulgated by the California Supreme Court. It will also consider the potential significance of the ruling as a precedent for other states, especially in light of current procedures in those states and two recent United States Supreme Court decisions concerning probationary teachers.

The Factual Controversy: Bekiaris v. Board of Education

Christo Tom Bekiaris, a 1966 college graduate, was first employed by the Modesto City School District as a probationary teacher at a local high school in September, 1967. During his initial year of teaching, Bekiaris wrote letters to the local paper to oppose American involvement in Vietnam, appeared before the city council to argue

9. "[The Court] holds that mere assertion by government that exclusion is for a valid reason forecloses further inquiry. That is, unless the government official is foolish enough to admit what he is doing—and few will be so foolish after today's decision—he may employ 'security requirements' as a blind behind which to dismiss at will for the most discriminatory of causes." Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 900 (1961) (Brennan, J., dissenting). "When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution." Board of Regents v. Roth, 408 U.S. 564, 582 (1972) (Douglas, J., dissenting). See text accompanying notes 109-127 infra.

10. See cases cited note 101 infra for federal decisions which have required administrative hearings for nonrenewed probationary teachers.

11. See text accompanying notes 87-97 infra.
against racially restrictive park ordinances, and attended a nonviolent demonstration to protest weapons on Armed Forces Day. The first official evaluation of his teaching at the end of the 1967-68 school year mentioned these activities but rated his teaching performance as satisfactory. His performance allegedly deteriorated during his second year at the high school and school officials gave him notice that he would not be rehired for the following school year.

In accordance with the procedural protections of the California Education Code12 and the California Administrative Procedure Act,13 Bekiaris requested a hearing and subsequently received an accusation and notice of hearing. The school board argued at the hearing that Bekiaris was not suited to continue teaching at the high school14 and offered two witnesses who supported its contentions. Bekiaris denied or disagreed with each of these allegations and introduced evidence that the reason behind the decision not to rehire him was that certain school officials disapproved of his political activities. He presented testimony which alleged that high school officials in September, 1968,
had asked the County Counsel's office whether a teacher could be terminated because he had written letters to a newspaper. The counsel replied that these activities were constitutionally protected as "rights of free speech," and that the only basis for terminating a teacher was "the manner in which he taught." 16

At the hearing, the hearing officer ruled that the motivations of Bekiaris's superiors in bringing the action against Bekiaris were immaterial "providing that the facts are such as would justify that disciplinary action." 16 He concluded, however, that none of the charges were adequately supported by the evidence and disapproved the proposal to not rehire Bekiaris. Nonetheless, the school board voted not to renew Bekiaris's contract. 17

Bekiaris then petitioned the superior court for a writ of mandate to set aside the board's decision. The trial court denied the writ, holding that since substantial evidence existed in the record to support the school board's decision, the record did not sustain Bekiaris's constitutional contentions. Bekiaris appealed to the Court of Appeal for the Fifth District. 18 Relying heavily on Griggs v. Board of Trustees, 19 the

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15. Record of the Administrative Hearing Before the Board of Education of the City of Modesto, State of California Re the Matter of the Determination of Cause For Not Reemploying Christo Tom Bekiaris at 127. This record is located in the Clerk's Office of the Stanislaus County court house in Modesto, California.

16. 6 Cal. 3d at 582-83, 493 P.2d at 483, 100 Cal. Rptr. at 19. In commenting on the question of whether Bekiaris's letters to the local newspaper were protected by the First Amendment, the hearing officer stated his position graphically: "I don't think that question is before me . . . . This may conceivably involve something as innocuous as to whether there should be bells on cats to protect the birds, and I cannot see whether it makes any difference whether Mr. Bekiaria is pro-bell or anti-bell insofar as what kind of teacher he is. That is what we are interested in here, . . . not his letters." Id. at 583 n.3, 493 P.2d at 484 n.3, 100 Cal. Rptr. at 20 n.3.

17. Id. at 584, 493 P.2d at 484, 100 Cal. Rptr. at 20. According to the Administrative Procedure Act, the hearing officer's power extends only to the degree to which it is granted by the agency. Thus, the hearing officer has no independent power, and his function essentially is to "preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law . . . ." CAL. GOV'T CODE § 11512(b) (West 1966). A school board may choose to delegate its functions as fact-finder and decision-maker to the hearing officer. Feist v. Rowe, 3 Cal. App. 3d 404, 421, 83 Cal. Rptr. 465, 476 (1970). This choice obviously was not exercised by the Modesto school board.

18. Bekiaris and the school board stated their contending positions succinctly in the briefs filed with the appellate court. Bekiaris stated: "The issue in this appeal is whether or not an Appellate Court will defer to administrative discretion and ignore the appellant's contention that the administrator's actual motivation was to silence the exercise of First Amendment rights. If the Court does indeed defer to administrative discretion and chooses to accept at face value the respondent's reasons for discharging the appellant, this will make a shambles of the protections of the Constitution." Brief for Appellant at 14, Bekiaris v. Board of Educ., 5 Civ. No. 1268 (Ct. App. Cal., filed Jan. 14, 1971). The school board responded: "What the appellant teacher seeks here is a cloak of constitutional protection so impenetrable as to render him
appellate court determined that it was restricted in its review to assessing “whether the board has proceeded without or in excess of its jurisdiction, whether there was a fair trial, and whether there was any abuse of discretion.” Finding no error according to this scope of review and also deciding that the school board’s decision was supported by substantial evidence in light of the entire record, it unanimously affirmed the decision of the trial court.

On appeal, the California Supreme Court ruled that the school board should have considered Bekiaris’s constitutional claims and that the trial court’s failure to do so was reversible error. First, the court held that when “the teacher seeks to present evidence to show that he was dismissed for the exercise of constitutional rights whose consequent limitation was not justified by a compelling public interest, that evidence must be received substantively [by the school board] and a determination made.” Second, the court ruled that a “dismissed employee is entitled to an independent judicial determination of the ultimate question whether . . . he was dismissed for the reasons stated [or] rather because of official dissatisfaction with his exercise of constitutional rights.” Since these determinations had not been made

immune from discharge, no matter what grounds are stated and proved. No such special immunity is granted to the politically active teacher.” Brief for Respondent at 5, id. The procedures outlined in Bekiaris, if conscientiously followed, would appear to avoid the problems raised here by both sides. See text accompanying notes 85 & 86 infra.

22. 6 Cal. 3d at 588, 493 P.2d at 487, 100 Cal. Rptr. at 23 (1972).
23. id. at 590, 493 P.2d at 487, 100 Cal. Rptr. at 25 (emphasis added). In California, the decisions of most statewide administrative agencies historically have been subject to an independent judicial review of the weight of the evidence where the decision affects an individual’s fundamental, vested right. Examples of such rights include licenses to practice one’s trade or profession and the right to receive unemployment compensation. E.g., Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 435 P.2d 553, 64 Cal. Rptr. 785 (1968); Thomas v. California Emp. Stab. Comm’n, 39 Cal. 2d 501, 247 P.2d 561 (1952); Val Strough Chevrolet Co. v. Bright, 269 Cal. App. 2d 855, 75 Cal. Rptr. 363 (1969); Arenstein v. California State Bd. of Pharmacy, 265 Cal. App. 2d 179, 71 Cal. Rptr. 357 (1968); McPherson v. Real Estate Comm’n, 162 Cal. App. 2d 751, 329 P.2d 12 (1958). When the decision of the statewide agency does not affect a fundamental, vested right, judicial review is limited to a determination of whether there was substantial evidence to support the agency’s decision. Bixby v. Pierno, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971); W. DEERING, supra note 2, at §§ 5.52-.64.

There is a line of cases which holds that a local agency decision is subject only to a “substantial evidence” judicial review, no matter what type of right is affected.
in the prior proceedings, the court remanded the case to the Modesto school board with instructions to make the required findings.24

Throughout the past twenty-five years, the courts gradually have lessened the ability of a government agency to restrict blatantly the constitutional rights of public employees in general, and teachers in particular. However, even under California's extensive procedures which existed prior to Bekiaris, a public employee's constitutional liberties remained vulnerable to attack because neither the administrative agencies nor the courts were required to examine any proffered constitutional defense as long as there was substantial evidence to support the employer's stated reasons for termination. Thus, in Bekiaris California has taken a momentous step towards eliminating covert attacks on the constitutional freedoms of public employees25 by ensuring them both

Since the question of true motive for the termination of Bekiaris' employment involved a special constitutional defense necessarily subject to independent judicial scrutiny, the Bekiaris decision explicitly refused to decide whether the trial court should exercise an independent review of the evidence when a local agency decision affects a fundamental, vested right. 6 Cal. 3d at 591 n.10, 493 P.2d at 490 n.10, 100 Cal. Rptr. at 26 n.10. However, a decision on this point should be forthcoming shortly from the California Supreme Court. See Strumsky v. San Diego County Employees Retirement Ass'n, 100 Cal. Rptr. 338 (1972), hearing granted, L.A. No. 3009, Feb. 17, 1972 (holding the independent judgment test applied where a local administrative decision affected a fundamental, vested right).

24. On remand, the school board again decided to terminate Bekiaris, finding that he was terminated for the reasons originally set out in the accusation and not for exercising his constitutional rights. Likewise, the superior court concluded that the true reason Bekiaris was not rehired "was . . . his failure as a teacher and not because of the exercise of his constitutional rights." Bekiaris v. Board of Educ., No. 117614 (Stanislaus Super. Ct., Dec. 27, 1972), notice of appeal filed, February 27, 1973, 5 Civ. No. 2014.

25. It appears that the scope of the holding in Bekiaris is not limited to probationary teachers. The procedures will apply to terminations involving permanent public school employees, especially since the procedural protections afforded them are similar to those provided probationary teachers. Compare Cal. Educ. Code §§ 13404, 13412-14 with § 13443 (West Supp. 1972).

Bekiaris will also apply to the employees of statewide agencies covered by the Administrative Procedure Act. Those agencies are enumerated in Cal. Gov't Code § 11501 (West Supp. 1972). The court did not restrict the holding to the terminations of probationary teachers, and since the same administrative procedures regulate the terminations of state employees as well as probationary teachers, it can be safely inferred that whenever a state employee raises a First Amendment defense, the Bekiaris procedures apply. The opinion fails to indicate whether the procedures it outlined must be followed by local agencies, but there is no reason why the Bekiaris rationale should not extend to the constitutional defenses raised by local as well as state employees.

In terms of judicial review, the holding certainly applies with equal force to state and local employees. Two statements in particular support this conclusion. First, the court held "that a dismissed public employee is entitled to a judicial determination of the true reasons for his dismissal when he presents evidence tending to show that he
an administrative and a judicial review of their constitutional defenses when they are threatened with termination.

Before reviewing in greater detail the procedural protections outlined by the California Supreme Court in *Bekiaris*, it may be helpful to trace briefly the development of the constitutional protections afforded public employees' civil liberties.

**The General Constitutional Protection Afforded Public Employees' and Teachers' Civil Liberties in California**

For many decades, a government employee risked his job if he chose to exercise his First Amendment rights. Under what was known as the "privilege doctrine," a government agency could terminate a public employee even when the stated reason for termination was the employer's disapproval of the employee's political activities. The doctrine's identifying symbol was Justice Holmes's ninety-year-old epigram that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."26 The doctrine was based upon a supposed right-privilege dichotomy: because a person has no right to government employment, it was thought that the "privilege" of working as a civil servant could be conditioned upon the employee's surrendering certain constitutional rights.27 The courts.

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26. McAuliffe v. City of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). Justice Holmes further observed: "There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control." *Id.* at 220, 29 N.E. at 517-18. Thus, Holmes never posited that a governmental agency could dismiss employees for any reason. While he believed that the conditions placed upon employment had to be "reasonable," most cases in the privilege doctrine tradition seemingly presumed the reasonableness of governmental action. See W. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 28-29 (1961). The controversy continues over what conditions currently fall within the elusive category of reasonableness. See notes 32 & 35 infra.

27. In the famous Scopes "Monkey Trial," petitioner Scopes argued that the criminal statute under which he was convicted for teaching the theory of evolution was unconstitutionally vague. The court replied: "The plaintiff in error . . . was under contract with the State to work in an institution of the State. He had no right or privilege to serve the State except upon such terms as the State prescribed. His
have slowly eroded this doctrine, and recently the United States Supreme Court explicitly overruled the right-privilege dichotomy. Hence, decisions by both the United States Supreme Court and California courts now recognize that the First Amendment right of public employees, including school teachers, cannot be circumscribed more than is necessary to maintain job efficiency.

**Supreme Court Decisions**

The Supreme Court's most important discussion of the extent to which a government employer may limit a public employee's political activities is *United Public Workers v. Mitchell,* decided in 1947. Poole, the petitioner in *Mitchell,* was a government worker who served as a local political party official in his off-duty hours. On election day he also worked at the polls and acted as a paymaster for other party workers. Poole admitted that his political activities violated the Hatch Act interdiction of federal employees engaging in political activity, but he sought a declaratory judgment that the act was unconstitutional.

The Court rejected Poole's argument that his political activities did not interfere with his job as a roller in the mint and held that his election activity properly subjected him to disciplinary action under the act. Although recognizing the petitioner's contention that the Constitution limits the extent to which Congress may regulate a federal employee's conduct, the Court asserted that the Congressional bans

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28. The best description of this erosion is contained in Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968). Van Alstyne delineated five approaches the courts have used to circumvent the right-privilege distinction in cases involving public employees' constitutional rights: the doctrine of unconstitutional conditions, recognition of the "unconstitutional effect" of a regulation, procedural due process, equal protection, and bills of attainder.


32. "Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or
on partisan political activity were justified since they promoted the administration and efficiency of the public service. "[T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government."\(^3\) The Court added: "Evidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively."\(^3\)

The basic right of a government agency to restrict the political activities of public employees remains intact twenty-five years after the Mitchell decision. However, the courts gradually have moved from Mitchell's one-sided position favoring the power of the government to restrict the constitutional liberties of its employees to a position affording greater protection to the constitutional liberties of public employees, and recently the Mitchell rationale was challenged successfully.\(^5\)

Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work. None would deny such limitations on congressional power but, because there are some limitations, it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid." 330 U.S. 75, 100 (1947).

33. Id. at 96.
34. Id. at 101.
35. National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578 (D.D.C. 1972), prob. juris. noted, 41 U.S.L.W. 3324 (Dec. 12, 1972). The majority of the three-judge district court held that the "least restrictive alternative test" should be used to evaluate the Hatch Act rather than the "rational basis" test used in Mitchell. 346 F. Supp. at 585. That is, the Hatch Act's provisions for removing or suspending federal employees as a penalty for taking active roles in political campaigns should be scrutinized in terms of whether Congress could regulate the federal civil service by means of less restrictive legislation, rather than in terms of whether there was any rational basis for the means which Congress adopted in the Hatch Act. Stating that the Hatch Act did not meet the least restrictive alternative test, and that the federal civil service has increased greatly in size and efficiency since the Mitchell decision in 1947, the court said the Mitchell rationale had been "outmoded by passage of time." Id. This approach was foreshadowed by Justice Black's dissent in Mitchell: "Certainly laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and immediate danger to the public." 330 U.S. 75, 110 (1947). Contra, Broadrick v. State of Okla. ex rel. Okla. Personnel Bd., 338 F. Supp. 711 (W.D. Okla. 1972), prob. juris. noted, 41 U.S.L.W. 3324 (Dec. 12, 1972). In Broadrick, the three-judge panel upheld the validity of a state statute which prohibited state civil servants from participating in partisan political campaigns, stating: "We find that a government's interest in avoiding the danger of having promotions and discharges of civil servants motivated by political ramifications rather than merit is highly desirable. This interest is of such an importance that it may properly be classified as a compelling governmental interest, and a showing of a compelling governmental interest is sufficient to justify some encroachment upon an individual's first amendment rights." 338 F. Supp.
The gradual progression toward fortifying the protection of public employees' First Amendment rights is well illustrated in the area of teaching. In *Adler v. Board of Education*, the Supreme Court upheld a section of the New York Civil Service Law known as the "Feinberg Law" which provided for the dismissal of any person advocating the overthrow of the United States government by unlawful means or who, after notice and hearing, was found to belong to an organization advocating the overthrow of the government. The Court rejected the appellants' objection that the law violated the First Amendment and, citing *Mitchell*, the Court observed:

Persons have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to go elsewhere. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York.

The majority of the Court considered the conditions of employment reasonable since they imposed only insignificant limitations on the teacher's First Amendment freedoms. The majority reasoned that the teachers had "chosen" to work for the school system and that since the law only prevented a civil servant from joining a relatively few organizations, the teacher's constitutional rights to freedom of speech and assembly had been only remotely restricted.

The analysis that the teacher chose a teaching career and consequently chose to have her personal freedoms restricted was contested by Justice Douglas who argued that the Feinberg Law was unconstitutional: "So long as she [the teacher] is a law-abiding citizen, so long as her performance within the public school system meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her."

In *Sweezy v. New Hampshire*, a university professor had invoked the First Amendment in refusing to provide information to the New Hampshire attorney general about a lecture he had given at the University of New Hampshire and the New Hampshire Progressive Party's

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37. Id. at 492 (citations omitted).
38. Id. at 493.
39. Id. at 511 (Douglas, J., dissenting).
activities and membership. In a plurality opinion, Chief Justice War-
ren held that the interrogation of the petitioner by the state served no
valid state interest and that his contempt conviction for refusing to an-
swer violated the due process clause. The Chief Justice indicated by
dicta that Sweezy's First Amendment liberties were infringed. Justice
Frankfurter, joined by Justice Harlan, concurred. They did not
find any imminent threat to New Hampshire posed by the state's Pro-
gressive Party. Thus, the interrogation of Sweezy's "political loyalties"
constituted an encroachment on his right to privacy of political thought
and action as protected by the Fourteenth Amendment.

In contrast to the Sweezy holding, Barenblatt v. United States
demonstrated the priority afforded the government's interest when a
majority of the Court considered serious a threat to governmental secur-
ity. Barenblatt, a former graduate student and teaching fellow at the
University of Michigan, was convicted of a misdemeanor, fined, and
jailed six months for refusing to testify before the House Committee
on Un-American Activities about his campus political activities. He
asserted to the Committee that the First, Ninth, and Tenth Amend-
ments protected him from being compelled to answer questions about
his possible connections with the Communist Party. In an opinion
written by Justice Harlan, the five man majority distinguished Sweezy
and held that the petitioner had no constitutionally protected right
not to testify because the danger to national security posed by the Com-
munist Party was thought significantly greater than the danger posed
to New Hampshire by that state's Progressive Party. Justice Black's
vigorous dissent excoriated the activities of HUAC and the majority's
views on the First Amendment: "[U]nless we . . . once again accept
the notion that the Bill of Rights means what it says and that this
Court must enforce that meaning, I am of the opinion that our great
charter of liberty will be more honored in the breach than in the ob-
servance."

Warren Court Decisions in the 1960's

Three major opinions dealing with the First Amendment rights
of teachers during the Warren Court years of 1960's illustrate that
a majority of the Court by then had adopted the view of Justice Black's

41. Id. at 250-51, 254.
42. Id. at 265, 267. Justices Clark and Burton dissented, stating that they
would have balanced in favor of the "[s]tate's interest in investigating subversive ac-
tivities for the protection of its citizens [over] the protection of Sweezy . . . ." Id. at
270. Justice Whittaker took no part in the decision of the case.
44. Id. at 109, 129.
45. Id. at 143-44.
Barenblatt dissent. Shelton v. Tucker,\textsuperscript{46} decided in 1960, invalidated an Arkansas statute which required each public school teacher to submit annually a list of every organization “to which he has belonged or contributed for the preceding five years.”\textsuperscript{47} Holding the statute fatally overdrawn, the Court said that “less drastic means”\textsuperscript{48} must be used to protect the state’s legitimate interest in the “fitness and competency of its teachers.”\textsuperscript{49}

Seven years later, in Keyishian v. Board of Regents,\textsuperscript{50} the Court effectively overturned the Adler\textsuperscript{51} decision and held the Feinberg Law unconstitutional. The petitioners, refusing to abide by the Feinberg Law’s loyalty oath requirements, alleged that the law was vague and overly broad. A majority of the Court agreed and declared that the law’s uncertain terms and overall complexity had resulted in a “highly efficient in terrorem mechanism”\textsuperscript{52} which had cast a “pall of orthodoxy”\textsuperscript{53} over the classroom. In addition to invalidating the Feinberg Law for vagueness, the Court also held that loyalty oath program was unconstitutional because it proscribed “mere knowing membership” in a subversive organization without the additional requirements of active membership and of specific intent to accomplish the unlawful goals of the subversive organization.\textsuperscript{54}

In the following term the Court decided Pickering v. Board of Education,\textsuperscript{55} where an Illinois permanent school teacher had been dismissed for writing a letter to a local newspaper in which he criticized the use of relatively large amounts of school funds for athletic programs and complained that local taxpayers had received insufficient information on the need for increased taxes. The school board charged Pickering with making false statements and with conduct which tended “to foment ‘controversy, conflict and dissension’ among teachers, administrators, the Board of Education, and the residents of the dis-

\textsuperscript{46} 364 U.S. 479 (1960).
\textsuperscript{47} Id. at 480.
\textsuperscript{48} Id. at 488.
\textsuperscript{49} Id. at 490. The Court further declared that the restriction of personal liberties must proceed carefully, especially when there are absolutely no procedural safeguards in the institutional processes. This was the situation in Arkansas where there was no tenure system and all teachers were subject to termination without formal charges, a hearing, or any opportunity to communicate with school officials about their termination. Arkansas now requires that a teacher facing termination be provided both reasons and a hearing if the teacher so requests. Ark. Stat. Ann. §§ 80-1245, 1246 (Supp. 1971).
\textsuperscript{50} 385 U.S. 589 (1967).
\textsuperscript{51} See text accompanying notes 36-39 supra.
\textsuperscript{52} 385 U.S. 589, 601.
\textsuperscript{53} Id. at 603.
\textsuperscript{54} Id. at 609-10; accord, Elfbrandt v. Russell, 384 U.S. 11 (1966).
\textsuperscript{55} 391 U.S. 563 (1968).
At his dismissal hearing before the school board, Pickering alleged that his First Amendment rights had been violated. The Illinois Supreme Court upheld the dismissal after determining that Pickering had actually made false statements, but it did not determine whether the statements had affected orderly school administration.

On appeal to the Supreme Court, the dismissal was reversed because the record did not indicate any relationship between Pickering's letters and the efficient functioning of the educational system. The Court acknowledged the need "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Thus, Pickering signifies that the balance must be struck in favor of the teacher whenever the state fails to prove that the teacher's conduct has impaired institutional efficiency.

These cases indicate a trend toward greater judicial concern for the teacher's personal liberties. Courts will tolerate governmental restriction of a teacher's First Amendment freedoms only where the government can demonstrate that the activities sought to be restricted would, if unchecked, impair the job performance of the teacher and the efficient functioning of the school system.

California Decisions

The California decisions which involve the First Amendment right

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56. Id. at 567.
57. Id. at 568.
58. Another Warren Court case decided in the area of education and the First Amendment was Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), which involved students who were dismissed from school for wearing black arm bands protesting the Vietnam War. The Court held that the students' dismissals abridged their rights of free speech. Two well-known quotations indicate the Court's rationale: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id. at 506. "Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibitions cannot be sustained." Id. at 509, quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). Although this holding deals specifically with the rights of students to engage in symbolic speech within the school itself, teachers are mentioned as retaining their First Amendment rights after passing through the "schoolhouse gate." No reference was made to teachers' conduct outside the school. It certainly can be inferred, however, that the "material and substantial" test would apply with equal if not greater force to teachers' activities outside the "schoolhouse." See Russo v. Central School Dist., 469 F.2d 623 (2nd Cir. 1972), cert. denied, 41 U.S.L.W. 3551 (April 17, 1973), for a decision applying the Tinker rationale and reinstating a teacher who had refused to recite the pledge of allegiance.
of public employees follow the general pattern noticed in United States Supreme Court decisions, gradually moving to a position which provides more complete protection for First Amendment freedoms. The first California case in which a teacher raised a First Amendment defense to a dismissal proceeding was Board of Education v. Swan.59

There the school board dismissed Mrs. Swan, a permanent teacher, for alleged unprofessional conduct. She contended that the school board fired her because she had testified before a Los Angeles County grand jury investigating the school system and because she had publicly criticized the school board. The California Supreme Court affirmed the trial court's rejection of this defense, holding that the school board's "motives" were irrelevant as long as the board could prove that Mrs. Swan had violated lawful school district regulations.60

Since Swan, California decisions—like those of the United States Supreme Court—reflect increasing judicial sensitivity toward protecting the constitutional rights of public employees.61 This sensitivity was manifested initially in the 1962 decision of Board of Trustees v. Owens.62 In Owens, a teacher was fired after he wrote five letters to the local newspaper criticizing the educational process and local school administrators. The official reason given for Owens's dismissal was unprofessional conduct, but he alleged that the true reason was the publication of the letters. The court of appeal viewed the basic issue as "whether there had been any disruption or impairment of discipline or the teaching process as a result of the defendant's letters."63 Finding no disruption or impairment, the court held that Owens could not be dismissed.

Since Fort v. Civil Service Commission,64 decided two years af-

60. The school board contended that Mrs. Swan had engaged in unprofessional conduct when she failed to report for teaching assignments, asked another teacher to join a teacher's union, failed to attend meetings called by the superintendent, dismissed students five minutes early, suggested in a written bulletin that teachers have duplicate keys made, and called the superintendent and board derogatory names before a parents and teachers association meeting. All of these actions allegedly were examples of unprofessional conduct because they violated regulations of the school district. 41 Cal. 2d 546, 549-50, 261 P.2d 261, 263-64 (1953).

61. See text accompanying notes 26-58 supra. See also Laguna Beach Unified School Dist. v. Lewis, 146 Cal. App. 2d 463, 304 P.2d 59 (1956) (teacher dismissed for unprofessional conduct after distributing pamphlets opposing the Korean War and urging young men to resist the draft); Board of Educ. v. Wilkinson, 125 Cal. App. 2d 100, 270 P.2d 82 (1954) (teacher dismissed for refusing to testify before a legislative committee investigating communists).

63. Id. at 157, 23 Cal. Rptr. at 717.
64. 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964).
Owens, the issue of whether a California public employee's challenged behavior affects his job performance has been the central focus in public employee termination cases. Fort's service as chairman of a local speakers committee working to re-elect then Governor Edmond G. Brown violated a section of the Alameda County Charter which prohibited any political activity by Alameda civil servants. The supreme court acknowledged that the county could restrict certain political acts, but delineated two guides which must be followed in drafting such restrictions. First:

The more remote the connection between a particular activity and the performance of official duty the more difficult it is to justify the restriction on the ground that there is a compelling public need to protect the efficiency and integrity of the public service. 65

Second:

Even if a compelling state purpose is present, the restriction must be drawn with narrow specificity. 66

Applying these guides, the court ruled that the section of the charter was "too broad and vague" and "would amount to a coercive restraint on free speech. . . ." 67

Two years after Fort, the supreme court further elaborated the standards controlling the government's power to impinge upon the constitutional freedoms of public employees. In Bagley v. Washington Township Hospital District, 68 the court distilled from prior case law a three-pronged test by which the legality of governmental restrictions upon public employees' rights could be judicially measured: (1) The political restraints must rationally relate to the enhancement of the pub-

65. Id. at 338, 392 P.2d at 389, 38 Cal. Rptr. at 629.

66. Id.


68. 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).

69. In Bagley, the terminated employee had worked as a nurse's aide. While participating in a campaign to recall her superiors, she and other workers had received a memorandum from the directors of the district which stated in part that "any political activity for or against any candidate or ballot measure pertaining to the . . . District is unlawful and will not be acceptable conduct for an employee of this hospital . . . ." Id. at 502, 421 P.2d at 412, 55 Cal. Rptr. at 404. This memo also referred to a section of the California Government Code which provided that: "No officer or employee whose position is not exempt from the operation of a civil service personnel or merit system of a local agency shall take an active part in any campaign for or against any candidate, except himself, for an office of such local agency, or for or against any ballot measure relating to the recall of any elected official of the local agency." Cal. Gov't Code § 3205 (West 1966). Both of these restrictions were held invalid under the tripartate test formulated by the court.
(2) The benefits which the public gains by the restraints must outweigh the resulting impairment of constitutional rights. (3) There must be no available alternative less subversive of constitutional rights. 

This flexible test has been employed by the courts to protect both the legitimate interests of public employers and the individual liberties of their employees. For example, the Bagley rationale was fundamental to a unanimous 1969 decision of the California Supreme Court which permitted the circulation of signature petitions related to public school financing by teachers during their lunch hours. The school board had contended in Los Angeles Teachers Union v. Los Angeles City Board of Education that the proposed petitioning would hamper the functioning of the school and would distract teachers from their planning work. But the court rejected this contention because the proposed petitioning demonstrated no threat to “order and efficiency in the schools.” Therefore, the First Amendment rights of the teachers could not legitimately be circumscribed.

The Fort and Bagley guidelines have proven useful primarily where the attack on First Amendment liberties is apparent; but the guidelines nevertheless could be circumvented by an employer who

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71. Compare Norton v. City of Santa Ana, 15 Cal. App. 3d 419, 93 Cal. Rptr. 37 (1971) (upholding police department rules and regulations requiring good conduct from a police officer); Akin v. Board of Educ., 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968) (permitting the expulsion of an hirsute high school student where it was shown that his beard definitely would disrupt the educational process); Hollon v. Pierce, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1967) (denying reinstatement to a school bus driver whose religious beliefs indicated that he could not be trusted with his passengers’ safety); and Goldberg v. Regents of the Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967) (justifying suspension and expulsion of university students for protesting in violation of reasonable university regulations) with City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970) (overturning as violating the Fourth Amendment sections 3600-704 of the California Government Code which required public disclosure of financial investments by all public officers and political candidates); Hofberg v. County of Los Angeles Civil Serv. Comm’n, 258 Cal. App. 2d 433, 65 Cal. Rptr. 759 (1968) (requiring civil service eligibility for a potential social worker denied same for pleading the Fifth Amendment before the House Committee on Un-American Activities); Ball v. City Council, 252 Cal. App. 2d 136, 60 Cal. Rptr. 139 (1967) (reinstating a police chief dismissed for his organizing activities); and Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967) (reinstating a teacher dismissed from his high school teaching position for wearing a beard).


73. Id. at 565, 455 P.2d at 836, 78 Cal. Rptr. at 732.
concealed the true reason for terminating an employee behind counterfeit charges. By requiring administrative and judicial findings on an employer's true motivation for dismissing an employee when that motivation is at issue, Bekiaris is the first California decision which shields public employees from such disguised attempts to subvert the valid exercise of First Amendment freedoms.

Procedure: Creating Adequate Procedural Safeguards for Probationary Teachers' First Amendment Rights

Prior to Bekiaris, the California courts uniformly had held that a public employer's motives were irrelevant where he had legal grounds to terminate his employee. In refusing to examine an employer's motives for terminating an employee, the courts relied on three concepts. First, as discussed above, the notion that public employment is a privilege rather than a right discouraged judicial scrutiny of public employee terminations. Related to the privilege doctrine was the concept that public employment is a mere variant of private employment. Just as a private employer is not legally obligated to retain an employee whose political activities are offensive, by analogy a public employer also was considered free to terminate employees at will. Third, the

74. Board of Educ. v. Swan, 41 Cal. 2d 546, 555, 216 P.2d 261, 267, cert. denied, 347 U.S. 937 (1953) (permanent school teacher terminated); Neuwald v. Brock, 12 Cal. 2d 662, 675-76, 86 P.2d 1047, 1053 (1939) (agricultural investigator terminated for allegedly unsatisfactory work and conduct); Kennedy v. State Personnel Bd., 6 Cal. 2d 340, 344, 57 P.2d 486, 488 (1936) (attorney terminated for allegedly unsatisfactory service); Livingston v. MacGillivray, 1 Cal. 2d 546, 558, 36 P.2d 622, 628 (1934) (County Water Dept. foreman's job "abolished"); Neely v. California State Personnel Bd., 237 Cal. App. 2d 487, 493-94, 47 Cal. Rptr. 64, 69 (1965) (referee charged with discourtesy and inefficiency); Monahan v. Department of Water and Power, 48 Cal. App. 2d 746, 754, 120 P.2d 730, 734 (1941) (county employee's challenge to job classification system rejected by court). This position was actually an application of the tort concept that "bad motives" are irrelevant where there is a legal right to act in a particular manner. For a general critique of the application of this concept to tort cases in general, see W. Prosser, Law of Torts 24-26 (4th ed. 1971).

75. See text accompanying notes 26-29 supra.

76. See, e.g., People v. Crane, 214 N.Y. 154, 175-76, 108 N.E. 427, 434 (1915) (Bartlett, C.J., concurring). "The state, an incorporeal master, speaking through the legislature, communicates the resolve [as to the character of its employees] to its agents by enacting a statute. Either the private employer or the state can revoke the resolve at will. Entire liberty of action in these respects is essential unless the state is to be deprived of a right which has heretofore been deemed a constituent element of the relationship of master and servant, namely the right of the master to say who his servants shall (and therefore shall not) be."

For a general discussion of the power which private employers hold over their employees' exercise of constitutional freedoms and a suggestion, interestingly enough,
courts traditionally have been reluctant to inquire into areas of administrative decision-making unless the decision is patently illegal or unjust.\footnote{77}

The previous discussion of the development of guidelines to protect the First Amendment rights of public employees\footnote{78} indicates that the reasons for refusing to examine a public employer's motives are no longer tenable. The reluctance of administrative and judicial bodies to scrutinize a public employer's motives for terminating an employee had fashioned a loophole in the constitutional protections of public employees. In closing the "motive loophole,"\footnote{79} the court in \textit{Bekiaris} outlined a series of administrative and judicial procedures which must be followed whenever a probationary teacher attempts to show that his employer's motives were constitutionally improper. The court held that evidence offered by the teacher at the administrative hearing must be received substantively and findings made concerning it. The court continued:

\begin{quote}
If it is found by the board that the reason for dismissal \textit{was not} the causes stated in the accusation but rather \textit{was} official dissatisfaction with the teacher's exercise of constitutional rights, the board should order reinstatement unless it further determines that the consequent limitation on these rights is justified by a compelling public interest. If the board finds that the reason for dismissal \textit{was} the causes stated in the accusation and \textit{was not} official dissatisfaction with the teacher's exercise of constitutional rights, it should enter a finding to that effect. If the board finds that the reason of dismissal \textit{was both} the causes stated in the accusation \textit{and} official dissatisfaction with the teacher's exercise of constitutional rights, it should make a finding to that effect and further
\end{quote}

that a tort action may lie where a private employer's "bad motives" injure his employee, see Blades, \textit{Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power}, 67 COLUM. L. REV. 1404 (1967).

\footnote{77} This judicial reluctance continues to manifest itself in the substantial evidence rule. The uniqueness of California's independent judgment test in situations involving fundamental, vested rights was pointed out in Newman, \textit{Foreward to W. DEERING}, \textit{supra} note 2 at xi (1970). In \textit{Board of Educ. v. Swan}, 41 Cal. 2d 546, 261 P.2d 261 (1953), cert. denied, 347 U.S. 937 (1954), Mrs. Swan asserted that the alleged violations of school regulations allegedly amounting to unprofessional conduct were not the true reason for her termination, but rather that the charges were a "smoke screen" to "get even" with her for testifying critically against the school board before a grand jury investigating the school system. In deciding that the school board's motives were irrelevant, the court refused to disturb the trial court's findings where Mrs. Swan's termination had been sufficiently justified in the face of "conflicting evidence." \textit{Id.} at 556, 261 P.2d at 268.

\footnote{78} See text accompanying notes 30-73 \textit{supra}.

\footnote{79} The \textit{Bekiaris} holding specifically overruled the "motive" cases. See note 74 \textit{supra}. The court said that "[s]ince the reason for the [motive rule] has been discredited, the rule, too, must fall." 6 Cal. 3d at 588 n.7, 493 P.2d at 487 n.7, 100 Cal. Rptr. at 23 n.7.
should determine whether, absent the exercise of constitutional rights, it would dismiss the teacher.80

If the teacher is not satisfied with the board's ultimate decision, he can obtain judicial review by filing for a writ of mandate with the superior court.81 The trial court must then "make an independent assessment of established factual elements and determine whether the true reason for dismissal was . . . official dissatisfaction with the teacher's exercise of constitutional rights, so that, absent the exercise of these rights, the board would not have dismissed the teacher."82 The court listed three possible conclusions the trial court could reach in determining whether the writ of mandate should issue.

If it determines that question [whether the true reason for the teacher's dismissal was official dissatisfaction with the teacher's exercise of constitutional rights] in the negative and also finds legal error in the record it shall deny the writ. If it determines that question in the affirmative it should proceed to consider whether or not the consequent limitation on constitutional rights was justified by a compelling public interest. If it concludes that it was not justified [sic] by a compelling public interest it should issue a writ of mandate requiring the Board to reinstate the teacher. If it concludes that it was so justified it should deny the petition for the writ.83

If the teacher appeals the decision of the trial court, "the appellate court's scope of review is identical to that of the trial court except that it shall uphold the determination of the trial court as to the reason for dismissal if that determination is supported by substantial evidence in light of the entire record."84

Like the Bagley test,85 these procedures are flexible and attempt to safeguard the requirements of the school system as well as the rights of the individual teacher. By carefully pointing out that the procedures would not prevent the termination of a teacher so long as the primary reason for termination is not the school board's dissatisfaction with the teacher's exercise of constitutional rights, the court sought to eliminate the danger that "a teacher about to be dismissed for valid causes could insulate himself from dismissal simply by engaging in political activities offensive to his superiors."86

Any educational system has a legitimate need, and is obligated to the public, to provide the security of contractual or de facto tenure

80. Id. at 592-93, 493 P.2d at 491, 100 Cal. Rptr. at 27.
82. 6 Cal. 3d at 593, 493 P.2d at 491, 100 Cal. Rptr. at 27 (emphasis added).
83. Id.
84. Id.
85. See text accompanying notes 68-71 supra.
86. 6 Cal. 3d at 593 n.12, 493 P.2d at 491 n.12, 100 Cal. Rptr. at 27 n.12.
only to competent teachers. If a probationary teacher could immunize himself against nonrenewal or dismissal by engaging in political activities known to be offensive to his superiors, he would enjoy de facto tenure the moment he signed his initial contract. The careful procedures outlined in *Bekiaris* reduce the danger of subterfuge by either the school authorities or the probationary teacher. When this aspect of the opinion is understood, the decision should be less objectionable to local school boards and also should provide persuasive precedent for courts and legislatures in other states to adopt similar procedures.

The Procedural Protection Afforded Probationary Teachers in Other States

The administrative procedures contained in section 13443 of California's Education Code,87 designed to protect California probationary teachers against unwarranted nonrenewal decisions, were enacted by statute in 1965.88 *Bekiaris* has modified these basic procedures by holding that a probationary teacher facing termination has a right to present evidence to show that the true reason for termination was the exercise of his constitutional rights, and that such evidence must be received substantively and findings made concerning it. The *Bekiaris* procedures do not overburden California's school districts with added institutional processes since the basic guidelines requiring administrative hearings and judicial review were already in effect. Hence, the supreme court easily eliminated the "motive loophole" by requiring that additional findings be made at the administrative and judicial review proceedings to which a nonrenewed probationary teacher already had a right.

In many states such thorough statutory procedures do not exist, however. In addition to the fact that no state's procedures require the type of findings outlined in *Bekiaris*, twenty-eight states fail to provide any administrative safeguards against unconstitutionally motivated nonrenewal decisions.89 Twelve states do furnish an opportunity for a probationary teacher to learn the reasons why his contract was

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87. See note 12 *supra*.
89. The twenty-eight states are Alabama, Colorado, Florida, Georgia, Hawaii, Idaho, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. Most of these states do require that the teacher receive notice of nonrenewal by a certain date. *E.g.*, MINN. STAT. § 125.17(3) (1960) (April 1 deadline); N.H. REV. STAT. ANN. § 189:14-a (1964) (March 15 deadline). However, statutorily prescribed notice requirements do not guard against unconstitutionally motivated decisions arriving in the mail before the prescribed deadlines.
not renewed, but a statement of reasons with no hearing can easily represent a partisan explanation which the terminated teacher will not be able to refute. Only six states in addition to California provide for a hearing at which the probationary teacher can challenge the nonrenewal decision, even though such a formal hearing is the only effective administrative forum in which to protest an allegedly unconstitutional nonrenewal decision. Nonetheless, the procedures in these six states, like the pre-Bekiaris procedures in California, fail to protect fully a nonrenewed teacher against covert attacks on his constitutional rights.

The state courts which do not require that a nonrenewed probationary teacher receive a statement of reasons or a hearing have done so on the ground that the absence of such procedural safeguards does not offend the Fourteenth Amendment due process clause. The rationale of the courts has been that they cannot create procedural rights for probationary teachers which approximate those of permanent teachers when the respective state legislatures distinguish between probationary and permanent employment. A review of these state court decisions makes obvious that greater administrative protections for proba-


93. See cases cited in note 92 supra.
tionary teachers' constitutional rights are more likely to come through state legislative reform than through litigation in state courts.94

A strong argument can be made in favor of granting probationary teachers statutory safeguards equal to those granted permanent teachers. Legislatures in eight states which fail to provide a hearing for nonrenewed probationary teachers do distinguish between dismissing a probationary teacher during the school year and not renewing his contract at the close of the year.95 In these eight states, only a probationary teacher who is dismissed during the school year is entitled to many of the same administrative protections as a permanent teacher who is dismissed during the school year or whose contract is not renewed. This distinction is based upon the view that a dismissal during the year is more harmful to a probationary teacher's career than nonrenewal. Although the potential for harm undoubtedly is greater in the case of dismissal during the year than in the case of nonrenewal, it does not follow that nonrenewal is such a harmless event in a teacher's career that the teacher ought not to be afforded thorough procedural protections. The current oversupply of teachers at every educational level in most parts of the nation96 may well mean that the

94. Although state legislatures must bear the burden of formulating administrative procedural protections, probationary teachers could litigate the constitutionality of the nonrenewal decision in a state court as well as in a federal court. The detailed determinations which California administrative agencies and trial courts must make after *Bekiaris* could be promulgated by other state courts in order to ensure careful consideration of the constitutional defenses raised by probationary teachers. To date, however, *Bekiaris* is the only state appellate court decision which requires such detailed determinations. *See*, e.g., *Watts v. Seward School Bd.*, 454 P.2d 732 (Alas. Sup. Ct. 1969), *cert. denied*, 397 U.S. 921 (1970); *Williams v. School Dist. of Springfield*, 447 S.W.2d 256 (Mo. Sup. Ct. 1969). Most of the decisions involving the constitutional rights of probationary teachers have been litigated in federal courts. *See* cases cited in notes 99-101 infra.


96. A recent National Education Association Report says that teachers face the worst job market since the Depression because the post-war baby boom has passed through the nation's schools and the trend towards increasing school enrollments has stopped. The report predicts a teacher surplus which will double by 1976 and which will reach 100,000 to 150,000 annually unless new jobs are created. It notes that 15,000 to 35,000 experienced teachers who quit teaching now want to return to school
stigma of nonrenewal will jeopardize a teaching career as much as dismissal during the year does.

Even if other state courts choose not to follow the *Bekiaris* lead, state legislatures should recognize the economic and social implications of nonrenewal on a probationary teacher's career and should seek to reduce unwarranted nonrenewal decisions by providing the same procedural safeguards for probationary teachers which already operate to protect permanent teachers in their state from unwarranted terminations. The additional expense and inconvenience incurred would be slight in comparison to the possible harm inflicted on a fledgling teacher's career by nonrenewal.\footnote{97}

**The Specific Federal Protection Afforded Probationary Teachers' Constitutional Rights**

During the past four years, probationary teachers frequently have turned to the federal courts for protection from allegedly unwarranted nonrenewal decisions of school administrators.\footnote{98} The courts held the jobs, and that the job outlook is also clouded by fiscal crises at the local school district level which have resulted in the cutting back of educational programs and reducing the size of teaching staffs. N.Y. Times, July 28, 1971, at 39, col. 1. See U.S. DEP'T OF LABOR, MANPOWER REPORT OF THE PRESIDENT: A REPORT ON MANPOWER REQUIREMENTS, RESOURCES, UTILIZATION, AND TRAINING 170-74 (1970); Graybeal, *Teacher Surplus and Teacher Shortage*, 37 EDUCATION DIGEST 13-6 (1972).

\footnote{97} This fact was recognized recently by the North Dakota legislature. The legislature prefaced a 1971 statutory amendment which requires a statement of reasons and a hearing for any teacher who is to be dismissed during the year or whose contract is not to be renewed with this statement of legislative intent. "The legislative assembly, in recognition of the value of good employer-employee relationships between school boards of this state and the teachers employed in the school systems, the need to recruit and retain qualified teachers in this state, and further in recognition of the many intangibles in evaluating the performance of individual members of the teaching profession, urges that each school board of this state ensure through formally adopted policies, that channels of communication exist between the board, supervisory personnel, and teachers employed within its school system. It is the intent of the legislative assembly that in the very sensitive area of discharge of teachers for cause prior to the expiration of the term of the teachers' contracts, or in decisions not to renew the contracts of teachers, that recognition be given by school boards to damage that can result to the professional stature and reputation of such teachers, which stature and reputation were acquired only after the expenditure of substantial time and money in obtaining the necessary qualifications for such profession and in years of practicing the profession of teaching; and that in all decisions of school boards relating to discharge or refusal to renew contracts, all actions of the board be taken with consideration and dignity, giving the maximum consideration to basic fairness and decency." N.D. CENT. CODE § 15-47-38(1) (Supp. 1971) (emphasis added).

\footnote{98} Probationary teachers file complaints against school administrations under the 1871 Civil Rights Act, now 42 U.S.C. § 1983 (1970) which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United
fact of probationary status irrelevant in most of the cases where probationary teachers charged that their First Amendment rights had been abridged. However, probationary status was held highly relevant when they asserted Fourteenth Amendment claims based on alleged due process deficiencies in administrative procedures. Some federal courts rejected entirely the due process claims of probationary teachers, while other courts differed on what procedures state educational systems were required to follow in order to comply with due process.

Recently, in Board of Regents v. Roth and Perry v. Sinder...
mann, the United States Supreme Court examined the relevance of a teacher's probationary status to a federal cause of action. The Court held in Sindermann that the right of a probationary teacher to assert a First Amendment claim is not affected by probationary status. However, the Court took what appears to be an unfortunately restrictive view of the due process clause and ruled that only those probationary teachers who can demonstrate an objective property interest or a recognized liberty interest are entitled to the court-ordered protection of a statement of reasons for termination and a hearing. The Roth and Sindermann decisions provide some protection against unjustified nonrenewals for those probationary teachers who either can successfully litigate a First Amendment claim or have what the Court considers to be a recognized liberty or property interest entitling them to due process administrative protection. But these decisions fail to protect fully a fledgling teacher's First and Fourteenth Amendment rights. Consequently, they fail to preserve the full value of freedom of expression for educational institutions.

103. 408 U.S. 593 (1972).
104. Although both Roth and Sindermann held positions in state college systems, it is clear that the Court's opinions apply with equal force to secondary school teachers. Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971), vacated, 408 U.S. 940 (1972).
105. Id. at 596.
106. 408 U.S. at 573, 577-78; 408 U.S. at 603. There are at least three reasons for believing that the type of court-imposed hearing envisioned in Roth and Sindermann may not result in great practical benefit for the terminated probationary teacher. First, a probationary teacher is entitled to a hearing only after he has proved the existence of a recognized liberty or property interest in federal court. He is not entitled to a pretermination hearing, and there may be a considerable time lag between the termination and the hearing. Second, a teacher who proves that a recognized liberty interest has been injured must then have an opportunity "to refute the charge before University officials" in order to "clear his name." 408 U.S. at 573 & n. 12. Even if he succeeds in clearing his name, the university still "remain[s] free to deny him future employment for other reasons." Id. n.12. See text accompanying notes 134-136 infra for other difficulties presented to the probationary teacher by the Court's conception of liberty. Third, a teacher who proves that he has a protected property interest only "obligate[s] college officials to grant a hearing . . . where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. 593, 603. This seems to imply that there is a presumption of constitutionality which the teacher has the burden of overcoming. In neither Roth nor Sindermann does the Court precisely state when due process requires a probationary teacher to be reinstated. See Van Alstyne, The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann, 58 A.A.U.P. BULL. 267 (1972) for a more thorough discussion of these practical problems.
107. See note 106 supra and text accompanying notes 133-140 infra.
108. See text accompanying notes 141-145 infra.
Board of Regents v. Roth

In Roth, a nontenured state university professor who had taught for one year alleged that his contract was not renewed because of his exercise of First Amendment rights in criticising the university administration. He contended further that the nonrenewal decision denied him procedural due process since the university gave him neither a statement of the reasons for his nonrenewal nor a hearing. The district court refused to decide the validity of Roth's First Amendment allegation until a trial elicited more facts, but it granted a summary judgment on the due process claim against the university for failing to provide Roth with a statement of the reasons for his nonrenewal and a hearing. 109 The United States Court of Appeals for the Seventh Circuit affirmed the summary judgment, stating in part that these two due process safeguards were necessary both as "a prophylactic against non-retention decisions improperly motivated by exercise of protected rights" 110 and also to protect Roth's future employment opportunities. 111

On certiorari, the Supreme Court took a more restrictive view of the scope of Fourteenth Amendment protection. Justice Stewart, writing for a majority of four justices, reversed the lower courts and held that Roth had demonstrated neither an interest in the type of liberty nor an interest in the type of property which the Fourteenth Amendment would protect. 112 While proclaiming that any definition of liberty must be "broad indeed," Justice Stewart said that the record did not indicate that the university made "any charge . . . that might seriously damage [Roth's] standing and associations in his community," such as that he was dishonest or immoral. 113 In addition, the

110. 446 F.2d 806, 810 (7th Cir. 1971).
111. Id. at 809.
112. 408 U.S. at 579. The Court's examination of what type of liberty or property interests the due process clause would protect marked a significantly different approach from that taken by earlier circuit court decisions. See notes 99-101 supra. The circuit courts relied on Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961), and balanced the interests of the individual teacher against those of the school system in determining what procedures were necessary to satisfy due process. The differing degrees of importance which the circuits assigned to a school system's interest in firing an incompetent teacher as opposed to the teacher's interest in being exempt from an arbitrary decisions denying renewal resulted in three positions: no due process procedures; a statement or reasons; or a statement of reasons plus a hearing. Assuming that an employee does not have a First Amendment claim to litigate, the Court's rejection of this balancing process in favor of attempted definitions of protected liberty and property interests means that a public employee who can demonstrate neither an objective property interest in his job nor an injured liberty interest in seeking another job may be denied renewal without a statement of reasons or a hearing.
113. 408 U.S. at 572, 573.
record did not indicate that the university's failure to renew his contract "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Thus, Justice Stewart concluded that it would stretch "the concept [of liberty] 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." In the Court's view, the record also failed to demonstrate that Roth had suffered any injury to a protected property interest. An examination of his contract, relevant state statutes, and college rules revealed that he had at most an "abstract need or desire" for his job, not a "legitimate claim of entitlement to it." Accordingly, the Court held that it was error to grant summary judgment against the university for its failure to provide Roth with reasons and a hearing.

In a dissenting opinion, Justice Douglas rejected the Court's restricted view of the scope of due process protection. For three reasons, Justice Douglas would have granted district courts the discretion to require that educational systems give reasons and a hearing to nonrenewed probationary teachers such as Roth. First, whenever a violation of First Amendment rights is alleged, "the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution." Second, nonrenewal should be treated as a more serious threat to a teacher's career than the majority was willing to concede. "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." Third, and as a consequence of these two substantive reasons, Justice Douglas saw practical advantages in establishing a procedure which would provide the teacher with an opportunity to rebut the reasons given for his nonrenewal before there is a trial on the merits of any First Amendment claim. Such a procedural approach is the only "means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees," and is the most functional way of handling such dis-

114. Id. at 573.
115. Id. at 575.
116. Id. at 577.
117. Id. at 579.
118. Id. at 582 (Douglas, J., dissenting).
119. Id. at 585 (emphasis added).
120. Id.
putes. "School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination." Justice Douglas's dissent, in contrast to Justice Stewart's majority opinion, is less concerned with conceptual refinements of liberty and property and, like *Bekiaris*, is greatly concerned with providing a probationary teacher effective procedural protection against unconstitutionally motivated nonrenewal decisions.

Justice Marshall also dissented. Although he agreed with Justice Stewart's analytical framework, he would have been more liberal in defining the terms "property" and "liberty." In his view, "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment." Thus, every citizen who applies for a government job has a property right to that job. The citizen also has a liberty interest in the job—the liberty to work. Refusal by a public employer to state the reasons why the citizen did not receive the job denies constitutionally guaranteed protection to both these interests. Because "procedural due process ... is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action," the due process clause should require the government to "say why [an application for public employment is denied or the contract of a government employee is not renewed], for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action." In rejecting the argument that requiring a government employer to provide a statement


122. It should be noted, however, that the district court opinion quoted approvingly by Justice Douglas requires the nonrenewed teacher to demonstrate that the stated reasons were "wholly inappropriate as a basis for decision" or "wholly without basis in fact" before the university had to justify its decision. 408 U.S. at 586 *quoting* 310 F. Supp. 972, 980. In contrast, the California Supreme Court in *Bekiaris* appears to require only that a teacher show that unconstitutional motives were the predominant reason for termination. "If the board finds that the reason for dismissal was both the causes stated in the accusation and official dissatisfaction with the teacher's exercise of constitutional rights, it should make a finding to that effect and further should determine whether, absent the exercise of constitutional rights, it would dismiss the teacher." 6 Cal. 3d at 593, 493 P.2d at 491, 100 Cal. Rptr. at 27. See text accompanying note 78 *supra*.

123. 408 U.S. at 588 (Marshall, J., dissenting).

124. *Id.* at 589.

125. *Id.*
of reasons for denying a particular job would "cripple" the government, Justice Marshall argued that "[i]t is only where the government acts improperly that procedural due process is truly burdensome."\textsuperscript{126} Moreover, Justice Marshall viewed the due process clause as requiring a hearing in addition to the statement of reasons for the nonrenewal of Roth's contract.\textsuperscript{127}

**Perry v. Sindermann**

The companion case to Roth, *Perry v. Sindermann*,\textsuperscript{128} involved a "probationary" teacher who had taught for ten years in a state college system which did not operate with an official tenure program. Sindermann alleged that the decision not to renew his contract was prompted by displeasure with his public criticism of the college's regents, and that the failure to provide him with a statement of the reasons for his nonrenewal and a hearing at which he might rebut the reasons stated violated the due process clause. The Fifth Circuit disagreed with the trial court which had granted summary judgment in favor of the college and held that Sindermann could state both a federal cause of action based on a First Amendment claim and a Fourteenth Amendment claim on the theory that he had been deprived of a property interest in continued employment.\textsuperscript{129} Writing again for the same majority as in Roth, Justice Stewart affirmed the First Amendment claim\textsuperscript{130} but rejected the Fourteenth Amendment claim to the extent that it was predicated on a purely subjective expectancy interest.\textsuperscript{131} But if Sindermann could demonstrate a sufficient property interest by showing the existence of an objective set of institutional practices amounting to "an unwritten 'common law' . . . that certain employees shall have the equivalent of tenure," the Fourteenth Amendment would require an administrative hearing "where he could be informed of the grounds for his nonretention and challenge their sufficiency."\textsuperscript{132}

\textsuperscript{126} Id. at 591.
\textsuperscript{127} Id. at 590.
\textsuperscript{128} 408 U.S. 593 (1972).
\textsuperscript{129} 430 F.2d 939, 942-44 (5th Cir. 1970), aff'd, 408 U.S. 593 (1972).
\textsuperscript{130} 408 U.S. at 596.
\textsuperscript{131} Id. at 603.
\textsuperscript{132} Id. at 602. Chief Justice Burger's concurring opinion to Roth and Sindermann may provide insight into the way some federal courts will now apply the Fourteenth Amendment in relation to terminated probationary teachers. Failing to mention a way in which such a teacher might be able to show injury to his liberty interest, the Chief Justice concentrated upon what types of asserted property rights the Fourteenth Amendment protects. He stated that in order to determine whether a recognized property right exists, a federal court must look to the existence of "either an express or an implied contract" under relevant state law. Id. at 604 (Burger, C.J., concurring). If the state law is uncertain, then he suggested that district courts abstain and permit
Criticism of Roth and Sindermann

It is submitted that the majority's restrictive understanding of what property and liberty interests fall within the ambit of the Fourteenth Amendment may unnecessarily hinder a probationary teacher's expression of independent views, and consequently will harm the quality of education. Such an understanding also signifies a retreat from the Court's traditional concern for the First Amendment liberties of teachers.

The majority's conception of property as an objective set of institutional practices which create an expectancy of re-employment would provide hearings for only certain probationary teachers—only those who can prove either that they worked at length in a system of de

state courts to resolve the issue of whether a teacher is entitled to a hearing. Id. This approach to deciding when interests are "property" protected by the Fourteenth Amendment could cause problems for probationary teachers. A charitable view of the Chief Justice's opinion would be that he was unaware that state court cases interpreting due process requirements have never provided any procedural protections for terminated probationary teachers in the absence of a specific statute or express contract. See note 92 supra.

Increased protection for probationary teachers' "expectancy interests," or implied-in-fact contracts, has come only through the federal courts' interpretation of the scope of the Fourteenth Amendment. Bomar v. Keyes, 162 F.2d 136 (2nd Cir.), cert. denied, 332 U.S. 825 (1947), was the first case which used the term "expectancy of continued employment" in the context of a probationary teacher. There, Judge Learned Hand ruled that a probationary teacher who had been terminated for her service on a federal jury could base a federal complaint on what is now section 1983 of the 1871 Civil Rights Act. Judge Hand held that the teacher's termination "may have been the termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect against invasion by acts themselves unlawful, such as the denial of a federal privilege." Id. at 139. This concept of a protected expectancy interest was used again in the Fifth Circuit cases cited in note 99 supra, and its meaning has been partially clarified by the Roth and Sindermann majority opinions.

Chief Justice Burger's state-oriented approach to what interests are protected, coupled with the general dearth of state statutory protection for probationary teachers, would mean that in nearly every instance where a probationary teacher had no independent First Amendment claim, he would be without procedural protection. Such an approach toward determining protected property interests would undercut the majority's "unwritten 'common law'" test of property and expose even more probationary teachers to arbitrary nonrenewal decisions. The Roth and Sindermann majority does not require lower federal courts to abdicate to state courts the task of determining whether a protected property interest exists, even when the relevant state law is uncertain. It nevertheless is clear that the majority considers the existence of protected property interests an issue to be determined largely by examining relevant state law and practices. 408 U.S. at 577 and 408 U.S. at 602 n.7. Chief Justice Burger's views are representative, however, of a renewed interest by some members of the Court in expanding the abstention doctrine. See, e.g., Askew v. Hargrave, 401 U.S. 476 (1971) (per curiam); Wisconsin v. Constantineau, 400 U.S. 433, 439-43 (1971) (Burger, C.J. and Blackmun, J., dissenting). But see Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972).
facto tenure or that they were not renewed at the last moment before acquiring tenure. However, many neophyte teachers will never be able to demonstrate the type of property interest contemplated by the Court and hence may not be renewed without benefit of a statement of reasons or a hearing.

Even though the Court's contention that a recently hired probationary teacher has no Fourteenth Amendment property right in his job can be logically justified, a reasonable understanding of the concept of liberty would require procedural protections for all probationary teachers. The majority's conception of liberty provides such protection for only a few probationary teachers and is deficient for two reasons. First, the majority's analysis of liberty focuses solely on the manner in which the educational administration itself conveys its nonrenewal decision to the teacher. According to Roth, unless the administration denies renewal to a probationary teacher in a manner which actually stigmatizes or embarrasses the teacher so that his future employment opportunities would be jeopardized, the probationary teacher's liberty interest is not deemed to be affected. Therefore, so far as procedural due process is concerned, an educational administration which wishes not to renew a probationary teacher is not required to state reasons for its decision; or it may proffer innocuous "official" reasons which mask the true motivation for the decision.

Second, the majority's assertion that a probationary teacher's liberty interest is not affected by nonrenewal because he "remains as free as before to seek another" job seems inaccurate. As Justice Douglas observed, procedural protections are required because nonrenewal may have enormous, lasting consequences on a teacher's career. As Justice Marshall stated, a probationary teacher's liberty interest in working in the particular job which he currently holds is by definition affected by a nonrenewal decision. The points raised by each of these dissenters are especially accurate today since the teaching market is glutted at all levels and is expected to remain so for many years to come. The majority's analysis of liberty is impervious

134. 408 U.S. at 575.
135. See text accompanying note 119 supra.
136. See text accompanying notes 123 & 124 supra.
137. See note 96 supra.
to the probable economic hardship in locating another teaching job after nonrenewal. In light of the current surplus of teachers, the majority should have recognized that all probationary teachers have a very fundamental liberty interest which is jeopardized by a nonrenewal decision. Instead, the Court has suggested a definition of liberty under which only those probationary teachers who have been officially stigmatized by an educational administration will be safeguarded from arbitrary or capricious nonrenewal decisions.

The result of the majority's understanding of property and liberty is that numerous probationary teachers who have no objective property interest, who are not officially stigmatized, and who are not able to litigate a First Amendment claim appear to have no federal protection from wholly arbitrary, capricious nonrenewal decisions. In states which do not provide effective procedural safeguards for probationary teachers, the virtual closing of the federal courts to probationary teachers may mean that more and more probationary teachers will "play it safe" and avoid expressing any controversial ideas which might rankle their superiors. This denial of access to federal courts represents a potentially serious injury to the diversity of views which many new, young probationary teachers might be expected to express in their teaching as well as outside their classrooms. 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.

138. The amount of time it takes to obtain final disposition of a civil action varies widely between judicial districts. Recently, the median amount of time from filing to disposition in a district court has been nine months. However, in civil rights actions with a trial the time interval has been a median of twenty-five months. 1971 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 296-97, Table C5a. If the judgment was appealed, the median time interval from the filing of a complete record to the final disposition was 7.6 months. Id. at 251, Table B4. Thus, a typical probationary teacher filing suit under 42 U.S.C. § 1983 (1970), who has a trial and appeals, can anticipate waiting more than two and one-half years. In crowded circuits, the delay will be longer. For many probationary teachers, especially those who have families to support, this kind of delay would be financially crippling and thus operates as an effective deterrent to engaging in activities which might cause nonrenewal and hence litigation.

139. "Academic freedom would avail us little if those teachers most likely to exercise it may be weeded out of the scholastic garden before they fall within the protective embrace of the tenure statutes." Frakt, Non-Tenure Teachers and the Constitution, 18 U. KANS. L. REV. 27 (1969).

In addition to these deleterious effects of the majority's restrictive conceptions of liberty and property, the Roth and Sindermann decisions represent a retreat from the Supreme Court's traditional concern for the First Amendment liberties of all teachers. The Roth majority's unwillingness to grant district courts the discretion to require procedural protections for any probationary teacher who alleges a First Amendment violation represents a failure to protect those rights as fully as possible. In holding that Roth was not entitled to a statement of reasons and a prior hearing where he "merely" alleged that his First Amendment rights were abridged by the nonrenewal decision, the majority argued that the Court had required prior administrative hearings only in cases where the threat to First Amendment freedoms was direct and immediate—such as where there was threatened an injunction against a public gathering\textsuperscript{141} or a seizure of allegedly obscene material.\textsuperscript{142}

Justice Stewart thus suggested that the type of threat to First Amendment freedoms alleged by Roth was only "indirect" and hence not entitled to the same procedural safeguards required where the threat is "direct."\textsuperscript{143} The threat to First Amendment liberties may in some cases be more apparent when a government agency declares its intention to halt a public gathering or seize a quantity of literature than when a teacher complains that he has been terminated for exercising his rights of expression or assembly. But this "directness" distinction cannot be viewed as the pivotal issue in Roth; rather, the majority and dissent appear to have differed on the basis of their conflicting estimations of the value of free speech to educational institutions. Given an unshakable estimation of the value of First Amendment liberties to the process of public education, there is every reason to conclude with Justice Douglas's dissenting opinion in Roth that whenever a teacher alleges that his exercise of free speech rights has resulted in his nonrenewal, district courts ought to have the discretion to require a particular educational unit to hold a hearing in order to determine whether those allegations are true.\textsuperscript{144} This position seems

\textsuperscript{141} Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968).
\textsuperscript{143} 408 U.S. at 575 n.14.
\textsuperscript{144} The line of 5th Circuit decisions cited in note 99 supra, one of which was Sindermann, required a hearing whenever a teacher asserted that his termination had resulted from constitutionally impermissible reasons. In Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970), the court stated: "If the board asserts a non-constitutional reason and the teacher claims it is a sham and that the real reason is one impinging on his constitutional rights, he must be afforded a hearing." \textit{Id.} at 948. By requiring that a probationary teacher prove his First Amendment claim at trial, Roth and
especially appropriate in view of the Supreme Court's historical recognition of the seminal role which free expression plays in educational environments.\textsuperscript{146}

**Conclusion**

This note has focused primarily on the administrative and judicial protections afforded the First Amendment rights of probationary teachers. The protections which exist in California are among the most progressive in the nation; with the elimination of the "motive loophole" in *Bekiaris*,\textsuperscript{146} a California probationary teacher now ought to be able to exercise vigorously his rights of speech and assembly. If his contract subsequently is not renewed for unconstitutional reasons, the *Bekiaris* procedures, if conscientiously applied, will enable him to obtain relief through state procedures.\textsuperscript{147} Unfortunately, many other states do not provide any procedural safeguards against unwarranted terminations of a probationary teacher's contract.\textsuperscript{148}

The United States Supreme Court's restricted interpretation of the due process clause in the *Roth* and *Sindermann* decisions means that only three types of probationary teachers will be able to obtain federal relief from unconstitutional nonrenewal decisions: one who has an objective property interest; one whose character has been officially maligned so that his liberty in the community might be impaired; and one who believes—and is prepared to litigate\textsuperscript{149}—that his nonrenewal was motivated by an animus to activities protected by the First Amendment. Other probationary teachers will have no federal remedy.\textsuperscript{150}

Given the limited availability of procedural protections in many states and the restricted scope of federal protection, there is a compelling need for legislative reform of state statutes to provide greater procedural protection against unconstitutionally motivated nonrenewal decisions. *Bekiaris v. Board of Education* could serve as a model for

\textsuperscript{145} E.g., "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent 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." Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960).

\textsuperscript{146} See text accompanying notes 74-79 supra.

\textsuperscript{147} See text accompanying notes 80-86 supra.

\textsuperscript{148} See text accompanying notes 89-97 supra.

\textsuperscript{149} See note 138 supra.

\textsuperscript{150} See text accompanying notes 102-140 supra.
such reform. The well-reasoned opinion in that case outlines the most effective procedures to date for protecting probationary teachers from disguised as well as overt attacks on First Amendment freedoms.

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Author's note: On June 25, 1973, the United States Supreme Court decided the two cases mentioned in footnote 35. In United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 93 S. Ct. 2880 (1973), the Court reaffirmed the Mitchell holding and again held that the Hatch Act provisions do not unconstitutionally infringe on federal employees' First Amendment rights. It stated: "Although Congress is free to strike a different balance [between the interest of the employee, as a citizen, in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees] than it has . . . we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act." Id. at 2890. Similarly, in the companion case of Broadrick v. Oklahoma, 93 S. Ct. 2908 (1973), the Court upheld the validity of an Oklahoma statute regulating the political activity of state employees. Thus, with these two decisions the Burger Court has again struck a balance in favor of governmental power rather than individual freedoms. See California v. LaRue, 409 U.S. 109 (1972); Kleindienst v. Mandel, 408 U.S. 753 (1972); Branzburg v. Hayes, 408 U.S. 665 (1972).

Obviously, these two holdings invalidate this note's projection of "increasing judicial sensitivity toward protecting the constitutional rights of public employees" contained in the second section of the text. However, the analysis and criticism of the Roth and Sindermann cases remains valid, and the exhortation to other state courts and state legislatures to emulate the Bekiaris procedures contains even more urgency.