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CONSTITUTIONAL AND PROCEDURAL ASPECTS OF EMPLOYEE ACCESS TO THE FEDERAL COURTS: PROMOTION AND TERMINATION

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INTRODUCTION

In the past three years civil rights filings in federal court have increased markedly, and the category experiencing the largest surge in litigation is employment, where complaints have jumped almost 200%.¹ Employment complaints once involved almost exclusively matters of prejudice and bigotry, but while discrimination with re-

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1. Statistics compiled by the Administrative Office of the United States Courts show the following trends in federal court litigation over the past three years:

AREA OF LITIGATION	1970	1971	1972	Percent Change 1972 over 1970
Civil Rights—Total	3,985	5,138	6,133	53.9
Voting	85	123	170	100.0
Employment	344	757	1,015	195.1
Accommodations	217	261	287	32.3
Welfare	173	132	149	-13.9
Other	3,166	3,865	4,512	42.5
N.A.R.A., 1966	3,268	2,725	2,530	-22.6
Fair Labor Standards Act	2,176	2,182	2,195	0.9
Labor-Management Relations (1948)	1,475	2,101	2,454	66.4
Labor-Management Reporting and Disclosure Act	121	116	147	21.5
Social Security Reviews	1,735	1,792	2,288	31.9
Economic Stabilization Act	--	--	376	--
Selective Service Act	447	695	281	-37.1

spect to hiring remains a common area of judicial struggle,² an increasing number of plaintiffs are invoking federal jurisdiction when, the authors think, their cases should be resolved elsewhere. This article's purpose is to examine federal jurisdiction over a new type of employment situation: where a person claims that by not promoting him or by terminating him, an employer is depriving him of property and liberty within the meaning of the fifth³ and fourteenth⁴ amendments to the United States Constitution. The authors

2. Discrimination is a relatively new area, though to be sure much older than promotion and termination. In the past ten years it has been rather well defined thanks to the Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C. § 2000(e) *et seq.* Before this statute discrimination in employment could be divided into two categories: public or quasi-public employment and private employment. In the first instance discrimination involves state action and thereby removes all question about Federal jurisdiction. The 1964 Act expanded Federal jurisdiction throughout the private sector in connection with hiring, promotion and termination where discrimination allegedly occurs.

Moreover, the Civil Rights Act of 1964 established a system for handling disputes involving discrimination in the private sector. Although even before 1964 most of the public agencies had established procedural guidelines and extra-judicial machinery to handle these types of grievances, a whole new system had to be established to grapple with private industry, associations, organizations and the like. The Equal Employment Opportunity Commission was intended to do just that. Its function was, and still is, to seek the elimination of employment practices that are unlawfully discriminatory by informal means leading to voluntary compliance with the statute. Where the Commission determines that discrimination charges are well founded, it attempts to obtain voluntary compliance. When these efforts are unsuccessful, the Commission brings suit in Federal court. *Feteke v. United States Steel Corp.*, 424 F.2d 331 (3rd Cir. 1970). The procedure is elaborately set forth at 42 U.S.C. § 2000(e) (5)(c), (d), (e).

In *Dent v. St. Louis-San Francisco Ry.*, 406 F.2d 399 (5th Cir. 1969), the Fifth Circuit Court of Appeals held that a prerequisite to the institution of an action in Federal district court was that one allege discrimination and follow the EEOC procedure before filing. This holding, however, has been eroded by more recent cases. For example, in *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970) a black employee charged racial discrimination in promotion. No complaint was filed with the Equal Employment Opportunity Commission within the 90 days after the alleged discriminatory act. Nevertheless, the court in *Culpepper* decided that failure to comply with the statute did not preclude his bringing the action in a Federal court. The upshot of this and other cases like it is a belief that a grievant need not follow EEOC procedures and may bring an action directly into Federal court whenever discrimination is alleged. The authors believe this is an extreme reading of *Culpepper*, and a misreading of the statute; and that the machinery in the Civil Rights Act should be strictly followed.

3. U.S. CONST. amend. V. The amendment provides in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

4. U.S. CONST. amend. XIV, § 1. The amendment provides in part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

contend that constitutionally protected interests are involved under very narrow and specific fact situations, and that many of these new complaints do not belong in federal court. Moreover, it is contended that in certain instances, the federal courts are not the optimum forum for employment litigation even if a federal question exists. Other agencies, arbitration panels, and review boards are better equipped to handle certain disputes and can resolve them more quickly and skillfully than United States district judges.

Employment lawsuits involving liberty and property interests appear to follow a standard format. The plaintiff asserts that as a matter of right he deserves to be retained on a job or elevated to a higher rank. The taproot of this logic is the Constitution, making the litigation a war of affidavits in which each side attempts to maneuver the case into, or away from, the coverage of the fifth and fourteenth amendments.⁵ But the constitutional meanings of property and of liberty have changed over the years, and to appreciate their modern definitions, some history is worthwhile, particularly with respect to the property concept.

LIBERTY AND PROPERTY—EXPANDING CONCEPTS

Property

Probably the one constant feature of property through the years is that it never has been seen as a natural right, but rather a deliberate construction by society.⁶ Moreover, what the property concept includes has varied with culture and historical period. The concept has been the subject of much thought and even more verbiage. One scholar wrote that property "never has been, is not, and never can be of definite content. The paradigm of a Sanskrit verb of a thousand forms could not approach in diversities the phases of that concept in any single time and place."⁸ As it appears in the Constitution, the term is the product of many forces which, though perhaps clear to the founding fathers, continue to be amorphous in

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. In this article we are exclusively concerned with situations in which state action is present. Otherwise there is no question that the court would lack jurisdiction and would never reach the liberty and property issues.

6. Reich, *The New Property*, 73 YALE L.J. 733, 771-72 (1962).

7. See Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).

8. *Id.* at 696.

the minds of modern historians. Even among the Greeks the term was ambiguous,⁹ and scholars agree that "the very limited records of Rome's legal development through six centuries contain no consistent doctrine" with respect to property.¹⁰ The importance of the Feudal era was that in a system at once political and agrarian, collective ownership was superimposed upon private ownership.¹¹

This union of the concepts of public and private law had momentous consequences. Private law deals with the assertion of one individual's right and powers against others. Public law deals with duties of individuals to the state, some negative, some affirmative. One is characteristically the field of individualism; and the fact that private law in its origins was predominantly property law must certainly have greatly stimulated absolutistic thinking about private rights. Public law, on the contrary, is the first of social duties. Writing of the political aspect of the union of these ideas in feudalism, Dr. McIlwain has pointed out the influence upon English theories of government of feudalism's "mingling . . . of the ideas of proprietary right and governmental authority . . . and the corresponding fusion of public and private law." Its influence on private law was perhaps greater. Ancient proprietary rights of familial and other associations in the land . . . acquired under feudalism a partially political character; and consequently, as individual rights in land became stronger they, too, did not

9. The end to which Plato's thought was directed was social solidarity. He believed in education as a tool for achieving a spirit of unity, but education only of the highest classes, who alone were considered deserving. Because unchallenged government was essential to social solidarity, and because private property promoted individual selfishness with resulting resistance to the city-state, Plato attacked private property in *The Republic*. At one point, in *The Laws*, he promoted communism as his ideal. Nevertheless he proposed individual possession of land (without powers of alienation) with communal use, and restriction of offspring so as to safeguard enjoyment. Aristotle's thought was different: he recognized private property as a part of the existing Greek institutions, and he even went so far as to exalt private property. Aristotle attacked Plato's communal doctrines and his ideal of unity, declaring that the truly ideal state would "enable the inhabitants to live temperately and liberally in the enjoyment of property." See ARISTOTLE, *POLITICS* (Jowett trans. 1885) II.5, §§ 4-17; II.12, § 12. Aristotle's own ideal occurs at *id.* at II.5 § 10; II.6, §§ 8-9; VII.5, §§ 1 and 15 *et seq.* Basically Aristotle asserted that private control would speed development of those worthy human qualities that, more than communism, would preserve his ideal society. Philbrick, *supra* note 7, at 697-98.

10. Philbrick, *supra* note 7, at 700.

11. *Id.* at 707 & n.50.

become merely proprietary, but became the basis of personal status in private and public law.¹²

Despite the waning of the Middle Ages, individual interests in property continued to be preferred to the interests of society. The slogan of the French Revolution may have been liberty, equality, and brotherhood, but subsequent manifestos were quick to shield property interests from social forces.¹³ And this occurred despite numerous proposals presented during the French Revolutionary period to curb private property in the public interest. In America, it is altogether possible that the reverent attitude toward private property that dominated the colonial period would have occurred merely because of the nation's geography, unsupported by philosophy.¹⁴ Nevertheless, many plutocrats used natural law philosophy to vindicate their actions. An inevitable companion was John Locke, with his libertarian doctrines and his conclusion that government has no other end but the preservation of property.

According to Locke, property included "life, liberty, and estate."¹⁵ It was a value standing on its own, though falling far short of an absolute right.¹⁶ In Locke's world a man's estate was the *means* of life; and liberty and property were almost a single concept.¹⁷ Inseparable from personality, Locke's property derived from one's rights in one's person; and this subsumed the right to labor and the right freely to contract to labor. In his discourse property followed

12. C. McILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* 384 (1932).

13. Philbrick, *supra* note 7, at 712 n.68. The Declaration read in part, "Property is the right that each citizen has to the enjoyment of that portion of goods guaranteed him by the state," and the Constitution of 1793 stated, "no one shall be deprived of the least portion of his property without his consent, except when public necessity, legally proven, evidently demands it, and then only on condition of just compensation previously made." This assurance is in some areas stronger than in the United States Constitution, and it was preserved in later French constitutions: 1 *LE CODE CIVILE, 1804-1904: LIVRE DU CENTENAIRE* (1904) 336-37; L. FAUCHER, *Property* in 3 *CYC. POL. SCI.* (J.J. Lawlor ed. 1884); 4 *CODE NAPOLEON, SUIVIE DE L'EXPOSE DES MOTIFS . . . DES RAPPORTS . . . OPINION . . . DES DISCOURTS* (1808) 25 *et seq.*; 1 *MOTIFS ET DISCOURTS PRONONCES LORS DE LA PUBLICATION DU CODE CIVIL* (1838) 286 *et seq.*

14. America's ability to expand westward across a virgin wilderness, relatively free from impedance, should be contrasted with nations like the Soviet Union, which only in the past 26 years has been able to exist secure from external threat. The effect of these two environments with respect to each nation's organization of political space is too complex for anything more than a passing comment here. See generally G. GORER & J. RICKMAN, *THE PEOPLE OF GREAT RUSSIA* (1949).

15. Philbrick, *supra* note 7, at 713.

16. Hamilton, *Property—According to Locke*, 41 *YALE L.J.* 864, 869 (1932).

17. *Id.* at 876.

directly after slavery,¹⁸ and because it was man's creation, it had the sacredness which he attached to human life itself.¹⁹

This system dovetailed nicely into the perceptions of an America "on the make."²⁰ The fourteenth amendment's phrases were invoked at first on behalf of the right of the working man to his trade.²¹ Even by the beginning of the Twentieth Century, courts were not yet distinguishing between liberty and property.²² In *Children's Hospital v. Adkins*,²³ a 1922 case, Judge Van Orsdel wrote, "it should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty, and property, the chief of these is property."²⁴ Small wonder that the framers of the Constitution handled liberty and property in tandem and kept them together in the fifth and fourteenth amendments. Traces of this early mind-set persist. "In the annals of the law," writes Hamilton, "property is still a vestigial expression of personality and owes its current constitutional position to its former association with liberty."²⁵

Undoubtedly property has experienced pronounced legal development from a time when it referred simply to landed estates. It has expanded until now, in the post-industrial era, "the total value under our law . . . of proprietary rights which have no material object is probably enormously greater than the value of such rights in all land and tangible chattels."²⁶ There are promissory notes, bills of exchange, patent rights, and shares of corporate stock. Shortly after World War II, Congress codified the body of common law that had developed to protect trademarks and trade names.²⁷ Intellectual property, another example, is a recent notion. Although the copy-

18. *Id.*

19. *Id.* at 868.

20. *Id.* at 876-77.

21. *Id.* at 877. See brief of Mr. Justice Campbell in the Slaughter House Cases. 83 U.S. (16 Wall.) 36 (1873).

22. Hamilton, *supra* note 16, at 876-77.

23. 284 F. 613 (D.C. Cir. 1922), *aff'd* 261 U.S. 525 (1923).

24. *Id.* at 622. "[N]ot that any amount of property is more valuable than the life or liberty of the citizen, but the history of civilization proves that, when the citizen is deprived of the free use and enjoyment of his property, anarchy and revolution follow, and life and liberty are without protection." *Id.*

25. Hamilton, *supra* note 16, at 878.

26. Philbrick, *supra* note 7, at 692.

27. LANHAM ACT, 15 U.S.C. § 1051 (1963).

right statutes are old,²⁸ the courts only lately have begun to protect property interests in ideas.²⁹ Rentalism is so prevalent in the United States that no discussion of modern property is complete without mentioning it.³⁰ And most recently, the expanding wealth of bureaucracy has created what Professor Charles Reich terms a "new property." This concept departs from the idea of undisputed ownership in order to cover significant new property interests, including statutory entitlements.³¹ Government largesse, says Reich, "affects the underpinnings of individualism and independence. It influences the workings of the Bill of Rights. It has an impact on the power of private interests, in their relation to each other and to government. It is helping to create a new society."³² This largesse takes many forms, including welfare benefits,³³ unemployment benefits,³⁴ occupational licenses,³⁵ direct financial subsidies and grants,³⁶ communications channels,³⁷ transport routes,³⁸ zoning variances³⁹ and public housing.⁴⁰

28. The first copyright act was passed in 1790. Act of May 31, 1790, ch. 15, 1 Stat. 124. Present copyright laws are codified at 17 U.S.C. §§ 1-216.

29. See, e.g., *Healy v. Macy & Co.*, 277 N.Y. 681, 14 N.E.2d 388 (1938); *Kovacs v. Mutual Broadcasting Sys.*, 99 Cal. App. 2d 56, 221 P.2d 108 (1950); *Kurland v. Columbia Broadcasting Sys.*, 40 Cal. 2d 799, 256 P.2d 962 (1953); *Belt v. Hamilton Nat'l Bank*, 108 F. Supp. 689 (D.D.C. 1952), *aff'd* 210 F.2d 706 (D.C. Cir. 1953). But see unfavorable cases collected in M. NIMMER, *NIMMER ON COPYRIGHT* § 167 (1972).

30. See A. TOFFLER, *FUTURE SHOCK* 60-61, 436-38 (1972).

31. The United States Supreme Court has held that these significant interests are safeguarded by the fourteenth amendment. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (driver's license); *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (possessory interest under conditional sales contract).

32. Reich, *supra* note 6, at 733.

33. Welfare statutes are multifarious. Some of the more significant of these are the Social Security Act, 42 U.S.C. §§ 301 *et seq.*; the Old Age Benefits Acts, 42 U.S.C. §§ 401 *et seq.*; and the Needy Families with Children Aid and Services Acts, 42 U.S.C. §§ 601 *et seq.* See generally Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245 (1965).

34. See, e.g., *Java v. California Dep't of Human Resources Dev.*, 317 F. Supp. 875 (N.D. Cal. 1970), *aff'd* 402 U.S. 121 (1970), indicating that once a person is deemed entitled to the benefit, it cannot be arbitrarily denied or cancelled without fulfillment of due process standards.

35. See, Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 *STAN. L. REV.* 553 (1962).

36. Examples would include farm subsidies and academic grants and fellowships. Another very important example is the Food Stamp Act of 1964, 7 U.S.C. §§ 2011 *et seq.*, 2016(a), 2019(b). *Tindall v. Hardin*, 337 F. Supp. 563 (W.D. Pa. 1972) holds that the deprivation of the right to receive benefits under this statute is denial of a statutory entitlement requiring procedural due process guarantees and protections.

37. Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

38. Interstate Commerce Act, 49 U.S.C. §§ 301 *et seq.* (1963).

Despite Locke, property has separated from personality, at least in part.⁴¹ But the more significant development flows from the increasing dependence on government and formal institutions for property rights. Where people once demanded that government leave them and their property alone, now those sentiments are turning back on themselves. Citizens are expecting more services and benefits from their lawmakers, and often what was commenced purely as a magnanimous gesture by the solons has metamorphosed into a positive obligation. Social welfare is a good illustration of this tendency. Originally the statute turned on the notion that welfare is a gratuity furnished by the state and thus amenable to whatever condition the state saw fit to impose.⁴² With the advent of New Deal legislation, the capricious nature inherent in charity was reduced. The Social Security Act provided that "A state plan for aid to dependent children must . . . (4) provide for granting to any individual, whose claim with respect to aid to a dependent child is denied, an opportunity for a fair hearing before such state agency. . . ."⁴³ Welfare controversies have run the procedural gamut since the original act, and many politicians and attorneys are familiar with the large body of experience and law that has emerged regarding the treatment of welfare recipients. Not only must there be a "fair hearing," but the procedural methods utilized by the agency must adhere to a phalanx of safeguards.⁴⁴ In the minds of the

39. Zoning statutes exist on the local level. A typical zoning enabling act is presented and discussed in C. BERGER, *LAND OWNERSHIP AND USE* 612-18.

40. See *Ruffin v. Housing Authority of New Orleans*, 301 F. Supp. 251 (E.D. La. 1969), requiring due process procedures for eviction from public housing.

41. Reich, *supra* note 6, at 771-74; Hamilton, *supra* note 16, at 877-78.

42. Reich, *supra* note 33, at 1245-46.

43. Social Security Act, ch. 531, Title IV, § 402(a)(4), 49 Stat. 627 (1935), as amended 42 U.S.C. § 602(a)(4) (1972).

44. In the past thirty years a large body of experience and law has grown up with respect to the procedures of government agencies which undertake regulation of economic affairs, or dispensation of benefits such as airline routes or television licenses. In a general way, the standards which have developed are as follows. (1) The rules which are to furnish the standard of decision should be clearly formulated in advance of any action; (2) the rules should be available to the public; (3) every action should begin with actual notice of the proposed action and a full statement of the basis for it; (4) the relevant facts should be determined in a proceeding at which the person or company affected can know the evidence and have an opportunity to rebut it; factual findings should not be based on hearsay or secret evidence known only to the agency; (5) the person or company should have the right to be represented by counsel; (6) there should be a distinct separation between those officials who investigate and initiate action and those who find the facts and make the decision; the latter

courts and populace, welfare benefits have crystallized into a right to which people are entitled.⁴⁵ It is harder to curtail benefits than to initiate them. Law schools abound with seminars in welfare litigation.⁴⁶ Most important, in the minds of those affected, assistance is not a gratuity, but an essential dole that they fully deserve.⁴⁷

The Supreme Court has recognized this attitude and endorsed it in *Goldberg v. Kelly*,⁴⁸ where Justice Brennan said, "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."⁴⁹ This conclusion was anticipated in *Shapiro v. Thompson*,⁵⁰ a case turning on equal protection and the elusive right to travel. There Justice Brennan commented in passing that the appellants could not argue that public assistance benefits are a "privilege" and not a "right."⁵¹ Indeed, in 1959, in *Fleming v. Nestor*,⁵² the Court recognized that with respect to federal social security benefits, "[t]he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."⁵³

officials should be subject to different authority than the former and free of any of the atmosphere in which the action was begun; (7) the decision, once made, should be accompanied by findings and reasons; (8) there should be opportunity for review of the decision within the agency, and, ultimately, in the courts.

Reich, *supra* note 33, at 1252.

45. Tenbroek and Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 U.C.L.A. L. REV. 237 (1954).

46. Such a class is one of the most popular at Columbia Law School, for example. Professor Reich has pointed to a "desperate need" for attorneys in the field of social welfare at the level "where individual rights are at stake." Reich, *supra* note 33, at 1257 (emphasis added). See also Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381 (1965).

47. Reich, *supra* note 33, at 1255.

48. 397 U.S. 254, 261-63 (1970).

49. *Id.* at 262 n.8.

50. 394 U.S. 618 (1968).

51. *Id.* at 627 n.6.

52. 363 U.S. 603 (1959).

53. *Id.* at 611. The actual case holding did not find a definite property interest in receiving social security benefits, at least under its particular fact situation involving an alien who was being deported for communist party membership. In fact the Court indicated that engrafting a concept of "accrued property rights" upon the social security system would deprive it of flexibility and boldness in adjusting to the constantly changing conditions which Congress anticipated. *Id.* at 610. Nevertheless, the case has been cited more for its dictum as the Justices have become increasingly willing to find property interests in such largesse. Cf. *Goldberg v. Kelly*, 397 U.S. 254 (1969).

That welfare benefits are property under the fifth and fourteenth amendments is virtually a truism in contemporary life.

A similar transformation of a government benefit into property obtains with drivers' licenses. Although such a license is not available as a matter of right, a hearing is required before the state can revoke it. Although the Supreme Court in *Bell v. Burson*⁵⁴ never specifically referred to a driver's license as property, it did classify it as an "entitlement" to which the relevant constitutional restraints applied.⁵⁵ Semantics aside, the practical effect of this decision is yet another expansion of the constitutional property concept.

Property and Public Employment

Public employment is another field where benefits have turned into important interests⁵⁶ and now are in the process of becoming

54. 402 U.S. 535 (1970).

55. Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a right or a privilege [citing cases].

Id. at 539.

In a similar manner other areas of government largesse have crystallized, if not yet into property, at least into valuable government benefits constituting such an "important interest" to the individual that they may not be denied in a manner that infringes constitutionally protected rights. *See Speiser v. Randall*, 357 U.S. 513 (1958) (tax exemptions); *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963) (unemployment benefits); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1968) (welfare benefits); *Graham v. Richardson*, 403 U.S. 365, 374 (1970) (welfare benefits).

Denials of public employment are beginning to acquire property dimensions. *See* notes 56-94 *infra* and accompanying text. But before this trend they too were treated under this general principle. *See United Pub. Workers v. Mitchell*, 330 U.S. 75, 100 (1946); *Weiman v. Updegraff*, 344 U.S. 183, 192 (1952); *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960); *Torcaso v. Watkins*, 367 U.S. 488 (1960); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1960); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 288 (1961); *Baggett v. Bullitt*, 377 U.S. 360 (1963); *Elfbrandt v. Russel*, 384 U.S. 11, 17 (1965); *Keyishian v. Board of Regents*, 385 U.S. 589 (1966); *Whitehill v. Elkins*, 389 U.S. 54 (1967); *United States v. Robel*, 389 U.S. 258 (1967); *Pickering v. Board of Educ.*, 391 U.S. 563 (1967). *See also Willcox, Invasions of the First Amendment Through Conditioned Public Spending*, 41 CORNELL L.Q. 12 (1955); *Note, Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

56. *See* note 55 *supra*; *see also Rozman v. Elliot*, 335 F. Supp. 1086 (D. Neb. 1971), holding that while private employers are not limited by the fourteenth amendment, public employers are.

property.⁵⁷ The shift has followed the steady postwar expansion of government largesse. At first the courts held that government employment is not "property."⁵⁸ Even by 1950 the Court of Appeals for the District of Columbia in *Bailey v. Richardson*,⁵⁹ held that public employment in general was a "privilege" and not a "right," with the result that procedural due process guarantees did not apply. The suit involved a federal employee who was removed from her position after an investigation produced evidence that she belonged to subversive organizations. Judge Prettyman decided that absent congressional limitation, the President can remove from the civil service anyone whose loyalty did not completely satisfy the Chief Executive.⁶⁰ The Supreme Court affirmed. Justice Clark abstained from the deliberations and the remaining members of the Supreme Court split evenly. Subsequently, the notion that government service is a privilege deteriorated through a series of opinions that have thoroughly undermined *Bailey v. Richardson*. The Court has held that a public college professor dismissed from a position held under tenure provisions⁶¹ and college professors and staff members dismissed during the terms of their contracts⁶² have interests in continued employment that are safeguarded by due process. Finally in 1971 Justice Blackmun noted that the Supreme Court "now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.'" ⁶³

The path was now clear for *Connell v. Higginbotham*,⁶⁴ another case involving a teacher at a public institution. In that decision a Florida citizen was relieved for failure to sign an oath of allegiance required of all public employees, part of which read, "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."⁶⁵ Deleting that portion

57. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Connell v. Higginbotham*, 403 U.S. 207 (1971), all intimating that such a property interest can exist under certain circumstances. *Contra*, *Sessions v. State of Conn.*, 293 F. Supp. 834 (D. Conn. 1968), *aff'd*, 404 F.2d 342 (2d Cir. 1968).

58. *Taylor v. Beckham*, 178 U.S. 348 (1900); *Ex parte Sawyer*, 124 U.S. 200 (1888); 2 COOLEY, CONSTITUTIONAL LIMITATIONS 746 n.1 (8th ed. 1927). See also *Sessions v. State of Conn.*, 293 F. Supp. 384 (D. Conn. 1968), *aff'd*, 404 F.2d 342 (2d Cir. 1968).

59. 182 F.2d 46 (D.C. Cir. 1950), *aff'd* by an equally divided court, 341 U.S. 918 (1951).

60. *Id.* at 65.

61. *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956).

62. *Weiman v. Updegraff*, 344 U.S. 183 (1952).

63. *Graham v. Richardson*, 403 U.S. 365, 374 (1970).

64. 403 U.S. 207 (1971).

65. *Id.* at 208.

of the oath, the Justices pointed out that it fell "within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process. *Slochower v. Board of Education*, 350 U.S. 551 (1956)."⁶⁶ These words are doubly significant when contrasted with the Court's 1950 language in *Bailey*. There, although the terminated employee did receive a hearing, the circuit court tartly reminded her that "never in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service."⁶⁷ The language in *Connell v. Higginbotham* intimating that such hearings have become commonplace represents the philosophical change that has overswept due process and property. This is especially so since the teacher in *Connell v. Higginbotham* was hired without tenure or a formal contract, but rather with a clearly implied promise of continued employment. This suggests that the Court tacitly found a property interest in the case.

Thus, by the end of the 1960's the Supreme Court had uncovered a general property interest in public employment; but it was not until the twin decisions of *Board of Regents of State Colleges v. Roth*⁶⁸ and *Perry v. Sindermann*⁶⁹ that they tackled specific factual issues and began to explore the constitutional borderlands. And they found the boundary beyond which the Constitution does not apply.

Roth and Sindermann

David Roth was hired for a probationary period of one academic year, to be an assistant professor at Wisconsin State University-Oshkosh. Eventually the college informed him that he would not be retained beyond that period. The Board of Regents' rules provided that a non-tenured teacher "dismissed" before the end of the year may have some opportunity for review of the action, but there was no real protection for a non-tenured person like Mr. Roth, who simply was not re-employed.⁷⁰ Reversing the court of appeals, Justice Stewart held that the Constitution did not require opportunity for

66. *Id.* at 208-09.

67. 182 F.2d at 57.

68. 408 U.S. 564 (1972).

69. 408 U.S. 593 (1972).

70. 408 U.S. at 567.

a hearing in this situation unless Roth could show that despite the absence of tenure or a formal contract, he had a property interest in continued employment.⁷¹ The Court explained why Roth had no such interest by saying:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.⁷²

Continuing, the Court indicated that property interests are not created by the Court.

Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them.⁷³

This language was the fountainhead of Justice Stewart's subsequent opinion in *Perry v. Sindermann*.⁷⁴ Although the Court reaffirmed that "the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty . . . or . . . property,"⁷⁵ it affirmed the circuit court because Professor Sindermann had demonstrated "a genuine . . . interest in continued employment at Odessa Junior College. He alleged that his

71. 408 U.S. at 578. Or in the alternative the decision not to rehire him somehow deprived him of "liberty." *Id.* at 575.

72. 408 U.S. at 577. See also *Olson v. Trustees of Cal. State Univ.*, 351 F. Supp. 430 (C.D. Cal. 1972), where the court said in dictum, "A one-year teaching contract that must be renewed does not carry a reasonable expectation of re-employment. The property interest expires on the same day as the contract." 351 F. Supp. at 433.

73. 408 U.S. at 577.

74. 408 U.S. 593 (1972).

75. *Id.* at 599.

interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, the respondent alleged that the college had a *de facto* tenure program, and that he had tenure under that program."⁷⁶ So while a long employment record at some other college may not be tantamount to a property right,⁷⁷ a person with a similar period of service at Odessa Junior College "had no less a 'property' interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him."⁷⁸

An important conclusion to be derived from the *Roth* and *Sindermann* decisions is that "property" is measurable only by an objective standard. Persons claiming that they "expected" to be kept on the job will not prevail unless they can point to extrinsic facts to support that expectation. A quasi-contract or a mutual understanding suffices in this regard.⁷⁹ But while it is not mandatory that the agreement be in writing, there must be some sort of agreement—a set of shared beliefs or understandings, however tacit or implied,⁸⁰ that amount to more than a "mere subjective 'expectancy.'"⁸¹

A corollary is that property interests must actually attach before the courts can shield them.⁸² Many recent cases concern individuals who did not receive a job or a promotion.⁸³ To say that they have a property interest is fallacious. Justice Stewart clearly stated that "the Fourteenth Amendment's procedural protection of prop-

76. *Id.* at 599-600.

77. *See, e.g.,* *Perkins v. Regents of the Univ. of Cal.*, 353 F. Supp. 618 (C.D. Cal. 1973).

78. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). But note that the state may by statute abrogate this situation: "If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated." *Id.* at 602 n.7.

79. *Id.* at 602.

80. *Id.*

81. *Id.* at 603.

82. *Olson v. Trustees of Cal. State Univ.*, 351 F. Supp. 430 (C.D. Cal. 1972).

83. From the Central District of California alone, the following cases, heard recently, involve persons suing for a promotion: *Sherman v. City of Pasadena*, ____ F. Supp. ____ (C.D. Cal. 1973); *Olson v. Trustees of Cal. State Univ.*, 351 F. Supp. 430 (C.D. Cal. 1973); *Perkins v. Regents of the Univ. of Cal.*, 353 F. Supp. 618 (C.D. Cal. 1973); *Crouch v. Regents of the Univ. of Cal.*, 73-118 DWW (C.D. Cal. 1973); *Rossi v. TWA*, 350 F. Supp. 1263 (C.D. Cal. 1972).

erty is a safeguard of the security of interests that a person has already acquired in specific benefits.”⁸⁴ The words “already acquired” are controlling in this passage. Without possession of or imminent access to an interest, a person cannot rely on the Constitution to protect his claim.⁸⁵ Thus an individual whose employment contract is breached by the state has a cause of action. So does a person who is promised, either explicitly or implicitly, that his contract will be renewed.⁸⁶ But a probationary employee who is fired during his trial period, and who knows that this procedure is authorized by statute, has no property interest;⁸⁷ such circumstances resemble the employee who has applied unsuccessfully for a promotion.⁸⁸ The property must vest before the interest therein can be asserted.⁸⁹ This difference between preserving an interest and attaining it must not be overlooked.⁹⁰

84. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576 (1972).

85. Olson v. Trustees of Cal. State Univ., 351 F. Supp. 430 (C.D. Cal. 1972).

86. Perry v. Sindermann, 408 U.S. 593 (1972).

87. Jenkins v. United States Post Office, 475 F.2d 1256 (9th Cir. 1973); Sayah v. United States, 355 U.S. 1008 (C.D. Cal. 1973).

88. Olson v. Trustees of Cal. State Univ., 351 F. Supp. 430 (C.D. Cal. 1972).

89. This principle applies not only to employment, but elsewhere, as in the case of social security benefits.

Appellant contends that the 1967 amendments to the Social Security Act ought not to be applied to her since her disability arose before those amendments were enacted and thus served to divest her of a vested right in property without due process. These rights are not vested and do not become vested until one has actually established his eligibility. Fleming v. Nestor, 363 U.S. 603 (1959); King v. Finch, 428 F.2d 709 (5th Cir. 1970). Appellant having had no rights lost by those amendments has no right to challenge them.

Harris v. Richardson, 468 F.2d 1260 (9th Cir. 1973).

90. The Internal Revenue Service also recognizes a difference between attainment and preservation with respect to a person's profession. Treas. Reg. § 1.212-1(f) (1957) states that “expenses of taking special courses or training” are not allowable as deductions under § 212, INT. REV. CODE OF 1954. Yet Treas. Reg. 1.162-6 (1958) allows a professional to deduct under § 162(a) of the Code dues to professional societies, subscriptions to professional journals and amounts currently expended for books whose useful life is short. One should be aware of the difference in Treas. Reg. 1.162-5 (1958) between the expenses of retaining the taxpayer's status or employment and the expense of education for a new position, a higher salary or an advancement in position. Several cases illustrate the underlying principle: Coughlin v. CIR, 203 F.2d 307 (2d Cir. 1953) (partner's expense in going to the NYU Institute of Federal Taxation held deductible); Sandt v. CIR, 303 F.2d 111 (3d Cir. 1962) (research chemist denied deduction for cost of attending law school where primary purpose was to qualify for a new post as patent chemist); Welsh v. United States, 210 F. Supp. 597 (N.D. Ohio 1962) (law school expenses incurred by IRS agent deductible on proof that purpose was improved skills in regular employment); Marlor v. CIR, 251 F.2d 615 (2d Cir. 1958) (graduate study by college professor on temporary appointment who cannot be reappointed or promoted without a showing of substantial progress toward a doctorate, held, deductible).

Later cases, as well as comments in *Roth* and *Sindermann*, go on to say that the basis of this type of constitutional litigation must be clear.⁹¹ Specific facts must be alleged that show the court exactly how the employer is curtailing an individual's property or liberty.⁹³ Since these issues usually are resolved on motions, attorneys would be wise to frame pleadings that are more detailed than usual and perhaps accompany them with affidavits. Without these safeguards it is quite difficult to resist a motion for summary judgment or a motion to dismiss.⁹⁵

Liberty

For most of its judicial life, liberty has evolved in a similar manner as property, with both concepts influencing and being influenced by various philosophies and jurists.⁹⁶ While the Supreme Court has not attempted to define the word with particularity, they have indicated that whatever connotation "liberty" has must be broad indeed.⁹⁷ Several meanings have been attached to the word,⁹⁸ but its definition remains unclear with respect to employment cases. To date the courts have interfered only "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him. . . ."⁹⁹ Even then what is required is not redress or damages, but just "notice and an opportunity to be heard,"¹⁰⁰ the purpose of which is to provide the grievant with a chance to clear his name.¹⁰¹

91. *Perkins v. Regents of the Univ. of Cal.*, 353 F. Supp. 618, 622 n.6 (C.D. Cal. 1973).

92. *Perry v. Sindermann*, 408 U.S. 593, 599 n.5 (1972).

93. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 574 n.13 (1972).

94. Since these cases may be classified as civil rights actions, pleadings must be artfully drawn. Allegations which are mere conclusions, unsupported by facts, do not suffice. *See, e.g.*, *Cohen v. Norris*, 300 F.2d 24, 29-30 (9th Cir. 1962); *Hoffman v. Halden*, 268 F.2d 280, 294 (9th Cir. 1959); *Reese v. Nixon*, 347 F. Supp. 314, 316 (C.D. Cal. 1972); *Freidman v. Younger*, 282 F. Supp. 710, 714 (C.D. Cal. 1969); *Fowler v. United States*, 258 F. Supp. 638, 643-44 (C.D. Cal. 1966).

95. *See, e.g.*, *Perkins v. Regents of the Univ. of Cal.*, 353 F. Supp. 618, 621 n.4 (C.D. Cal. 1973); *Fed. R. Civ. P.* 56(e).

96. *See* notes 7-22 *supra* and accompanying text.

97. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954); *Stanley v. Illinois*, 405 U.S. 645 (1972).

98. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

99. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

100. *Id.*

101. "Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 n.12 (1972).

Situations in which the Court has insisted that employees receive procedural safeguards have been heinous to the point where the state's action is tantamount to a "badge of infamy."¹⁰² The use of anonymous informers would qualify for this category where their invective destroys a grievant's chances for employment.¹⁰³ So would an overly careless designation of a group as subversive when few or no facts exist to support the charge.¹⁰⁴ Similarly, statutes that bar disloyal persons from public employment may not be drafted so as to classify knowing members of an association with those who innocently joined.¹⁰⁵

The source of all these opinions is an official act which degrades the complainants, not necessarily to the degree that would attach were they criminally convicted,¹⁰⁶ but enough to haunt them in later endeavors. Thus no liberty interest exists in cases where an employee, for some reason, is blocked from employment at one establishment while remaining quite free and able to work elsewhere.¹⁰⁷ "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply, is not rehired in one job but remains free as before to seek another."¹⁰⁸ Nor does it matter that a record of

102. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Weiman v. Updegraff*, 344 U.S. 183, 191 (1952).

103. *Peters v. Hobby*, 349 U.S. 331, 352-53 (1954).

If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his "liberty," they must be put to the test of due process of law. The use of faceless informers is wholly at war with that concept. [Douglas, J., concurring opinion].

Id. at 352.

104. *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 137-38 (1950).

105. *Weiman v. Updegraff*, 344 U.S. 183 (1952).

There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy.

Id. at 190-91.

106. *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123 (1950). "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." [Frankfurter, J. concurring]. *Id.* at 168. See generally FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 163 (1928).

107. In *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1960), a short order cook's identification credentials were withdrawn for security reasons, yet the record showed that no stigma accompanied the act. Her employer even offered to place her at another facility. The Court found no denial of liberty, reasoning that "All that was denied her was the opportunity to work at one isolated and specific military installation." *Id.* at 896. "[T]his is not a case where the government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." *Id.* at 898.

108. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 (1972).

nonretention might make somebody slightly less attractive to future employers.¹⁰⁹ "[A]ny reason [for a dismissal] other than a reduction in force is likely to be of some extent a reflection on a probationer's ability, temperament, or character."¹¹⁰ Nonetheless not every dismissal attains constitutional proportions.¹¹¹

Disagreement exists in connection with the scope of these Supreme Court rulings. In the employment context, "liberty" appears to be a concept whose meaning is dependent on subtleties within each individual factual setting.¹¹² Perhaps this is true because regarding employment, the concept is relatively new. Nonetheless certain principles are crystallizing. No one loses his liberty when he fails to receive a promotion¹¹³ unless he can prove additional relevant facts.¹¹⁴ A person who is told that his credentials are substandard does not automatically derive a cause of action unless the criticism is unduly harsh or unnecessarily publicized.¹¹⁵ Although no case has explicitly drawn the analogy, the courts seem to be following the laws of defamation.¹¹⁶ An employer is privileged to chastise his staff provided that he does not spread his sour judgment further than necessary.¹¹⁷ Conceivably a stinging, abusive letter shown only to the employee would not usurp his liberty while a polite, but widely published dismissal note would. The present law requires the employer to act reasonably and refrain from curtailing future job opportunities, and it was precisely this reasonable behavior that finally defeated Professor Roth at the Supreme Court.¹¹⁸

109. *Id.* at 574 n.13; cf. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1956).

110. *Medoff v. Freeman*, 362 F.2d 472, 476 (1st Cir. 1966). This would logically hold true for permanent employees as well.

111. *Jenkins v. United States Post Office*, 475 F.2d 1256 (9th Cir. 1973).

112. Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

113. That he has been denied a position more prestigious, more secure, and possibly more lucrative than what he already occupies, without more, does not mean that he has been deprived of a constitutionally protected interest. If it did, then any high school senior applying as a freshman and turned down without a hearing or statement of reasons by a state university would have a cause of action under the Fourteenth Amendment.

Olson v. Trustees of Cal. State Univ., 351 F. Supp. 430, 432 (C.D. Cal. 1972).

114. See notes 119-21 *infra* and accompanying text.

115. See notes 107-08 *supra* and accompanying text. See also *Sayah v. United States*, 355 F. Supp. 1008 (C.D. Cal. 1973).

116. W. PROSSER, *LAW OF TORTS*, §§ 106-11 (3d ed. 1964).

117. See note 107 *supra*. See also *Sayah v. United States*, 355 F. Supp. 1008, 1015 (C.D. Cal. 1973).

118. Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his

Current interpretations of liberty leave unclear the remedy that is available to one who is terminated and, through no fault of the employer, is precluded from similar positions elsewhere. Not long ago an Illinois district court facing just such a problem, vacated a motion for summary judgment which it previously had granted.¹¹⁹ In reversing itself the court explained that the litigation "presented genuine issues of material fact—the degree to which plaintiffs' career opportunities have been foreclosed and the extent to which this has been caused by their termination."¹²⁰ The judge grappled with the question whether the termination deprived the plaintiffs of other opportunities. The unresolved issue in *Roth*, he concluded, is "[d]oes a substantial adverse affect [sic] upon career opportunities which has been proven to have been caused by termination of employment constitute a state-imposed restriction upon liberty which requires a hearing under the due process clause?"¹²¹ Shortly after this a United States district court in California handed down a decision that attacked the reasoning in the Illinois case, but did not assume a totally opposite stance in its holding.¹²² That case involved a French professor who had taught for seven years at UCLA before learning that she would not receive tenure. She alleged in her complaint an inability to obtain another academic appointment, but did not support her allegation with affidavits or other material.¹²³ At the hearing, her counsel offered to prove that a professor who is asked to leave after so many years is virtually unemployable, at least in Southern California.¹²⁴ Dismissing the complaint without prejudice, the court indicated that if she had a case at all, it would be that relieving the plaintiff after seven years is equivalent to branding her with a hopeless stigma.¹²⁵

If this is the law, it means that certain people, by virtue of their seniority or the paucity of jobs in their field, cannot be fired. A

freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this again, would be a different case.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573-74 (1972).

119. Franz v. Board of Educ. of Riverside School Dist. No. 96, No. 72 C151 (N.D. Ill. Aug. 10, 1972).

120. *Id.*

121. *Id.*

122. Perkins v. Regents of the Univ. of Cal., 353 F. Supp. 618, 622-23 (C.D. Cal. 1973).

123. *Id.* Plaintiff's complaint at 10.

124. *Id.* at 624.

125. *Id.* at 622.

liberal interpretation might go further and impose on employers an affirmative duty to discover whether everyone on their payroll is rehirable. While it is true that the state may not foreclose a range of opportunities in a manner that contravenes the right to due process,¹²⁶ logic dictates that the state should not have to make sure that the job market can absorb its discarded help.¹²⁷ The burden on the government, let alone other employers, would be intolerable.¹²⁸ We doubt that the frontiers of liberty extend that far. *Roth* precluded such an extrapolation by recognizing that non-retention obviously must reduce a person's attractiveness, while maintaining that this alone does not curtail liberty.¹²⁹ What may curtail liberty is termination accompanied by malice¹³⁰ or undue publicity.¹³¹ As one judge quipped, "Even the Declaration of Independence guarantees only 'the pursuit of happiness,' not the millenium itself."¹³² One's liberty evaporates when his ability to pursue falters.

126. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1956).

127. *Perkins v. Regents of the Univ. of Cal.*, 353 F. Supp. 618, 623-24 (C.D. Cal. 1973).

128. *Cf. Zobriscky v. Los Angeles County*, 28 Cal. App. 3d 930, 105 Cal. Rptr. 121 (1972):

Modern government offers its citizens a wide spectrum of benefits, including public employment, public contracts, public education, tax exemptions, loans subsidies, franchises, and licenses of all kinds. In view of the number, sweep and scope of these benefits we do not believe an evidentiary hearing can be routinely required each time an application for one of those benefits is denied. Were the law otherwise the resulting burden on government would be overwhelming. For example, an affidavit in the case at bench indicates that in the County of Los Angeles alone over 7000 applications for general relief are received each month, of which less than 1000 are accepted. Thus, the grant of Zobriscky's petition would mandate over 6000 evidentiary hearings each month for the County of Los Angeles for this one benefit offered by government. The resulting increase in the cost of administration of the general relief program brought about by the cost of such hearings would necessarily reduce the net amount of moneys available for general relief purposes, and in this sense mandatory evidentiary hearings would work at cross purposes to the primary objective of welfare itself.

Id. at 933, 105 Cal. Rptr. at 123.

129. *Board of Regents of State Colleges v. Roth*, 406 U.S. 564, 574 n.13 (1972).

130. *Id.* at 573.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty or immorality. Had it done so, this would be a different case.

Id.

131. *Sayah v. United States*, 355 F. Supp. 1008, 1015 (C.D. Cal. 1973).

132. *Perkins v. Board of Regents of the Univ. of Cal.*, 353 F. Supp. 618, 624 (C.D. Cal. 1973).

REVIEW BOARDS, AGENCIES, AND FEDERAL JURISDICTION

The growth of quasi-judicial panels has created a new reason for limiting federal jurisdiction over employment disputes. Not only can most cases be handled by those bodies, but the law provides that incidents within a board's jurisdiction often *must* be passed upon by the appropriate administrative machinery before a plaintiff can pursue his remedies in federal court. Two of the better known review boards occur in connection with the airline and railway industries.

Railway and Airline Disputes

In 1934 Congress amended the Railway Labor Act, creating the National Railroad Adjustment Board¹³³ to settle so-called minor disputes between individual employees and the carriers.¹³⁴ Two years later the legislature extended the Railway Labor Act to cover the then-fledgling air transportation industry.¹³⁵ In each case the congressional action was grounded in a desire to curb a growing backlog of disputes. The original Railroad Adjustment Board was intended to be a lightning rod for a vast number of small skirmishes that had previously found their way to federal court. Thirty years later, however, even that organization needed relief: railroad employees sometimes had to wait as long as 10 years before obtaining a decision on their claims. The First Division lagged approximately seven and a half years behind.¹³⁶ Accordingly, in 1966 Congress amended the act to provide for a series of special adjustment boards.¹³⁷

Judicial review of railway board findings is limited,¹³⁸ and dis-

133. Act of June 21, 1934, Pub. L. No. 73-441, 48 Stat. 1189-93, *amending* 45 U.S.C. § 153 (1926) (codified at 45 U.S.C. § 153 (1970)). Pursuant to subsection (a) of this section, the board consists of 34 members, 17 from the carriers and 17 from the employees' labor organizations. Four divisions are established under § 153(h), with each division covering different types of employees.

134. *Brotherhood of R.R. Trainmen v. New York Cent. R.R.*, 246 F.2d 114 (6th Cir. 1957), *cert. denied*, 355 U.S. 877. Minor disputes would include grievances related to interpretation or application of agreements directly regarding pay, rules and working conditions, and may also comprehend agreements as to individual promotions and terminations.

135. Act of April 10, 1936, Pub. L. No. 74-487, 49 Stat. 1189-91, *amending* 45 U.S.C. §§ 181-88 (1934) (codified at 45 U.S.C. §§ 181-88 (1970)). See *International Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682, 683 (1963).

136. 1966 *United States Code Congressional and Administrative News* 2286.

137. Act of June 20, 1966, Pub. L. No. 89-456, 48 Stat. 1193, *amending* 45 U.S.C. § 153 (1964) (codified at 45 U.S.C. § 153 (1970)).

138. *Slocum v. Delaware, L&W. R.R.*, 339 U.S. 239 (1950); *Van Zandt v. Railway Express Agency*, 99 F. Supp. 520 (S.D.N.Y. 1950).

strict courts do not have jurisdiction over actions based upon wrongful discharges either for reinstatement or for damages.¹³⁹ The provisions as applied to air carrier employees are equally binding and final.¹⁴⁰ While there may be an instance when the aggrieved party has the option of choosing between federal court and the adjustment boards,¹⁴¹ this does not mean that the plaintiff can pursue both remedies to completion. Rather he is put to an election and must refrain from switching forums if his first effort falters.¹⁴² This is analogous to the situation where federal and state courts hold concurrent jurisdiction¹⁴³ and the judgment obtained in one court is res judicata in the other.¹⁴⁴ Whichever rationale a court adopts, the result is the same: a grievant is precluded from multiple litigation.¹⁴⁵

Civil Service—Promotion

Similar restraints exist in the civil service context. In promotion for example, the Civil Service Commission has statutory authority to ascertain what credentials are required for a particular position, to classify newly created positions into their payscale system, and to change positions among the classes and grades when facts so warrant.¹⁴⁶ More important, an employee affected by these decisions may request the Commission to "exercise the authority granted to it by . . . this section and the Commission shall act on the request."¹⁴⁷ Although this language is somewhat ambiguous, the Ninth Circuit has interpreted it to mean that "Congress has vested the Commission with full power to hear employees' complaints of

139. *Morrisette v. Chicago, Burlington & Quincy R.R.*, 299 F.2d 502 (7th Cir. 1961), *cert. denied*, 369 U.S. 874 (1962).

140. *Sigfred v. Pan American World Airways*, 230 F.2d 13 (5th Cir. 1956), *cert. denied*, 351 U.S. 925; *Rossi v. Trans World Airlines*, 350 F. Supp. 1263 (C.D. Cal. 1972).

141. *Rosen v. Eastern Airlines*, 400 F.2d 462 (5th Cir. 1968).

142. *Rossi v. Trans World Airlines*, 350 F. Supp. 1263 (C.D. Cal. 1972).

143. *Washington v. Aerojet-General Corp.*, 282 F. Supp. 517 (C.D. Cal. 1968).

144. *Pennsylvania Gen. Cas. Co. v. Pennsylvania ex rei Schnader*, 294 U.S. 169 (1935).

145. *Rossi v. Trans World Airlines*, 350 F. Supp. 1263 (C.D. Cal. 1972); *see also Bower v. Eastern Airlines*, 214 F.2d 623 (3d Cir. 1954):

Whether we say that the party is bound by his own voluntary election between an administrative and an alternative judicial remedy, or describe the party who initiated the administrative proceeding as estopped from denying its agreed final and binding character, or view this as an application of the rationale of res judicata in a new area, we are satisfied that the court should declare and enforce a rule of repose against the re-examination of plaintiff's claim in this case.

Id. at 626.

146. Classification Act of 1949, 5 U.S.C. § 5112(a) (1966).

147. *Id.* § 5112(b).

non-compliance with the Classification Act and the standards promulgated thereunder, to investigate such complaints and to make a binding adjudication thereon. (5 U.S.C. § 5112(b))."¹⁴⁸ An earlier decision, *Hardy v. Rossell*,¹⁴⁹ tallies with the Ninth Circuit's reluctance to become involved. In that case government employees brought an action challenging the downgrading of their positions by the Commission and asked for an injunction pendente lite. However, the employees also had filed "timely administrative appeals" to the Commission. Reasoning that since the law provided that upon successful administrative appeal the employees would be restored to their former positions with back pay, the court held that plaintiffs were not subject to any irreparable harm and refused to interfere, pending exhaustion of their administrative remedies.

What remains open is whether employees can bypass the Commission channels and file their complaints directly in federal court. Decisions from railway and pilot disputes indicate by analogy that they might have this option,¹⁵⁰ although the authors wonder if it is the proper function of a reviewing court to pass on the qualifications of an employee for a particular position.¹⁵¹ To create extra-judicial panels and fail to require that grievants initiate their cases there does nothing more than duplicate effort and prolong disputes. It would be better to conclude that, absent any contrary statutory provisions, federal review of the Commission's decisions regarding promotion should be narrowed severely. This would square with the settled law that any agency or arbitration decision can be challenged in court when the board acted capriciously or otherwise did not follow its own procedure.¹⁵²

Civil Service—Termination

Similar review machinery exists to handle termination disputes occurring within civil service agencies.¹⁵³ To be sure, a person is entitled to judicial review when he suffers "legal wrong because of agency action or [he is] adversely affected or aggrieved by agency

148. *White v. United States Civil Service Comm'n* 468 F.2d 1357, 1358 (9th Cir. 1972).

149. 135 F. Supp. 260 (S.D.N.Y. 1955).

150. See notes 135-39 *supra* and accompanying text.

151. For a negative answer, see *Bookman v. United States*, 453 F.2d 1263 (Ct. Cl. 1972).

152. See notes 167-72 *infra* and accompanying text; see also *Bielec v. United States*, 456 F.2d 690 (Ct. Cl. 1972).

153. We use the term "agency" as defined in Administrative Procedure Act, 5 U.S.C. § 701(b) (1966).

action within the meaning of a relevant statute."¹⁵⁴ But this does not mean that a grievant automatically has access to the federal courts or that he has any more rights than he had under the previously existing law of judicial review.¹⁵⁵ Limiting language appears in the Administrative Procedure Act,¹⁵⁶ where only six grounds are cited upon which the reviewing tribunal may upset an agency action, finding or conclusion.¹⁵⁷ Underlying these limitations is the fact that like promotion, "[d]ismissal from federal employment is largely a matter of executive agency discretion The scope of judicial review is narrow."¹⁵⁸ It follows that the conclusions of each agency's machinery should be treated the way arbitration agreements are handled in court.

Advantages of Review Board Action

Even if federal judicial review power over these boards were not

154. *Id.* § 702 (1966).

155. See *Olin Industries v. NLRB*, 72 F. Supp. 225 (D. Mass. 1947).

156. 5 U.S.C. § 706 (1966). The Act provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

157. *First Nat'l Bank of Smithfield, N.C. v. First Nat'l Bank of Eastern N.C.*, 232 F. Supp. 725 (E.D.N.C. 1964), *rev'd on other grounds*, 352 F.2d 267 (4th Cir. 1965).

158. *Toohey v. Nitze*, 429 F.2d 1332, 1334 (9th Cir. 1970); see also the Legislative History of the Equal Employment Opportunity Act of 1972, Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, November 1972, at 811: "It has been well-recognized that the same requirements applicable to due process in the courts do not necessarily apply to all other judicial or quasi-judicial proceedings." e.g., *L.B. Wilson Inc. v. F.C.C.*, 170 F.2d 802 (D.C. Cir. 1948): "[D]ue process is not necessarily *judicial process*." (Emphasis added.)

restricted by law, it should be narrowed for three policy reasons. One involves crowded trial schedules, to which we referred earlier.¹⁵⁹ Easing congestion was one reason why Congress established the Equal Employment Opportunity Commission. The legislators were keenly aware of delays, sometimes as much as 35 months, before cases were finally closed.¹⁶⁰ Promotion and termination cases are increasing rapidly. The federal bench should react as Congress did when discrimination filings began to increase: by directing as many cases as possible to specialized tribunals.

The second reason involves the high degree of skill and expertise available through use of specialized review boards. Judges by necessity have to be generalists, with an acceptable but hardly exceptional knowledge of the laws which they interpret. Special arbitrators are familiar with the practical intricacies of their particular occupations.¹⁶¹ They understand the peculiarities that often may be dispositive of a case. The result is that these boards tend to be fair for both sides, and the process itself is quicker and cheaper than full-scale litigation.¹⁶²

Congress has acknowledged the superior knowledge and experience of members of special review boards. For example, in drafting the Administrative Procedure Act, Congress required only that agency decisions be supported by "substantial evidence."¹⁶³ This concept has been defined by the Supreme Court as something less than the weight of the evidence, "and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."¹⁶⁴ The standard was adopted to free reviewing courts

159. *Supra* note 1; see also *Can Arbitration Ease Docket Backlog? A Symposium*, 25 Mo. B.J. 481 (1969).

160. Legislative History of the Equal Employment Opportunity Act of 1972, *supra* note 158, at 802, 804.

161. *Rossi v. Trans World Airlines*, 350 F. Supp. 1263 (C.D. Cal. 1972).

162. See Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681 (1970).

163. Act of June 11, 1946, ch. 324 § 10(e), 60 Stat. 243, 5 U.S.C. § 1009(e) (1964) (codified at 5 U.S.C. § 706 (1966)).

164. *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1965). "We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229. 'It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300." *Id.* at 619-20. "Although these two cases

from the time consuming task of weighing the evidence and also to give "proper respect to the expertise of the administrative tribunal."¹⁶⁵ Even before this legislation, courts placed a premium on agency expertise. Some courts even used the substantial evidence test before the Administrative Procedure Act was passed.¹⁶⁶ The point to be stressed is that when an issue is close, the judgment of experts in the field deserves respect.

None of this means that federal courts should abdicate their responsibility to make sure board decisions are grounded in fairness. They still possess the power to upset a clearly erroneous or fraudulent finding. For example, decisions by Railway or Pilot System adjustment boards are binding on the judiciary unless the board failed to observe due process.¹⁶⁷ One court has said that judicial inquiry ends once it is found that 1) the board's procedure and award conformed to the statute and any agreement, 2) the award confined itself to the letter of submission and 3) the award was not arrived at by fraud and corruption.¹⁶⁸ Other courts have limited review even more severely. In *Bower v. Eastern Airlines*,¹⁶⁹ the court stated that its inquiry into the due process question only required it to "determine whether the Board had given the plaintiff a full and

were decided before the enactment of the Administrative Procedure Act, they are considered authoritative in defining the words 'substantial evidence' as used in the Act. 4 Davis, Administrative Law Treatise Sec. 29.02." *Id.* at 620 n.18.

165. *Id.* at 620. See also, e.g., *F.T.C. v. Mary Carter Paint Co.*, 382 U.S. 46, 48-49 (1965). "[T]he Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act.' *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385. There was substantial evidence in the record to support the Commission's finding. . . . The Court of Appeals should have sustained it." *Id.* at 48-49. But see *Universal Camera Corporation v. NLRB*, 340 U.S. 474 (1951): "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Id.* at 490. This suggests that the bench intervene only in cases of clear error; and the same opinion notes that the special agencies are in general "equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Id.* at 488.

166. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 483, 490 (1951); *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 620 n.19 (1965).

167. *Rossi v. Trans World Airlines*, 350 F. Supp. 1263 (C.D. Cal. 1972); *Rosen v. Eastern Airlines*, 400 F.2d 462 (5th Cir. 1968).

168. *Rosen v. Eastern Airlines*, 400 F.2d 462 (5th Cir. 1968); *Farris v. Alaska Airlines*, 113 F. Supp. 907 (W.D. Wash. 1953).

169. *Bower v. Eastern Airlines*, 214 F.2d 623, 626-27 (3d Cir. 1954).

fair hearing and had exercised its honest judgment in reaching its conclusions and decision on the full record."¹⁷⁰

A parallel rule exists with respect to other federal agencies. Courts must ascertain whether the agency has exceeded its statutory powers or has complied with legal requirements.¹⁷¹ No judge can substitute his opinion for the agency's. He is obligated only to determine if the agency abused its authority by acting capriciously or by depriving someone of a substantive right.¹⁷²

CONCLUSION

Early in this article the authors voiced the belief that most promotion and termination cases involving liberty and property interests do not belong in the federal courts. While such a statement is amenable to a spate of reasons involving public policy, it should be clear that independent of any social reasons, the law supports this contention. The area is admittedly new, and conflicts are bound to emerge.¹⁷³ But the two most recent Supreme Court decisions¹⁷⁴ indicate a restrictive interpretation. This is as it should be. Government is not in the business of assuring happiness; and no public employer is obliged to make certain that a person on his staff will achieve an executive position, let alone remain employable. Making sure that people are treated equitably is burdensome enough. To stretch liberty and property any further departs from fairness and approaches the paternal.

While the statutes indicate that in certain areas independent review boards enjoy primary jurisdiction, equally pressing policy arguments exist. Reducing congestion and utilizing experienced arbitrators are no less compelling than the neutral principles of

170. *Id.*

171. See note 150 *supra*; see also *Mulry v. Driver*, 366 F.2d 544 (9th Cir. 1966).

172. *Bielec v. United States*, 456 F.2d 690 (Ct. Cl. 1972); *Suess v. Pugh*, 245 F. Supp. 661 (N.D. W. Va. 1965). Also note that in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 430 U.S. 923 (1971), the court decided that judges should interfere in the circumstances previously mentioned, but also when "it becomes aware especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." 444 F.2d at 851.

173. See, e.g., the disparity involving "liberty" in *Perkins v. Regents of the Univ. of Cal.*, 353 F. Supp. 618 (C.D. Cal. 1973) and *Franz v. Board of Educ. of Riverside School Dist.* No. 96. No. 72 C151, (N.D. Ill., August 10, 1972).

174. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

administrative due process. The machinery exists, supported by law, to limit the mounting employment cases. What must accompany it is judicial willingness to interpret the Supreme Court strictly and perhaps even to invoke sanctions when it is reasonably believed that a complaint is frivolous.¹⁷⁵ Only then can this new area in the field of employer-employee relations be absorbed painlessly into the federal docket.

175. See, e.g., *Suel v. Addington*, 465 F.2d 889 (9th Cir. 1972), a case in which plaintiff contended that his employment with the State of Alaska was terminated as the result of conspiracy founded upon racial discrimination. The district court found that his claims were frivolous and that his counsel had too vexatiously multiplied the proceedings as to increase costs. It held appellees entitled to costs under 28 U.S.C. § 1927 in the sum of \$100. Affirming this decision, the Ninth Circuit commented that "[u]pon this record this did not constitute abuse of discretion." *Id.* at 889.

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