The Burger Court Opinion Writing Database

Perry v. Sindermann

408 U.S. 593 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1972

No. 70-36 -- Perry v. Sindermann

Dear Potter:

I have your proposed opinion affirming the court of appeals.

My records show 9 votes to reverse, with Bill Douglas and Bill Brennan adding "with modifications."

I have not had a chance to analyze your treatment, but I want to 'flag' this aspect, given that we are all working under the usual June pressure.

Regards,

WEB

Mr. Justice Stewart

Copies to Conference

P.S. I have not yet analyzed your proposed opinion, No. 71-162 -- Regents v. Roth, but a cursory examination suggests that unilateral "expectations" are perhaps being given a status never before acknowledged. The whole purpose of a probationary period could be undermined if the "incompetents" made it a practice -- as is commonly done -- of picking a "First Amendment quarrel" with the college president or dean in the second half of the probationary year. For me, a least, this needs some careful examination because of its impact on contract concepts.

(7)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 21, 1972

MEMORANDUM TO THE CONFERENCE:

No. 70-36 -- Perry v. Sindermann
No. 71-162 -- Board of Regents v. Roth

Dear Potter:

I agree with most of your new drafts in Perry and Roth, but I have problems with the definition of the "property" interest that is protected by procedural due process. Although your opinions citeCorbin, you effectively direct the creation of a federal common law of implied contracts. It seems to me, though, that the issue whether teachers -- and all other state employees -- have a property interest in re-employment, which should be protected by procedural due process, should be determined under state contract law. This, of course, would include the law of implied contracts. In other areas (e.g., welfare rights in Goldberg v. Kelly, drivers' licenses in Bell v. Burson, and liberty on parole in Morrissey v. Brewer), the Court has effectively created the substantive right in providing the procedural right but not on a contract base. It has ignored the absence of a substantive right under state law. But, in the situation of state employment, it seems to me that the substantive right should be defined by state contract law. Here the state is acting as employer, an area in which discretionary action is generally recognized as legitimate. States enter into contracts with employees as a result of arms-length negotiation. And there is an existing body of state law governing the rights and duties of such relationships. In this context, I see no justification for the creation of a federal common law of implied contract right to re-employment and I question whether we have sufficiently explored the ramification of Perry in particular.

I hope to get out a memo today on this.

Regards,

WEB

Mr. Justice Stewart

Copies to Conference

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Supreme Court of the United States
Washington, D. C. 20543

June 21, 1972

CHAMBERS OF
THE CHIEF JUSTICE

No. 70-36 -- Perry v. Sindermann
No. 71-162 - Board of Regents v. Roth

Dear Potter:

I find that while the current draft circulated yesterday eliminates some problems, that other basic problems remain.

In effect, the Court would recognize a federal common law of contracts of teachers (and presumably all other public employees) enforceable in federal courts.

Historically the law of contract is a state concern and I have difficulty in carving teachers out as an exception. Added to that, the treatment of "expectations" opens up a whole new area of uncharted concepts, that I find inappropriate for federal jurisdiction. If the concept of "expectations" was circumscribed, as perhaps your opinion contemplates, by traditional ideas of implied contracts, this would be less troublesome, but even there I have problems with our defining basis contract concepts.

I can accept the idea that due process calls for an administrative hearing at the college level on a claim that non-renewal is a consequence of exercising First Amendment rights, if the further remedy were confined to state courts in the first instance. But I cannot read the 14th Amendment and implementing statutes as vesting jurisdiction on Federal Courts to pass on every non-renewal of a probationary teacher, policeman, fireman, etc.

An added difficulty for me is the suggestion that a teacher cannot be restricted as to what he or she says. I accept this as to speech outside the school, but surely a teacher of chemistry or biology is not free to lecture a class on his views of Rhodesia, South Africa and disarmament or relations with Russia and China.

Teachers are hired for specific purposes and for me they can be confined to expression on that subject unless they do it on their own time.

I suspect that my concern arises partly because I have difficulty seeing the outer boundaries of the proposed solution. I have an uneasy feeling that something like reverse Erie implications are lurking in the proposed approach and I do not want to "federalize" relationships traditionally governed by state law in state courts.

I do not know if anyone contemplates writing on this, but I will canvass this subject as soon as anyone else indicates troubles along the lines I have expressed.

Regards,

WEB

Mr. Justice Stewart

Copies to Conference

P.S. Your memorandum arrived after the above was written. It may help but it does not reach the other point, note 14, last sentence, at p. 11, that "in or out of his classes" he can say what he wants. I cannot imagine you mean there is a free speech right to promote or oppose candidates or issues in a chemistry class. If a teacher wants to make a speech in the park, he is, of course, free, but not in classes where he has a specific mission.

In haste,

W. E. B.

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: _____ 1972

Recirculated: _____

No. 70-36 -- Perry v. Sindermann

No. 71-162 - Board of Regents v. Roth

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the Court's judgments and opinions in Perry and Roth, but there is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to reemployment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for non-renewal of his contract. Thus whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. The Court's opinion makes this point very sharply: "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." Board of Regents v. Roth, ante, at pp. 12-13.

atlh
Pre.

Because the availability of the right to a prior administrative hearing turns on a question of state law, the issue of abstention will arise in future cases contesting whether a particular teacher is entitled to a hearing prior to nonrenewal of his contract. If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 27, 1972

Dear Potter:

In No. 70-36 - Perry v. Sindermann,

please join me in your opinion.

W. O. D.

Mr. Justice Stewart

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 26, 1972

Dear Potter:

I have your memorandum covering the seven cases being held for Nos. 70-36 and 71-162.

Would you kindly note for the Journal that in No. 70-141 I would grant.

In No. 70-354 I would grant.

In No. 71-249 I would grant.

In No. 71-430 I would grant.

In No. 71-819 and No. 71-946 I would grant each petition and affirm each judgment.

In No. 71-6259 I would grant.

In No. 71-5790 I would be content if the case were remanded solely on Lynch v. Household Finance, No. 70-5058.

W. O. D.

Mr. Justice Stewart

71-162
Oct 71
Wm Douglas

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From:

Circulated: 6/26/72

Recirculated:

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 70–36 & 71–162

Charles R. Perry et al., Petitioners, 70–36 *v.* Robert P. Sindermann, etc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
The Board of Regents of State Colleges et al., Petitioners, 71–162 *v.* David F. Roth, etc.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Although I agree with Part I of the Court's opinion in No. 70–36, I also agree with my Brother MARSHALL that "respondent[s] [were] denied due process when [their] contract[s] [were] not renewed and [they were] not informed of the reasons and given an opportunity to respond." *Post*, at —. Since respondents were entitled to summary judgment on that issue, I would affirm the judgment of the Court of Appeals in No. 71–162 and, to the extent indicated by my Brother MARSHALL, I would modify the judgment of the Court of Appeals in No. 70–36.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

1st DRAFT

Circulated: MAY 23 1972

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70-36

Charles R. Perry et al., Petitioners, *v.* Robert P. Sindermann, etc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 6, 1972

Re: No. 70-36 - Perry v. Sindermann
No. 71-162 - Board of Regents v. Roth

Dear Chief,

This is in response to your note of today about these cases, which were argued together and considered together in our Conference discussion.

My understanding of the views expressed at the Conference was that all of us, with the possible exception of Bill Rehnquist, agreed that a state university could not refuse to rehire a faculty member (or, indeed, any other employee) if the basis of that refusal were the faculty member's exercise of the right to free speech guaranteed by the First and Fourteenth Amendments. My further understanding of the Conference discussion was that a majority of us agreed that a state university faculty member has no constitutional right to reemployment when his contracted for period of employment has ended. Furthermore, he has no due process right to a hearing if he is not reemployed, unless he can show that he has somehow been deprived of liberty or property. He would, therefore, have such a right if the university had impaired his liberty by (1) personally stigmatizing him, or (2) foreclosing substantial employment opportunities elsewhere. He would also have a right to a hearing if the university had deprived him of property because, in fact, by reason of the actual "policies and practices of the institution," he was entitled to continued employment, in the absence of "cause" to terminate it.

It was upon this understanding that the opinions in these two cases were written, after you assigned them to me. This led to a reversal of the Court of Appeals' judgment in favor of the respondent teacher in Roth. It led to a disagreement with much of the Court of Appeals' rationale in Perry, and a remand to the District Court.

I continue to adhere to the views reflected in the two opinions I have circulated, believing that they no more than reflect many previous decisions of the Court. It may be, however, that I have misunderstood the views of the other Justices. As I understand Bill Douglas' dissenting opinion in Roth, he thinks that a teacher, as contrasted with other governmental employees, has a First Amendment right to reemployment simpliciter. With that I cannot and do not agree. It is my impression that another member of the Court has the tentative view that there is a "property" right in any governmental job vacancy. With that I also wholly disagree.

The proposed opinions in this case were circulated two weeks ago, on May 23. At our Conference on May 29 I suggested that I might have misapprehended the views of a majority of the Conference in these cases, and that if I had, the opinions should be reassigned to somebody else. I renew that suggestion now.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

P.S. - I do not think the Due Process Clause entitles a person to a hearing simply because his "unilateral" expectations have been defeated. As promptly as possible, I shall recirculate the opinions with language modifications designed to eliminate any misapprehension on that score.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

2nd DRAFT

Circulated: _____

Recirculated: JUN 7 1972

SUPREME COURT OF THE UNITED STATES

No. 70-36

Charles R. Perry et al., Petitioners, *v.* Robert P. Sindermann, etc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 20, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-36, Perry v. Sindermann
No. 71-162, Bd. of Regents v. Roth

As you will note, both of these proposed opinions have been substantially recast.

P.S.

/ Changes Throughout

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

4th DRAFT

Circulated: _____

Recirculated: JUN 20 1972

SUPREME COURT OF THE UNITED STATES

No. 70–36

Charles R. Perry et al., Petitioners, *v.* Robert P. Sindermann, etc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1972

MEMORANDUM TO THE CONFERENCE

Seven cases have been held for our decisions in No. 70-36, Perry v. Sindermann, and No. 71-162, Board of Regents v. Roth. They appear on page 14 of this week's Conference List.

(1) In No. 70-141, Hodgin v. Noland, the petitioner was for two years a librarian in a public library. He was hired by the City without any sort of contract. Two years later, he was fired without any sort of prior hearing. He brought a 1983 action, alleging that his discharge was based on his exercise of constitutional rights and that the failure to provide him a hearing violated procedural due process. The jury in federal district court found that the petitioner's discharge was not based on his activities which he claimed were constitutionally protected. Thus the only real issue in the case now is the procedural due process issue. In the absence of a written contract "or other arrangement limiting the right of termination," the Court of Appeals held that the petitioner had not been deprived of an interest protected by procedural due process. Although the circumstances here are substantially different from those in Roth and Perry, I believe that the Court of Appeals' holding is sufficiently close to our proposed holdings in those cases that I intend to vote to deny certiorari.

(2) In No. 70-354, Fooden v. Board of Governors, the petitioners are two non-tenured state college professors whose one-year contracts were not renewed. They brought this action in

Wm Douglas Oct 71 70-162

a state court, claiming that their nonrenewal was based on their union activity and that they had been denied their procedural due process right to a statement of reasons and a hearing. Summary judgment was granted against them on both issues. The courts below held that the petitioners had failed to raise a "material issue of fact" regarding their claim that the nonrenewal was based on protected activity. The petitioners had simply stated their mere "information and belief" that that was the basis of their non-renewal; they did not produce any more hard information on discovery. On this record, the petitioners' first amendment claim is hardly clearly presented. And the Illinois Supreme Court seems to have rejected the due process claim in a manner consistent with the proposed holdings in Roth and Perry. Accordingly, I intend to vote to deny certiorari.

(3) In No.71-249, Orr v. Trinter, the petitioner is a non-tenured public high school teacher. He argues that nonrenewal of his contract without a hearing violated procedural due process. The Court of Appeals held that there had been no violation of procedural due process. Again, because this holding is consistent with Roth and Perry, I intend to vote to deny certiorari.

(4) In No. 71-430, Crabtree v. Board of Education, the petitioner is a non-tenured public high school teacher. His contract was not renewed, and he was not afforded an opportunity for a prior hearing. He brought this action in state court, alleging a denial of procedural due process. The State Supreme Court rejected this claim. Again, I intend to vote to deny certiorari.

(5) In No. 71-819, Thomas v. Shirck, and No. 71-946, Shirck v. Thomas, the issue once again is whether the nonrenewal of the contract of a non-tenured public high school teacher must be preceded by opportunity for a hearing. The

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

Court of Appeals, relying on its prior decision in Roth, held that there is a right to a hearing in these circumstances. I intend to vote to vacate this decision and remand in light of our decision in Roth.

(6) In No. 71-6259, McEntaggart v. Cataldo, the petitioner is a non-tenured state college professor whose contract was not renewed. He was given a statement of reasons for his non-retention, but he was not given an opportunity for a hearing. The Court of Appeals held that this did not violate his right to procedural due process. I intend to vote to deny certiorari.

(7) In No. 71-5790, Canty v. Board of Education, the petitioner is a "regular substitute" teacher in a public junior high school. It is not clear whether he had any form of contractual protection, but it appears that he did not. He was discharged from his post without a prior hearing. The petitioner brought this 1983 action, claiming that his procedural due process rights had been abridged. The district court dismissed the suit, and the Court of Appeals affirmed the dismissal on the ground that the petitioner had not alleged that an interest in "personal liberty" was at stake, and that mere "property rights" are not covered by 1343(3) jurisdiction. This decision must be vacated and remanded in light of our decision in Lynch v. Household Finance Corp., No. 70-5058, rejecting the "liberty"/"property" distinction under 1343(3). Since the existence vel non of any kind of contract is not wholly clear, I would also remand in light of Roth and Perry while we're at it.

P.S.

P.S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-36, Perry v. Sindermann
No. 71-162, Board of Regents v. Roth

The changes indicated on the enclosed pages are in response to suggestions from Bill Rehnquist. The changes will be made in the next prints.

P.S.

case, however, there is no suggestion whatever that the respondent's interest in his "good name, reputation, honor or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other formal disability that foreclosed a range 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. For "[t]o be deprived not only of present government employment but of future opportunity for it is no small injury . . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 185 (Jackson, J., concurring). See *Truax* v. *Raich,* 239 U. S. 33, 41. The Court has held that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] due process," *Schware* v. *Board of Bar Examiners,* 353 U. S. 353 U. S. 232, 238, and, specifically, in a manner that denied the right to a full prior hearing. *Willner* v. *Committee on Character,* 373 U. S. 96, 103. See *Cafeteria Workers* v. *McElroy, supra,* at 898. In the present case, however, this principle does not come into play.[13]

[13] The District Court made an *assumption* "that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." 310 F. Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that "the substantial adverse effect non-retention is likely to have upon career interests of an individual professor" amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guaranties. 446 F. 2d, at 809. But the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make

But even assumin, arguendo that su a "substantial adverse effect" under these circu - stances would cor - stitute a State imposed restriction on liberty, the record contains no support for these assumptions.

though not formalized in writing, may be "implied." 3 Corbin on Contracts, §§ 561–572A. Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

A teacher, like the respondent, without formal tenure might be able to show—from the words and conduct of his superiors, from other surrounding circumstances and from past usage—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See Byse & Joughin, Tenure in American Higher Education 17–28.

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement "under the policies and practices of the institution." 430 F. 2d, at 943. Proof of such a property interest would not, of course, entitle

* We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as State law . . . ." Board of Regents v. Roth, ante, at 12. If it is the law of Texas that a teacher in the respondent's position has no contractual or other

claim to j tenure, the respondent' claim would be defeated.

larly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower* v. *Board of Education,* 350 U. S. 551, and college professors and staff members dismissed during the terms of their contracts, *Wieman* v. *Updegraff,* 344 U. S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without a hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell* v. *Higgenbotham,* 403 U. S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. 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.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings—rules or understandings that secure certain benefits

that stem from an independent source such as State law

to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." *Id.,* at 123.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-36, Perry v. Sindermann
No. 71-162, Bd. of Regents v. Roth

The changes indicated on the enclosed pages of these opinions are in response to Lewis Powell's suggestions. These changes will be incorporated in the next prints.

P.S.

Thus the respondent offered to prove that a teacher, with his long period of service, at this particular State 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.

We have made clear in *Roth, ante,* at ——, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" is a constitutional concept. It denotes a range of interests that are secured by "existing rules or understandings." *Id.,* at ——. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*

mutually explicit

A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. By analogy, the law of contracts long has employed a process by which agreements,

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probationary period in the academic profession is extended beyond the normal maxmium of seven years).

. . . . .

"(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities."

The respondent alleges that, because he has been employed as a "full-time instructor" or professor within the Texas College and University System for 10 years, he should have "tenure" under these provisions.

though not formalized in writing, may be "implied." 3 Corbin on Contracts, §§ 561–572A. Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

A teacher, like the respondent, ~~without formal tenure might be able to show from the words and conduct of his superiors, from other surrounding circumstances and from past usage that he has a legitimate claim of entitlement to job tenure.~~ Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See Byse & Joughin, Tenure in American Higher Education 17–28.

who has held his position fo a number of yea might be able to show from th circumstances o this service -- and from other relevant facts that he has a a legitimate claim of entitl ment to job tenure.

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement "under the policies and practices of the institution." 430 F. 2d, at 943. Proof of such a property interest would not, of course, entitle

IV

~~Our analysis of the respondent's constitutional rights in this case does not in any way indicate a view that provision of an opportunity for a hearing and a statement of reasons for nonretention would be inappropriate or unwise in public colleges and universities. Indeed, these basic procedural safeguards might be most salutary.~~[17]

~~But it is a written Constitution that we apply~~. We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities. 17/ For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

---

[17] See, *e. g.*, Report of Committee A on Academic Freedom and Tenure, "Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," 56 AAUP Bulletin 21 (Spring 1970).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1972

70-36 - Perry v. Sindermann

Dear Chief,

In order to make perfectly clear that the opinion in Sindermann does not undertake to create "a federal common law of implied contracts," I plan to add the following footnote at the end of the first full paragraph on page 9 of the opinion:

> [1] We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings. . . ." Board of Regents v. Roth, ante, at 12. And the ultimately governing "rules" in a case such as this one are the rules of state law. It may be that the law of Texas is clear that a teacher in the respondent's position has no contractual or other claim to job tenure. If that is the case -- if the petitioners can show on remand that state law specifically rejects any claim of any kind of "property" interest in these circumstances -- then the respondent's claim would be defeated.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

pp 889

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Stewart, J.

Circulated: _____

Recirculated: JUN 22 1972

SUPREME COURT OF THE UNITED STATES

No. 70-36

Charles R. Perry et al., Petitioners, *v.* Robert P. Sindermann, etc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

pp 3, 4, 8, 10
(minor)

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

6th DRAFT

Circulated: _____

Recirculated: JUN 26 1972

SUPREME COURT OF THE UNITED STATES

No. 70-36

Charles R. Perry et al., Petitioners, *v.* Robert P. Sindermann, etc. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 28, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 23, 1972

Re: No. 70-36 - Perry v. Sindermann

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

1st Draft
No. 70-36

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Charles R. Perry et al., Petitioner) On Writ of Certiorari
) to the United States
v.) Court of Appeals for
) the Fifth Circuit.
Robert P. Sindermann, etc.)

From: Marshall, J.

Circulated: 6-22-72

Recirculated: _____

(June ___, 1972)

MR. JUSTICE MARSHALL, concurring in the judgment.

Respondent was a teacher in the state college system of the State of Texas for a decade before the Board of Regents of Odessa Junior College decided not to renew his contract. He brought this suit in federal district court claiming that the decision not to rehire him was retaliation for his public criticism of the policies of the college administration, and that because the decision was made without giving him a statement of reasons and a hearing, it denied him procedural due process as guaranteed by the Fourteenth Amendment. Only the latter claim is before us.

The District Court granted summary judgment for petitioners, but the Court of Appeals reversed. The Court affirms the judgment of the Court of Appeals remanding the case to the District Court for a full determination whether respondent could claim entitlement to re-employment "under the policies and practices of the institution." I agree that the case should be remanded to the District Court, but for the reasons stated in

Changes Throughout

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2d Draft
No. 70-36

Charles R. Perry et al., Petitioner) On Writ of Certiorari
) to the United States
v.) Court of Appeals for
) the Fifth Circuit.
Robert P. Sindermann, etc.)

Circulated: _____

Recirculated: 6/22/72

MR. JUSTICE MARSHALL, concurring in the judgment and in Part I of the opinion of the Court.

Respondent was a teacher in the state college system of the State of Texas for a decade before the Board of Regents of Odessa Junior College decided not to renew his contract. He brought this suit in federal district court claiming that the decision not to rehire him was retaliation for his public criticism of the policies of the college administration in violation of the First Amendment, and that because the decision was made without giving him a statement of reasons and a hearing, it denied him the due process of law guaranteed by the Fourteenth Amendment. The District Court granted summary judgment for petitioners, but the Court of Appeals reversed and remanded the case for further proceedings. This Court affirms the judgment of the Court of Appeals.

I agree with Part I of the Court's opinion holding that respondent has presented a bona fide First Amendment claim that should be considered fully by the District Court. But, for the reasons stated in my dissenting opinion in Board of Regents v. Roth, No. 71-162, ante, at ___, I would modify the judgment of the Court of Appeals to direct the District Court to enter summary judgment for respondent entitling him to a statement of

no chang

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Printed

1st DRAFT

From: Marshall, J.

Circulated:

Recirculated: JUN 26 19

SUPREME COURT OF THE UNITED STATES

No. 70-36

Charles R. Perry et al., Petitioners, *v.* Robert P. Sindermann, etc. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1972]

MR. JUSTICE MARSHALL, concurring in the judgment and in Part I of the opinion of the Court.

Respondent was a teacher in the state college system of the State of Texas for a decade before the Board of Regents of Odessa Junior College decided not to renew his contract. He brought this suit in Federal District Court claiming that the decision not to rehire him was retaliation for his public criticism of the policies of the college administration in violation of the First Amendment, and that because the decision was made without giving him a statement of reasons and a hearing, it denied him the due process of law guaranteed by the Fourteenth Amendment. The District Court granted summary judgment for petitioners, but the Court of Appeals reversed and remanded the case for further proceedings. This Court affirms the judgment of the Court of Appeals.

I agree with Part I of the Court's opinion holding that respondent has presented a bona fide First Amendment claim that should be considered fully by the District Court. But, for the reasons stated in my dissenting opinion in *Board of Regents* v. *Roth*, No. 71-162, *ante*, at —, I would modify the judgment of the Court of Appeals to direct the District Court to enter summary judgment for respondent entitling him to a statement of reasons why his contract was not renewed and a hearing on disputed issues of fact.

WM. Brennan

0971

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1972

Re: No. 70-36 - Perry v. Sindermann

Dear Potter:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Stewart

cc: The Conference

June 21, 1972

Re: No. 70-36 Perry v. Sinderman
No. 71-162 Board of Regents v. Roth

Dear Potter:

Your excellent opinions have been strengthened, I think, by the changes circulated on yesterday.

I may talk to you further, and to the Conference, as to whether I should participate in these cases. But whether I do or not, it occurred to me in reading them over last night that you might take a look at these suggestions:

1. In Roth (p. 14), I would prefer not to commend expressly the "provision of an opportunity for a hearing" with respect to every teacher and professor situated as was Roth. My recollection is that an amicus brief from the City of New York indicated that there are thousands of non-tenured teachers in the city educational system, with substantial "turnovers" each year. I would think a statement of reasons for non-retention would be appropriate, but once a school or college adopted the practice - however voluntarily - of holding a hearing this in itself might become such an "expectation" as to create rights.

In short, I would omit reference to the desirability of affording an opportunity for a hearing.

2. In Sinderman, it seems to me that you go beyond Roth in the description of the type of "property" interest that might give

rise to due process rights. Compare pages 8 and 9 of Perry with what seems to me to be the more restrictive language in Roth.

I appreciate, of course, that the facts in the two cases vary significantly. Sinderman had been on the faculty for a number of years, and the paragraph in the Faculty Guide was certainly relevant. Yet, the general articulation of the "property interest" concept seems to me to go beyond the facts.

For example, on page 8, last sentence in the first full paragraph refers to "rules or understandings". I would think the latter term, without qualification, would unduly expose the college. You might consider changing it to "rules or mutually explicit understandings".

I have another suggestion which I will deliver to you, as it is a little difficult to explain without prolonging this memorandum.

* * * * *

The foregoing, of course, are merely for your consideration. I have not given these cases the care and attention which you obviously have.

Sincerely,

Mr. Justice Stewart

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1972

Re: No. 70-36 Perry v. Sindermann
No. 71-162 Board of Regents v. Roth

Dear Potter:

This will confirm, for the information of the Conference, our conversation shortly after your opinions were first circulated.

In view of the pendency in the Western District of Virginia of the Radford College case (in which I was chief counsel for the Commonwealth of Virginia), I would prefer to remain out of these cases - now that I have seen these opinions. While the factual situation in Radford was different (involving a salary increase rather than employment or re-employment), I think it is quite likely that counsel for both sides will find some language in your opinions which they will rely upon in argument.

If my vote is needed to decide these cases, I would like to discuss my position with the Conference. I may add, in the interest of a full disclosure, that if I were to vote I would join your opinions with the changes incorporated as of June 21.

Sincerely,

Lewis

Mr. Justice Stewart

cc: The Conference

In #36

June 21, 1972

Re: No. 70-36 - Perry v. Sindermann
No. 71-162 - Bd. of Regents v. Roth

Dear Potter:

The proposed footnote at page 9 of Perry v. Sindermann, of which I received a draft this afternoon, just about solves my problem with Sindermann. If you could see your way clear to make one change in that draft footnote, as suggested below, and two changes in Roth, I will join both.

Sindermann. I would like to see if the last two sentences in the draft ~~footnote~~ could be elided into something like the following:

> "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."

Roth. Page 12. Could you add, in order to make the cross-referencing complete, at the end of the sentence

beginning "he must, instead . . ." in the paragraph which both begins and ends on page 12, the following language so that that sentence would read:

> "He must, instead, have a legitimate claim of entitlement to it which stems from an independent source such as State law."

On page 9, footnote 13, there is an intimation that if either the District Court's assumption as to nonretention, or that of the Court of Appeals, was supported in the record, that would be sufficient to make out a deprivation of liberty under the cases cited in the text. I would prefer to see that point left open, and I do not get any emanations of a contrary intent on your part from the rest of the opinion. Could you, after the word "but", beginning a sentence on the fourth line from the bottom of the page in this footnote, insert the following expression, so that the sentence would read:

> "But even assuming arguendo that such a 'substantial adverse effect' under these circumstances would constitute a State imposed restriction on liberty, the record contains no support for these assumptions."

Sincerely,

Mr. Justice Stewart

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 22, 1972

Re: No. 70-36 - Perry v. Sindermann
No. 71-162 - Bd. of Regents v. Roth

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to the Conference