The Burger Court Opinion Writing Database

Board of Regents of State Colleges v. Roth

408 U.S. 564 (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 12, 1972

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

MEMORANDUM TO THE CONFERENCE:

In these two cases I confess to considerable confusion and I attribute this to myself and the problem, not the proposed opinions.

The field is one of difficulty and sensitivity embracing, as it does, the broad spectrum of teachers' (and public employee) tenure, academic freedom, etc.

With certain exceptions for the First Amendment aspect, why is this not a matter of contract? Ordinary contract doctrine would not give either contracting party any right beyond the stipulated term. The contract rights may be intertwined with § 1983 rights in the sense that a federal court action is available; the claim would be that a violation of § 1983 arises out of exercise of First Amendment rights. I assume this would call for an evidentiary hearing in federal courts.

Apart from § 1983 claims, state courts are available for a traditional breach of the sort of "implied" contract these teachers seem to assert.

If the proposed opinions mean only that a teacher on a one-year contract is entitled to a hearing (administrative) at the college level, if it is alleged that a renewal would have been made but for a critical speech or speeches made by the teacher, I think I would not have too much trouble with that result. At present I cannot spell out the outer boundaries of the holdings, and if I were advising a state college, I would not know what to tell them to do.

If the holdings mean that in reality one-year contracts are meaningless, I could not go along.

Regards,

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 71-162

Circulated: 5-25

Recirculated:

The Board of Regents of State Colleges et al., Petitioners, *v.* David F. Roth, etc.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Respondent like Sindermann in the companion case had no tenure under Wisconsin law and, unlike Sindermann he had had only one year of teaching at Wisconsin State University—Oshkosh—where from 1968–1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 Black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the Black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in *Sindermann*, an action was started in a Federal District Court under 42 U. S. C. § 1983* claim-

*Section 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5, 7, 8

4th DRAFT

From: Douglas, J.

Circulated:

Recirculated: 5-29

SUPREME COURT OF THE UNITED STATES

No. 71-162

The Board of Regents of State Colleges et al., Petitioners, *v.* David F. Roth, etc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Respondent Roth, like Sindermann in the companion case, had no tenure under Wisconsin law and, unlike Sindermann, he had had only one year of teaching at Wisconsin State University—Oshkosh—where from 1968–1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 Black students without determining individual guilt. He also criticized the unversity's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the Black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in *Sindermann,* an action was started in a Federal District Court under 42 U. S. C. § 1983 [1] claim-

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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. 71–162

The Board of Regents of State Colleges et al., Petitioners, *v.* David F. Roth, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

[1] The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: "*David F. Roth* is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) *Oshkosh* as (Rank:) *Assistant Professor* of (Department:) *Political Science* this (Date:) *first* day of (Month:) *September* (Year:) *1968.*" The notice went on to specifiy that the respondent's "appointment basis" was for the "academic year." And it provided that "[r]egulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." See n. 2, *infra*.

pp 9-12, 14-15

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.

3rd DRAFT

Circulated: _____

Recirculated: JUN 7 1972

SUPREME COURT OF THE UNITED STATES

No. 71-162

The Board of Regents of State Colleges et al., Petitioners, *v.* David F. Roth, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

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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.

5th DRAFT

Circulated: _____

Recirculated: JUN 20 1972

SUPREME COURT OF THE UNITED STATES

No. 71-162

The Board of Regents of State Colleges et al., Petitioners, *v.* David F. Roth, Etc.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

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pp 2, 4, 9, 11-14

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

6th DRAFT

From: Stewart, J.

Circulated: _____

Recirculated: JUN 22 1972

SUPREME COURT OF THE UNITED STATES

No. 71–162

The Board of Regents of State Colleges et al., Petitioners, *v.* David F. Roth, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

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M—

pp 9 6 14
(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.

7th DRAFT

Circulated: _____

Recirculated: JUN 26 1972

SUPREME COURT OF THE UNITED STATES

No. 71-162

The Board of Regents of State Colleges et al., Petitioners, *v.* David F. Roth, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 28, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

[1] The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: "*David F. Roth* is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) *Oshkosh* as (Rank:) *Assistant Professor* of (Department:) *Political Science* this (Date:) *first* day of (Month:) *September* (Year:) *1968*." The notice went on to specifiy that the respondent's "appointment basis" was for the "academic year." And it provided that "[r]egulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." See n. 2, *infra*.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 23, 1972

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

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

1st Draft
No. 71-162

The Board of Regents of State Colleges et al., Petitioners	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit
v.	
David F. Roth Etc.	

(June ____, 1972)

MR. JUSTICE MARSHALL, dissenting.

Respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for the 1968-69 academic year. During the course of that year he was told that he would not be rehired for the next academic term, but he was never told why. In this case he asserts that the due process clause of the Fourteenth Amendment to the United States Constitution entitled him to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[1/] This claim was sustained by the District Court which granted respondent summary judgment, 310 F.Supp. 972, and by the Court of Appeals which affirmed the judgment of the District Court. 446 F.2d 806. This Court today reverses the judgment of the Court of Appeals and rejects respondent's claim. I dissent.

While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented,

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1/ Respondent has also alleged that the true reason for the decision not to rehire him was to punish him for certain statements critical of the University. As the Court points out, this issue is not before us at the present time.

No change

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–162

The Board of Regents of State Colleges et al., Petitioners, *v.* David F. Roth, Etc.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1972]

MR. JUSTICE MARSHALL, dissenting.

Respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for the 1968–1969 academic year. During the course of that year he was told that he would not be rehired for the next academic term, but he was never told why. In this case he asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitled him to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[1] This claim was sustained by the District Court which granted respondent summary judgment, 310 F. Supp. 972, and by the Court of Appeals which affirmed the judgment of the District Court. 446 F. 2d 806. This Court today reverses the judgment of the Court of Appeals and rejects respondent's claim. I dissent.

While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented, and also with those portions of Parts II and III of the Court's opinion that assert that a

[1] Respondent has also alleged that the true reason for the decision not to rehire him was to punish him for certain statements critical of the University. As the Court points out, this issue is not before us at the present time.

B

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1972

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

Dear Potter:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Stewart

cc: The Conference

May 31, 1972

Re: 71-162 - Board of Regents v. Roth
70-36 - Perry v. Sindermann

Dear Potter:

If I had known at the time I told you I would send you this note how discursive and probably unhelpful it would turn out to be, I probably would not have burdened you with it.

As to the holdings in both Perry and Roth to the effect that a public university may not discharge any employee, tenured or not or teacher or not, in violation of that employee's First Amendment rights, I of course agree completely. My misgivings begin when your opinions turn to the issue of procedural due process.

The Liberty Issue.

In Roth, page 9, you say that "an impairment of future employment opportunities is a deprivation of the 'very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure'". You go on to say that a State "cannot foreclose a range of opportunities 'in a manner that contravenes due process'", citing Schware and Willner. I have thought these cases to stand for the proposition that where the State seeks to regulate access to an entire calling or profession, it is subject to the requirements of procedural due process in doing so. Cafeteria Workers v. McElroy so characterized them, 367 U.S. at 896. I think it is arguable, however, from the language on page 9, in the context of Roth, that the government as an employer may under some

circumstances not discharge an employee without granting notice and hearing if the result of that discharge drastically affected "the respondent's future employment prospects", page 12, and that if the record did contain support for the proposition that failure to rehire Roth would have a "substantial adverse effect" upon his career interests, he might well be entitled to a hearing because he would then be denied liberty without due process of law.

I think these are extremely broad and open ended intimations that are not supported by prior case law. As I understand it, you are stating that apart from the "stigma" line of cases, page 9, and the free speech cases, a government employee may have a separate procedural due process right by virtue of the liberty guaranteed him by the Fourteenth Amendment if he can show that non-retention "drastically" curtails his future employment opportunities, or has a "substantial adverse effect" upon his career interests.

As support for my contention, I appeal to that landmark constitutional case decided by a Justice of this Court who is still sitting, Cafeteria Workers v. McElroy. There you said, citing a long line of authorities:

> "The Court has consistently recognized that an interest closely analogous to Rachel Braxmer's, the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." 367 U.S. at 896.

The Property Issue.

At page 12 of Roth, you turn from liberty to property. I agree with your conclusion in that portion of the opinion, but have some reservations about the way that the issue of

"property" is treated in Perry. At page 8 of Perry, you say that property embraces "claims and expectations upon which people rely in their daily lives", referring to Roth, and that if a person can show that he had claim to "legitimate expectation of a benefit, based on 'existing legal or customary rules or understandings', he may have a property interest in that benefit".

I have some difficulty as an original proposition with the notion that a teacher having contract by tenure has a federal constitutional right to a notice and hearing before he may be dismissed, but I think the cases you cite in your opinion do support that proposition, at least in the First Amendment area. But as I read the language I have just referred to on page 8 of Perry, you go further than simply saying that the teacher there may have had a legally enforceable contract right against the university, as a result of representations and understandings by the latter, that was the contractual equivalent of tenure. You describe a species of interest less than an enforceable contract right which is nonetheless "property" under the Fourteenth Amendment.

If this is true for teachers, it is presumably true for all employees of the federal government, and the various State and municipal governments -- if any of them can show an "expectation upon which people rely in their daily lives" that would be kept on in government employment, he may not be dismissed without notice and hearing, even though he had no contractual right whatever to be retained. If this be the law, based on the property aspect of the Fourteenth Amendment, I do not see how it can logically be distinguished from the "expectation" of a job printer who has received some portion of the business of some federal, state, or municipal agency over a period of years, and from whom the business has been withdrawn. I would think that he, too, would have the same sort of "property" interest in his contract to perform printing

services as a teacher would have in his "contract" to perform teaching services, and that each would be entitled to notice and hearing.

I think these results are quite open ended, and go a good deal beyond Cafeteria Workers v. McElroy. I suppose the long and the short of it is that you want to plow some new ground here, and that I do not.

We are taking our daughter Nancy with us to Phoenix tomorrow, and she is planning to stay with the Carrolls. If David is still there, we may have a report on him for you when we return Sunday.

Best regards.

Sincerely,

WHR

Mr. Justice Stewart