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8

THE LAW OF PUBLIC EMPLOYMENT

Certain basic principles in the law of public employment apply to anyone who works for government at nearly any level. Those principles could be demonstrated by any line of cases, but because the reader is presently in college and consequently familiar with some of the terminology, we will begin by examining cases in the field of education.

In Chapter 2, which dealt with executive control over agencies through the power of appointment and removal, we learned that only a limited number of policy-making and advisory-level employees serve at the pleasure of the executive. The discussion that follows focuses instead on civil service employees and those who normally do not make policy. Merit, rather than political party considerations, is supposed to guide personnel decisions regarding the employees discussed in the section that follows. Although general principles of the law of public employment will be elucidated, remember, too, that these may be modified from jurisdiction to jurisdiction by labor union contracts and statutes.

Case in Point:
Hale v. Walsh
747 P.2D 1288 (1987)

Dr. Thomas Hale gave up his tenured teaching position at a state university in Louisiana in 1977 to become the untenured chairman of the Department of History at Idaho State University. As part of his teaching load, he was assigned the history seminar that all seniors majoring in history had to take. One student who had transferred to Idaho State University got to the spring semester of his senior year and still had not enrolled in the senior seminar. That spring semester, he was scheduled to student-teach, a role that conflicted with the seminar, and after receiving his degree, he was to begin a teaching position at a local high school. After much negotiation, Dr. Hale agreed to allow this student to complete the senior seminar credits by completion of a research paper. When Dr. Hale received the paper near the end of the semester, he suspected that the paper was plagiarized. After a relatively easy library search, Professor Hale documented the plagiarism and failed the student. As a result of this action, the student would not graduate or get the job.

The student, however, was the son-in-law of a former dean, and the former dean was the best friend of the academic vice president (provost at some universities). The vice president put pressure on Dr. Hale's dean to put pressure on Hale to change the student's grade. Ultimately, the dean's attempts at persuasion failed, so the vice president ordered the dean to threaten Dr. Hale with termination unless the professor changed the grade. Professor Hale refused to compromise academic standards and refused to change the grade. Because of his experience with the Louisiana University system, which is unionized, Professor Hale understood enough of the law of public employment to appreciate that his legal position was precarious and that the university was going to issue him a terminal contract (one more year of teaching at this university); despite the apparent unfairness of the situation, the courts would not hear his case based on the existing situation.

Short of caving in on the academic standard question, Hale could not stop the fact that he was going to lose his job, but he could manipulate the situation so that he could get a court to hear his case. Capitalizing on his previous limited experience with faculty unions in Louisiana, Hale became very active in a union that was trying to become the bargaining agent for the Idaho State faculty (the American Federation of Teachers). Indeed, within a matter of months, he became the chapter president of the union. In that capacity, he made a speech critical of the university president on the steps of the administration building and invited the local media, who gave the event appropriate coverage. Shortly thereafter, Hale received a terminal contract, and a year later, he was out of a job.

Questions

1. It is obvious from the preceding scenario that Hale believed that the union activity and speech would help his legal situation. Do you believe he was right? Why? If so, does that make sense to you?
2. Why was Hale's legal situation hopeless without the union activity and public speech?

Usually, public employees who claim they were unjustly fired must sue under the Fifth Amendment due process clause (if they work for the federal government) or the Fourteenth Amendment due process clause (if they work for state or local government). Both due process clauses prohibit the government from taking an individual's life, liberty, or property without due process of law. Hence, to establish a lawsuit under a due process clause, potential litigants must show that government action is about to take their life or inhibit the exercise of their liberty or the use of their property.

When the government allegedly unjustly fires an employee, is it true that they have taken that employee's property by taking his or her paycheck away? No, not necessarily. The first principle of public employment law is that *the employee must establish either a property interest or a liberty interest to challenge an employment termination in court.* Indeed, one must establish a liberty or property interest to establish a due process suit of any kind.

Property Interest

Almost all employees, whether they work for government or in the private sector, serve a probationary period of employment when they first start a job. Usually, the probationary

period of employment is specified, say, six months, and at the end of that period, a supervisor provides some type of formal evaluation of the probationary employee's work (this process is also typically specified in an employee handbook). A decision is made to either retain or terminate the employee as a result of that formal review process.

If the decision is made to retain the employee, then the employee has what the courts refer to as a continuing expectation of employment. That is what establishes a property interest in the law of public employment under the due process clause. Property interests are normally created by state or local law. If the decision is made not to retain the employee, then there is no continuing expectation of employment and therefore no property interest: The employee cannot sue. Employees who lack the requisite property interest simply cannot challenge their employment termination in court (unless they can demonstrate a liberty interest).

In education, a continuing expectation of employment and hence a property interest is established by obtaining tenure. In secondary schools, the probationary employment period is about three years; in universities, it is often five years but can approach eight or even ten years. The normal probationary period for most other public employees is six months to a year.

Board of Regents v. Roth
408 U.S. 564 (1972)

The opinion is by Justice Stewart, joined by Justices Burger, White, Blackmun, and Rehnquist. Justices Brennan, Douglas, and Marshall dissented; Justice Powell took no part in the decision.

Respondent (Roth), hired for a fixed term of one academic year to teach at a state university, was informed without explanation that he would not be rehired for the ensuing year. A statute provided that all state university teachers would be employed initially on probation and that only after four years' continuous service would teachers achieve permanent employment "during efficiency and good behavior," with procedural protection against separation. University rules gave an untenured teacher "dismissed" before the end of the year some opportunity for review of the "dismissal" but provided that no reason need be given for nonretention of an untenured teacher, and no standards were specified for reemployment. Respondent brought this action claiming deprivation of his Fourteenth Amendment rights, alleging infringement of (1) his free speech right because the true reason for his non-retention was his criticism of the university administration, and (2) his procedural due process right because of the university's failure to advise him of the reason for its decision. The District Court granted summary judgment for the respondent on the procedural issue. The Court of Appeals affirmed.

II

"While this Court has not attempted to define with exactness the liberty guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska,* 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, e.g., *Bolling v. Sharpe,* 347 U.S. 497, 499–500; *Stanley v. Illinois,* 405 U.S. 645.

There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

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. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau,* 400 U.S. 433, 437. *Wieman v. Updegraff,* 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123; *United States v. Lovett,* 328 U.S. 303, 316–317; *Peters v. Hobby,* 349 U.S. 331, 352 (Douglas, J., concurring). See *Cafeteria Workers v. McElroy,* 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's "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 disability that foreclosed his 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. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury." *Joint Anti-Fascist Refugee Committee v. McGrath* (Jackson, J., concurring). See *Truax v. Raich,* 239 U.S. 33, 41. The Court has held, for example, 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. 232, 238, and, specifically, in a manner that denies 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.

To be sure, the respondent has alleged that the non-renewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that the decision not to rehire him was, in fact, based on his free speech activities.

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. 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 as free as before to seek another. *Cafeteria Workers v. McElroy,* supra, at 895–896.

III

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly,* 397 U.S. 254. See *Flemming v. Nestor,* 363 U.S. 603, 611. Similarly, 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 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. Higginbotham,* 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 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. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University–Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

IV

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. For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution. 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.

Questions

1. The Court says that "property interests are not created by the Constitution." What does create a property interest?
2. Roth lost this case. Can you explain why?
3. At this point, you should be able to articulate why Hale's legal position was hopeless prior to his union activity and speech. Can you do that?

We return now to *Hale v. Walsh,* at the beginning of this chapter. The problem for Professor Hale was that because he lacked tenure, he had no expectation of continuing employment and so could not demonstrate to a court a property interest. His suit was a due process action, and because that clause protects against deprivations of property or liberty and he had no property interest, his only hope would be a liberty interest.

Liberty Interest

An employee can establish a liberty interest if, as a result of the termination, the former employee's reputation is damaged or his or her ability to seek employment is inhibited. Normally, a simple decision not to retain an employee does not sufficiently damage either reputation or employability to establish a liberty interest. If, however, a teacher's contract was not renewed and if the former teacher asked why and was publicly told "because you are incompetent and a terrible teacher," that would establish a liberty interest.

For that reason, one of the canons of personnel management in public administration is that probationary employees who are terminated from employment should *never* be told why. The logic goes like this: Because they are probationary employees, they lack a property interest. To discuss with them the reasons for the termination may provide the grounds to establish a liberty interest. Silence, on the other hand, means that the affected employee will have difficulty getting into court because he or she cannot show a property interest; the silence has ensured the lack of ability to demonstrate a liberty interest. Within the university community, an almost cabalistic silence surrounds the decision to deny a faculty member tenure or, as in Professor Hale's case, not to renew a contract.[1]

A terminated public employee may establish a liberty interest in one more way. Because it is unconstitutional for government to punish an individual as a result of the exercise of a constitutionally protected right (e.g., freedom of speech, freedom of association—i.e., to join a union, to be free from discrimination based on race, gender, age, etc.), it follows that government normally cannot fire an employee for having exercised a constitutional right. Hence, in some cases in which a probationary public employee can demonstrate that the *primary reason* behind a decision to terminate was because the employee exercised a constitutionally protected right, that will establish a liberty interest under the due process clause.

The case presented next, *Pickering v. Board of Education* (1968), is a classic case that discusses the First Amendment protection of public employees. Mr. Pickering was a high school teacher who was fired for writing a letter to the editor in the local paper.

In 1961, the Board of Education for District 205 of Will County submitted two bond issues to the voters; the first was defeated, but the second passed ($5,500,000). Again in 1964, the board submitted two bond issues to the voters, who rejected both. In response to these elections, there were many letters to the editor in the local paper. One of them was sent by Pickering:

> Dear Editor:
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> I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. First, let me state that I am referring to the February through November, 1961 issues of your paper, so that it can be checked.

One statement in your paper declared that swimming pools, athletic fields, and auditoriums had been left out of the program. They may have been left out but they got put back in very quickly because Lockport West has both an auditorium and athletic field. In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn't quite regulation distance even though the board spent a few thousand dollars on it. Whose fault is that? Oh, I forgot, it wasn't supposed to be there in the first place. It must have fallen out of the sky. Such responsibility has been touched on in other letters but it seems one just can't help noticing it. I am not saying the school shouldn't have these facilities, because I think they should, but promises are promises, or are they?

Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, many letters have been written to this paper and probably more will follow, I feel I must say something about the letters and their writers. Many of these letters did not give the whole story. Letters by your Board and Administration have stated that teachers' salaries total $1,297,746 for one year. Now that must have been the total payroll, otherwise the teachers would be getting $10,000 a year. I teach at the high school and I know this just isn't the case. However, this shows their "stop at nothing" attitude. To illustrate further, do you know that the superintendent told the teachers, and I quote, "Any teacher that opposes the referendum should be prepared for the consequences." I think this gets at the reason we have problems passing bond issues. Threats take something away; these are insults to voters in a free society. We should try to sell a program on its merits, if it has any.

Remember those letters entitled "District 205 Teachers Speak." I think the voters should know that those letters have been written and agreed to by only five or six teachers, not 98% of the teachers in the high school. In fact, many teachers didn't even know who was writing them. Did you know that those letters had to have the approval of the superintendent before they could be put in the paper? That's the kind of totalitarianism teachers live in at the high school, and your children go to school in.

In last week's paper, the letter written by a few uninformed teachers threatened to close the school cafeteria and fire its personnel. This is ridiculous and insults the intelligence of the voter because properly managed school cafeterias do not cost the school district any money. If the cafeteria is losing money, then the board should not be packing free lunches for athletes on days of athletic contests. Whatever the case, the taxpayer's child should only have to pay about 30 cents for his lunch instead of 35 cents to pay for free lunches for the athletes. In a reply to this letter your Board of Administration will probably state that these lunches are paid for from receipts from the games. But $20,000 in receipts doesn't pay for the $200,000 a year they have been spending on varsity sports while neglecting the wants of teachers. You see we don't need an increase in the transportation tax unless the voters want to keep paying $50,000 or more a year to transport athletes home after practice and to away games, etc. Rest of the $200,000 is made up in coaches' salaries, athletic directors' salaries, baseball pitching machines, sodded football fields, and thousands of dollars for other sports equipment.

These things are all right, provided we have enough money for them. To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse. If these things aren't enough for you, look at East High. No doors on many of the classrooms, a plant room without any sunlight, no water in a first aid treatment room, are just a few of many things. The taxpayers were really taken to the cleaners. A part of the sidewalk in front of the building has already collapsed. Maybe Mr. Hess would be interested to know that we need blinds on the windows in that building also.

Once again, the board must have forgotten they were going to spend $3,200,000 on the West building and $2,300,000 on the East building.

As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money. I must sign this letter as a citizen, taxpayer

and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?

Respectfully,
Marvin L. Pickering

The letter was printed after the elections were over. The school board determined that portions of Pickering's letter were false and that the letter was "detrimental to the efficient operation and administration of the schools." Pickering, who was fired, argued that his letter was protected speech under the First Amendment. After reviewing the board's decision only to determine whether there was substantial supporting evidence in the record, a state trial court sustained the board's decision. The decision was also affirmed by the Illinois Supreme Court, so Pickering appealed to the U.S. Supreme Court.

Pickering v. Board of Education 391 U.S. 563 (1968)

Justice Marshall wrote the opinion for a unanimous Court.

II

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E.g., *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). "[The] theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Board of Regents*, supra, at 605–606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III

The Board contends that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not," *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to

furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)–(4) of appellant's letter, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, infra) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest. In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds

allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Questions

1. It is clear that Pickering made some factual representations in his letter that turned out to be wrong. Do false statements receive constitutional protection?
2. It is also clear that Pickering's letter fell on deaf ears and that it was not effective. The Court said, "Pickering's letter was greeted with massive apathy and total disbelief." Do you think a different result would have been reached in this case if Pickering had written prior to the election and the letter was a substantial factor for the defeat of the bond issues? Does the Constitution protect only speech that has no "detrimental" effect?
3. In cases involving a liberty interest, courts will nearly always do a balancing test. Courts will balance the right of the employee (citizen) against the interests of the state (employer). Describe the interests on both sides of the scale.
4. Can you explain now why Professor Hale felt compelled to engage in union activity and give the public speech?

In what other kinds of activities could employees engage that would be constitutionally protected but would upset administrators to the point that they would fire an employee? Professor Aumiller, a homosexual and faculty adviser to the gay rights student organization, gave an interview to the student paper. The university president, fearing a loss of alumni contributions if the alumni sensed that the administration encouraged or tolerated homosexuality, fired Professor Aumiller; the school did not renew his next contract and, of course, refused to say why (*Aumiller v. University of Delaware,* 1973).[2] Professor Duke got fired for teaching Marxism in a Texas state university (*Duke v. North Texas State University,* 1973).[3] Teachers have been fired for criticizing discriminatory conditions in schools (*Givhan v. Western Line Consolidated School District,* 1979;[4] and *Bernasconi v. Tempe Elementary School District,* 1977).[5] Teachers have even been fired for too effectively representing the teacher's union in negotiations with the school board (*Simard v. Board of Education,* 1973).[6] Usually, these cases involve some kind of speech (as in the

Pickering case earlier) or union activity (freedom of association is a constitutionally protected right).

The reader will notice from the discussion in the *Pickering* case that not all speech is protected. The Supreme Court has determined that some forms of expression lie beyond the Constitution's protection. Obscenity is not protected expression. Libel is not protected, nor are "fighting words," or "hate speech." Even though an employee's speech may not fall into one of those categories, it may nevertheless be unprotected speech. If a public employee says something critical about a supervisor or the higher administration, such criticism will be protected only under the following conditions: (a) Ordinarily, it must be a public statement; (b) it must pertain to an issue of public importance; and (c) the expression cannot destroy the working relationship between the employee/employees and administration (for teachers, it cannot disrupt discipline or the orderly educational process). Generally, the speech cannot inhibit the public mission of the employer or the agency.

Absent a property interest then, a probationary public employee can challenge employment termination in a court of law only under the following two conditions: (a) An administrator has publicly discussed the reason for the termination, and that has damaged the former employee's reputation and, consequently, his or her ability to find another job in the field. (b) The administrator has refused to say why employment was terminated, but the employee suspects the primary reason was that he or she may have said something publicly critical of the agency (as in the case of Mr. Pickering).

In the latter types of cases, the plaintiff (terminated employee) must present some evidence to the judge (jury) that some form of constitutionally protected behavior was engaged in and the exercise of that protected behavior was the primary reason for the termination. Once sufficient evidence is presented to that effect, the burden of proof switches to the administration, which can take three courses of action. First, they can try to prove that the exercise of protected behavior was not the primary reason to terminate. Second, and closely related to the first, is the "same decision anyway" defense, which essentially argues that, although the exercise of a protected right may have been part of the decision to terminate, the administration would have reached the decision to terminate on other grounds anyway (say, incompetence or insubordination). Finally, the administration can attempt to argue that the speech is not the kind of speech that is protected under the Constitution (perhaps the speech does not relate to issues of public importance).

So, how did Professor Hale establish a liberty interest sufficient to get his case to court? First, it is important to understand what did not create a liberty interest. Even though the ultimate issue here was the academic integrity of a university, that was not a sufficient enough public issue to clothe it with constitutional protection. Even if Dr. Hale had gone to the press, that would not have turned it into an issue of "public concern." Disputes between the faculty and the administration of a school over academic questions are normally not matters of "public concern" because courts treat such issues as internal squabbling and normally defer to the expertise of the administration. This is true not just for schools but for any public agency.

One can only imagine the conversations that must have taken place between Professor Hale and the dean, but whatever was said, it was not protected speech either. That is because it was not public (although, in some cases, speech between two people has been protected) and ultimately it did not relate to matters of sufficient public interest.

Dr. Hale created a liberty interest by becoming active in union politics and convincing the court that that activity was the primary reason for his nonretention. It was primarily that public speech, clothed in official union activity, that created the liberty interest.

The Court has applied the same jurisprudence to the termination of public contracts. In the case of *Board of County Commissioners v. Umbehr* (at the end of this chapter), a small businessman who had a contract with the county to haul trash successfully sued the commissioners when they cancelled his contract because he had publicly criticized the commission.

At this point, the law of public employment should be fairly clear. If an employee has a continuing expectation of employment (a property interest), the employee can only be fired for cause and there must be a pre-termination hearing. Absent a property interest, a public employee can be fired for no reason at all and has no right to demand an explanation; there will be no pre-termination hearing. Employees without a property interest may be able to get a court to hear their case if they can successfully raise a liberty interest (damage to reputation or infringement of a constitutionally protected right).

On March 30, 1981, a would-be assassin shot and wounded President Reagan. Upon hearing the news, Ardith McPherson, a black deputy constable (sheriff) in Harris County, Texas, engaged another black deputy in a conversation about the direction of the Reagan Administration's policies. At the end of that conversation, she said, "If they go for him again, I hope they get him." This statement was overheard by a third deputy, who told the constable. Constable Rankin called McPherson into his office and questioned her about her speech. She admitted making the statement, and Rankin fired her on the spot. McPherson was a probationary employee. Was she rightly or wrongly fired? You should recognize first that as a probationary employee, she had no right to a pre-termination hearing. The issue should narrow for you to whether her statement was protected. You should recognize that to answer that, courts will apply a balancing test.

First, might McPherson's statement be unprotected? The first variable to examine is whether the speech involved matters of public concern. The Court decided that speech about the policy directions of an administration is sufficiently clothed with public concern to potentially qualify as protected speech. Threats to kill a president are not protected speech, but that is not what McPherson did. The Court did not address the fact that this was private speech between two people; it simply said the speech was potentially protected. Having decided that the speech was potentially protected, the Court next balanced the interests. The potentially protected speech can become unprotected if Rankin can carry the burden of proof that the speech somehow undermined the mission of the Constable's office. By his own admission, the speech did not destroy the working relationship between Rankin and McPherson, nor did it interfere with her working relationship with other employees. Because she was a data entry clerk with no law enforcement function, her speech did not undermine the public safety function of the Constable's office. In *Rankin v. McPherson,* 483 U.S. 378 (1987), the Supreme Court said that the speech was protected and the employer could not carry his burden of proof that the speech damaged internal working relationships or that it harmed the mission of the agency.

On the other hand, see *Rowland v. Mud River School District,* 470 U.S. 1009 (1985), 730 F. 2d 444 (1984). Rowland was a high school guidance counselor. When her secretary repeatedly asked her why she was so happy, Rowland responded that she was in love. As the conversation deepened, Rowland revealed that she was in love with another woman. The secretary told the principal, who fired Rowland. Rowland was a probationary employee. The trial court found as a matter of fact that the administration had no internal reason to fire Rowland other than that she had admitted to a bisexual lifestyle. That is, there was no disruption or inhibition of working relationships or discipline, nor was the educational mission

of the school compromised. That court awarded her reinstatement and compensatory damages. The court of appeals reversed with orders to dismiss the suit because the utterance was not a matter of public concern. The Supreme Court denied *certiorari.*

Termination of Public Employees Who Possess a Property Interest

Apparently, it is fashionable these days for students to refer to tenure as "a job for life." Actually, that is not quite accurate. Once a public employee acquires a property interest, he or she has a continuing expectation of employment. That expectation of employment can be interrupted in two ways. First, public employees with a property interest can be fired for cause. Second, their employment with a public agency can be terminated for financial reasons (referred to as financial exigency).

Termination for Cause

Usually, both public and private employers provide employees with a handbook covering all aspects of employment. This handbook includes the specific period of probationary employment, the process of evaluation at the end of probationary employment, the criteria to be considered in the evaluation process, and the specific reasons for which employees can be terminated once they have passed beyond probationary employment. This employee handbook should also describe the procedure the agency must go through to terminate an employee for cause. What constitutes a for-cause termination varies from agency to agency and from state to state, but criteria often include incompetence, insubordination, malfeasance, immoral conduct, dishonesty, and so on. Even with a property interest, people can be (and many have been) fired for cause.

Remember that the combination of the Fifth and Fourteenth Amendment due process clauses forbids government from taking your life, liberty, or property without due process. This due process notion applies only to government, not to private employers, although labor unions have forced private business to accept some degree of due process through collective bargaining agreements. Also, it is not that government cannot take your liberty or property; it is just that it must go through due process first.

What is due process? It is a procedure that government must follow to avoid the arbitrary, capricious, or mistaken taking of an individual's liberty or property (or, obviously, a life as well). Basically, due process consists of a notice (that government is about to take some action that may affect your liberty or property) and a hearing. Just exactly how intricate that hearing must be is a matter of confusion and the cause of considerable litigation. Due process ranges from a notice from the vice principal (or dean of students) that one is about to be suspended from school for a particular reason and a very simple hearing before that same vice principal or dean on the one hand, to the myriad kinds of protection afforded those accused of capital offenses at the other extreme. So the amount of process due under the law depends on the nature of the liberty or property about to be affected. That is why there is renewed debate about the imposition of capital punishment. Even though the procedure is elaborate, it is obvious that it does not protect against "mistaken" deprivations of life and liberty.

In terms of public employment, no typical due process hearing can be described. Usually, strict rules of evidence do not apply, and attorneys may be present but are not

Table 8.1 Disposition of Termination Cases for Litigants With Tenure

Winner	*For Cause*	*Financial Exigency*	*Other*	*Total*
Plaintiff/teacher	43% (84)	38% (22)	57% (12)	118
Defendant/board	57% (111)	62% (36)	43% (9)	156
Total	195	58	21	$N = 274$

SOURCE: Steven Cann, "A Virus in the Ivory Tower," 18 *Educational Considerations* 43-44 (1991).

required. If they are allowed to be present, attorneys often may not have input during the hearing. Generally, reviewing courts look at the procedure first to be satisfied that it is fair.

The reader is already aware from the material in Chapter 4 that courts reviewing quasi-judicial decisions (which due process hearings are) will apply the substantial evidence test on review. To terminate a public employee for cause successfully, administrators must first be certain that the procedure (notice and the hearing) is fair and that sufficient evidence supports the specific charge. If all of that is done, then a reviewing court will simply examine the procedure, and should it find no procedural flaws, the court next will apply the substantial evidence test and most often will sustain the decision.

In a study of 500 teacher termination cases, 274, or 55 percent, involved tenured teachers. Contrary to the popular perception that they have "a job for life," tenured teachers dismissed for cause lost in 57 percent of their appeals to the courts[7] (see Table 8.1). In addition, tenured teachers lost 62 percent of the cases involving either financial exigency or forced retirement. That is only to be expected because the administration or employer is forced by the due process hearing to build a reasonably sound case. Indeed, this research shows that the most frequent reason for a plaintiff/teacher to win a challenged termination-for-cause is that the administration failed to provide adequate procedures. However, once a reviewing court is satisfied with the procedure, the most common disposition of these cases is for the reviewing court to find that there was substantial evidence to support the termination (67 percent of the cases).

Termination for Financial Reasons

Suppose that your state loses millions of dollars in revenue due to a recession. Sales tax receipts fall by several million dollars, and corporate tax revenues drop off by an equal percentage. Suppose, further, that the federal government decides to reduce grants and other federal monies that used to be turned back to the states. In such circumstances, the state legislature has only two courses of action open to it—raise taxes or reduce spending (deficit spending is forbidden in many states). Most states facing exactly these choices in the early 1980s, the late 1980s, and early 1990s, and again from 2001 to 2004 chose to reduce state spending. When governmental units are forced to reduce spending, a common way to go about that is to reduce personnel. Because personnel account for about 70 percent of agency budgets, that is a logical place administrators begin looking to cut costs. There are basically three ways to reduce personnel (the public administration term is RIF, which stands for "reduction in force"). The three methods are referred to as "last hired, first fired"; the attrition method; and program assessment (or evaluation). Two of these

options—last hired, first fired and the attrition method—are perhaps the "easier" options for administrators and do not generally involve administrative law or litigation.

The last hired, first fired option means that probationary employees are not offered a contract at the end of the probationary period. The attrition method simply means that as employees die, retire, or transfer, they are not replaced (President Clinton reduced the size of the civilian federal workforce by more than 100,000 employees through the attrition method). Both of these options are easier for administrators than the third option because no due process hearings are required, the actions rarely lead to litigation, and the process is the least disruptive way to accomplish the unpleasant task of reducing the workforce within the agency. However, these two methods are not good options from a planning perspective. To RIF under either of these options could, for example, leave an English Department without faculty to teach, say, creative writing, a business school without someone to teach marketing or finance, a history department without someone to teach early American history; worse yet, a department could be left without a secretary! Indeed, a comptroller general's report concludes that President Clinton's RIF program of attrition had the following consequences: (a) federal agencies are poorly equipped to meet the challenges of the 21st century because employees lack skills in information technology, economics, and management; (b) the reduced influx of young people leaves a void of new knowledge, energy, and ideas and negatively impacts the agency's future leadership; (c) many agencies are left without the manpower to perform their functions.[8]

The third option is to conduct a program assessment, ascertain which programs are not cost-efficient, and eliminate those programs (and their personnel) that are found to be inefficient and/or not necessary to the agency or institution. If the decision is made to RIF an entire program, the likelihood is that employees who possess a property interest will be terminated. That means the institution must provide a due process hearing first.

Usually, reviewing courts will not interfere with administrative decisions relating to financial exigency so long as objective criteria are applied to determine who will be terminated and a due process hearing is available to those who possess a property interest (*Levitt v. Board of Trustees,* 376 F.Supp. 950 [1974]). This assessment of court deference to administrators' RIF decisions is supported by the data in Table 8.1.

Consequences of the Court's Jurisprudence in Public Employment Law

The second-order consequences of the Court's decisions in *Roth* and its progeny have been (a) to create a dual legal subsystem in public employment law, (b) to encourage poor personnel decisions, (c) to encourage disruption (the only way for Professor Hale to get a court to look at his case was to join a union and give a critical speech on the front steps of the administration building), and (d) to cause unnecessary litigation.

The dual legal system in public employment law exists because the Court has created two classes of litigants: those with a property interest, who get administrative law applied to their suits, and those without a property interest, who get constitutional law applied to their cases. Regardless of the reason for the termination, plaintiffs with a property interest have a right to a due process hearing. *A fortiori,* the public employer must make an attempt to provide adequate procedures and supply reasons and evidence at a hearing to support the decision. Because this is a quasi-judicial hearing, the only questions for a reviewing

court to answer are (a) whether the procedure is adequate to meet the dictates of due process and (b) whether there is substantial evidence in the record to sustain the decision (classic administrative law, which public employers win nearly 60 percent of the time). Plaintiffs who do not possess a property interest, however, cannot get their case into court without establishing a liberty interest. These frequently involve questions under the First Amendment or the equal protection clause. That being the case, there is no reason to expect a reviewing court to show deference to agency expertise or concentrate on procedural issues (because there is no procedure involved), and there will be no substantial evidence test (because there is no hearing, there is no record). The court will have to determine whether the alleged protected activity was a primary reason in the decision to terminate and whether the activity falls under the Constitution's protection (classic constitutional law, which the plaintiffs win nearly 60 percent of the time).

Poor personnel decisions fall into two categories. In the first, employees with a property interest are retained when they should be let go because employers fear the inevitable lawsuit. Public administrators need to appreciate the fact that the hearing works to protect both the employee and the employer. If the procedure is fair and there is substantial evidence in the record to sustain the decision, it is unlikely that a reviewing court will interfere with the decision. In the second type of bad personnel decisions, employees without a property interest are terminated for reasons that are not related to job performance.

That this jurisprudence encourages disruption should be evident from the case of Professor Hale. The lesson is simple: Public employees without a property interest who fear termination have only one course of action open if they want protection from the courts—turn the issue into a liberty interest by public criticism of their employer.

Finally, there are three situations that would probably not get litigated if probationary public employees were entitled to an internal due process hearing. In the first, cases like Pickering's and Hale's, the mere existence of an internal hearing (116 in my sample of 500 or nearly one fourth) would modify the administration's behavior in a more constitutional direction. Fewer employees in situations such as these would be terminated, hence fewer lawsuits. In the second category of cases, employers present a successful "same decision anyway" defense. That is, at trial, they are able to satisfy the court that there is sufficient evidence to sustain a specific charge (incompetence, insubordination, etc.). A hearing before a board of peers where such evidence is presented would limit employees' propensity to sue. The third category of suits that would be reduced by a pre-termination hearing for employees without a property interest are those that I will call "frivolous," in which the plaintiff can establish neither a property nor a liberty interest; these cases generally are dismissed at an early stage and would probably be screened out of the courts by an internal hearing. These three categories of cases constituted 35 percent of the suits by untenured litigants in my study.[9]

The law of public employment was, until recently, fairly well settled. A property interest meant that a public employee could be terminated only for cause, and there had to be a pre-termination hearing. Absent the property interest, a plaintiff might be able to litigate over the existence of a liberty interest. Most often, such cases involve an analysis of whether a constitutionally protected right was violated.

The law of public employment involves what legal scholars refer to as "bright line rule" jurisprudence as well as a "balancing" jurisprudence. With a "bright line rule," cases are rather cut and dried, and it is often clear who should win. The Court created a bright line rule in *Roth*. If public employees have a property interest, they cannot be terminated without cause, supported at an internal agency due process hearing. Should such a situation be

litigated, all the court has to do is determine whether there is a continuing expectation of employment (which is created by state law or federal law in the case of federal employees) and whether an appropriate pre-termination hearing was held. The court would go on to see whether there was substantial evidence in the record from the pre-termination hearing to sustain the decision to terminate. There is little room for subjective judgments by the judge to influence who wins.

On the liberty side of public employment due process, the Court created a balancing test in *Pickering*. With a balancing test, it is nearly impossible to predict who will or should win a case. That is because it is never certain whether or not a majority of five on the Supreme Court will determine that an individual's utterance involves a matter of public concern. Even if certain speech should be classified as involving public concerns by its content, it is uncertain whether or not that speech so adversely affected the work atmosphere as to lose its potential constitutional protection. Whenever the Court creates a balancing test rather than a bright line rule, the Court has reserved for itself the subjective determination of who will win and who will lose. It is easy to manipulate the scales in a balancing test. With a bright line rule, the facts of the case rather than a judge's ideology frequently determine the disposition of the case.

Public employment cases are due process cases, but the Court has always applied a different due process jurisprudence to public employment law than it has to due process cases in other administrative law contexts, which are the subject of the next chapter. There you will become familiar with a case called *Mathews v. Eldridge,* made famous because the Court imposed a balancing test on all administrative law due process cases except those involving public employment. Although the Court had not ruled on the issue, most observers assumed that the *Roth* jurisprudence applied to employee discipline as well as termination. That is, public employees could not be disciplined in a way that threatened their property interest without a pre-deprivation hearing. See *Bush v. Lucas* at the end of Chapter 10, in which hearings were held before a NASA engineer was reassigned and demoted. The case below is a little noticed case in which the Court applied the *Mathews* balancing test to a public employee who was suspended without pay. The employee had a continuing expectation of employment and was suspended following his arrest, but the charges were dropped, so ultimately, the reason for the suspension was a "mistake." As you read the case, bear in mind that the reason for a due process hearing is to avoid government deprivations of property or liberty by mistake. This case has important ramifications for public employment law because it applies the balancing test of *Mathews* to the otherwise bright line rule jurisprudence involving public employees with a property interest.

Gilbert v. Homar
520 U.S. 924 (1997)

Justice Scalia delivered the unanimous opinion of the Court.

This case presents the question whether a State violates the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay.

I

Respondent Richard J. Homar was employed as a police officer at East Stroudsburg University (ESU), a branch of Pennsylvania's State System of Higher Education. On August 26, 1992, when respondent was at the home of a family friend, he was arrested by the Pennsylvania

State Police in a drug raid. Later that day, the state police filed a criminal complaint charging respondent with possession of marijuana, possession with intent to deliver, and criminal conspiracy to violate the controlled substance law, which is a felony. The state police notified respondent's supervisor, University Police Chief David Marazas, of the arrest and charges. Chief Marazas in turn informed Gerald Levanowitz, ESU's Director of Human Resources, to whom ESU President James Gilbert had delegated authority to discipline ESU employees. Levanowitz suspended respondent without pay effective immediately. Respondent failed to report to work on the day of his arrest, and learned of his suspension the next day, when he called Chief Marazas to inquire whether he had been suspended. That same day, respondent received a letter from Levanowitz confirming that he had been suspended effective August 26 pending an investigation into the criminal charges filed against him. The letter explained that any action taken by ESU would not necessarily coincide with the disposition of the criminal charges.

Although the criminal charges were dismissed on September 1, respondent's suspension remained in effect while ESU continued with its own investigation. On September 18, Levanowitz and Chief Marazas met with respondent in order to give him an opportunity to tell his side of the story. Respondent was informed at the meeting that the state police had given ESU information that was "very serious in nature," but he was not informed that that included a report of an alleged confession he had made on the day of his arrest; he was consequently unable to respond to damaging statements attributed to him in the police report.

In a letter dated September 23, Levanowitz notified respondent that he was being demoted to the position of groundskeeper effective the next day, and that he would receive backpay from the date the suspension took effect at the rate of pay of a groundskeeper. (Respondent eventually received backpay for the period of his suspension at the rate of pay of a university police officer.) The letter maintained that the demotion was being imposed "as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the [ESU] Police Department Manual."

Upon receipt of this letter, the president of respondent's union requested a meeting with President Gilbert. The requested meeting took place on September 24, at which point respondent had received and read the police report containing the alleged confession. After providing respondent with an opportunity to respond to the charges, Gilbert sustained the demotion. . . .

II

The protections of the Due Process Clause apply to government deprivation of those perquisites of government employment in which the employee has a constitutionally protected "property" interest. Although we have previously held that public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process, see *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 578 (1972); *Perry v. Sindermann,* 408 U.S. 593, 602–603 (1972), we have not had occasion to decide whether the protections of the Due Process Clause extend to discipline of tenured public employees short of termination. Petitioners, however, do not contest this preliminary point, and so without deciding it we will, like the District Court, "assum[e] that the suspension infringed a protected property interest," and turn at once to petitioners' contention that respondent received all the process he was due.

A

In *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532 (1985), we concluded that a public employee dismissible only for cause was entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing. Stressing that the

pretermination hearing "should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," id., at 545–546, we held that pretermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story, id., at 546. In the course of our assessment of the governmental interest in immediate termination of a tenured employee, we observed that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." Id., at 544–545.

Relying on this dictum, which it read as "strongly suggesting that suspension without pay must be preceded by notice and an opportunity to be heard in all instances," 89 F.3d at 1015, and determining on its own that such a rule would be "eminently sensible," id., at 1016, the Court of Appeals adopted a categorical prohibition: "[A] governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." Ibid. Respondent (as well as most of his amici) makes no attempt to defend this absolute rule, which spans all types of government employment and all types of unpaid suspensions. This is eminently wise, since under our precedents such an absolute rule is indefensible.

It is by now well established that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause. See, e.g., *United States v. James Daniel Good Real Property,* 510 U.S. 43, 53 (1993); *Zinermon v. Burch,* 494 U.S. 113, 128 (1990) (collecting cases); *Barry v. Barchi,* 443 U.S. 55, 64–65 (1979); *Dixon v. Love,* 431 U.S. 105, 115 (1977); *North American Cold Storage Co. v. Chicago,* 211 U.S. 306, 314–320 (1908).

Indeed, in *Parratt v. Taylor,* 451 U.S. 527 (1981), overruled in part on other grounds, *Daniels v. Williams,* 474 U.S. 327 (1986), we specifically noted that "we have rejected the proposition that [due process] always requires the State to provide a hearing prior to the initial deprivation of property." 451 U.S. at 540. And in *FDIC v. Mallen,* 486 U.S. 230 (1988), where we unanimously approved the Federal Deposit Insurance Corporation's suspension, without prior hearing, of an indicted private bank employee, we said: "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." Id., at 240.

The dictum in *Loudermill* relied upon by the Court of Appeals is of course not inconsistent with these precedents. To say that when the government employer perceives a hazard in leaving the employee on the job it "can avoid the problem by suspending with pay" is not to say that that is the only way of avoiding the problem. Whatever implication the phrase "with pay" might have conveyed is far outweighed by the clarity of our precedents which emphasize the flexibility of due process as contrasted with the sweeping and categorical rule adopted by the Court of Appeals.

B

To determine what process is constitutionally due, we have generally balanced three distinct factors:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Mathews v. Eldridge,* 424 U.S. 319,

335 (1976). See also, e.g., *Mallen,* supra, at 242; *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 434 (1982).

Respondent contends that he has a significant private interest in the uninterrupted receipt of his paycheck. But while our opinions have recognized the severity of depriving someone of the means of his livelihood, see, e.g., *Mallen,* supra, at 243; *Loudermill,* 470 U.S. at 543, they have also emphasized that in determining what process is due, account must be taken of "the length" and "finality of the deprivation." *Logan,* supra, at 434. Unlike the employee in *Loudermill,* who faced termination, respondent faced only a temporary suspension without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all.

On the other side of the balance, the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers. Respondent contends that this interest in maintaining public confidence could have been accommodated by suspending him with pay until he had a hearing. We think, however, that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him. ESU's interest in preserving public confidence in its police force is at least as significant as the State's interest in preserving the integrity of the sport of horse racing, see *Barry v. Barchi,* 443 U.S. at 64, an interest we "deemed sufficiently important . . . to justify a brief period of suspension prior to affording the suspended trainer a hearing," *Mallen,* 486 U.S. at 241.

The last factor in the *Mathews* balancing, and the factor most important to resolution of this case, is the risk of erroneous deprivation and the likely value of any additional procedures. Petitioners argue that any presuspension hearing would have been worthless because pursuant to an Executive Order of the Governor of Pennsylvania a state employee is automatically to be suspended without pay "as soon as practicable after [being] formally charged with . . . a felony." 4 Pa. Code § 7.173 (1997). According to petitioners, supervisors have no discretion under this rule, and the mandatory suspension without pay lasts until the criminal charges are finally resolved. If petitioners' interpretation of this order is correct, there is no need for any presuspension process since there would be nothing to consider at the hearing except the independently verifiable fact of whether an employee had indeed been formally charged with a felony. See *Codd v. Velger,* 429 U.S. 624, 627–628 (1977). Compare *Loudermill,* supra, at 543. Respondent, however, challenges petitioners' reading of the Code, and contends that in any event an order of the Governor of Pennsylvania is a "mere directive which does not confer a legally enforceable right." We need not resolve this disputed issue of state law because even assuming the Code is only advisory (or has no application at all), the State had no constitutional obligation to provide respondent with a presuspension hearing. We noted in *Loudermill* that the purpose of a pre-termination hearing is to determine "whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action." 470 U.S. at 545–546. By parity of reasoning, the purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay. *Mallen,* 486 U.S. at 240. But here that has already been assured by the arrest and the filing of charges.

In *Mallen,* we concluded that an "ex parte finding of probable cause" such as a grand jury indictment provides adequate assurance that the suspension is not unjustified. Id., at 240–241. The same is true when an employee is arrested and then formally charged with a felony. First, as with an indictment, the arrest and formal charges imposed upon respondent "by an independent body demonstrate that the suspension is not arbitrary." Id., at 244. Second, like an indictment, the imposition of felony

charges "itself is an objective fact that will in most cases raise serious public concern." Id., at 244–245. It is true, as respondent argues, that there is more reason to believe an employee has committed a felony when he is indicted rather than merely arrested and formally charged; but for present purposes arrest and charge give reason enough. They serve to assure that the state employer's decision to suspend the employee is not "baseless or unwarranted," id., at 240, in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime.

Respondent further contends that since (as we have agreed to assume) Levanowitz had discretion not to suspend despite the arrest and filing of charges, he had to be given an opportunity to persuade Levanowitz of his innocence before the decision was made. We disagree. In *Mallen,* despite the fact that the FDIC had discretion whether to suspend an indicted bank employee, see 64 Stat. 879, as amended, 12 U.S.C. § 1818(g)(1); *Mallen,* supra, at 234–235. We nevertheless did not believe that a presuspension hearing was necessary to protect the private interest. Unlike in the case of a termination, where we have recognized that "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect," *Loudermill,* supra, at 543, in the case of a suspension there will be ample opportunity to invoke discretion later—and a short delay actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges. Respondent "has an interest in seeing that a decision concerning his or her continued suspension is not made with excessive haste." *Mallen,* 486 U.S. at 243. If the State is forced to act too quickly, the decision maker "may give greater weight to the public interest and leave the suspension in place." Ibid.

C

Much of respondent's argument is dedicated to the proposition that he had a due process right to a presuspension hearing because the suspension was open-ended and he "theoretically may not have had the opportunity to be heard for weeks, months, or even years after his initial suspension without pay." But, as respondent himself asserts in his attempt to downplay the governmental interest, "because the employee is entitled, in any event, to a prompt post-suspension opportunity to be heard, the period of the suspension should be short and the amount of pay during the suspension minimal." . . . judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Discrimination in Public Employment

In 1865, a sufficient number of states in the union ratified the proposed Thirteenth Amendment (outlawing slavery) so that it became the law of the land. The Fourteenth Amendment (1868) and the Fifteenth Amendment (1870) soon followed. Collectively referred to as the Civil War Amendments, they were meant to legally end the system of slavery and apartheid in this country. The Fifteenth Amendment prohibits the states from denying the right to vote on the basis of race. It is primarily the Fourteenth Amendment, forbidding the state from denying citizens equal protection of the laws, on which this discussion will focus. The final section of all three amendments gives Congress the power to pass laws to enforce the amendments. Generally, Congress does this in the form of civil rights acts (or voting rights acts in the case of the Fifteenth Amendment).

During the past 125 years, Congress has passed several civil rights acts, including the Civil Rights Act of 1875, which made it a federal crime for owners of public accommodations

(hotels, churches, amusement places, theaters, and common carriers) to discriminate on the basis of race. When the federal government pressed charges against individuals and a railroad for discriminating against blacks, the Supreme Court said that Congress did not have the power to pass such laws regulating private discrimination. The Court reasoned that because the Fourteenth Amendment says "no state shall deny equal protection," the power of Congress to enforce that amendment should be limited to instances of official state discrimination (*Civil Rights Cases,* 109 U.S. 3 [1883]). That precedent, set in 1883, is still valid law today.

Indeed, because of the ruling in the *Civil Rights Cases,* when Congress passed the Civil Rights Act of 1964, it based that act on the commerce clause (banning discrimination in interstate commerce) rather than on the Fourteenth Amendment. Because the federal government's reach is so broad and extensive under the commerce clause (Occupational Safety and Health Administration, minimum wage, pollution control, etc.), that is how the federal government attacks private discrimination today. Recall from the case in point in the preceding chapter that the Court had to define *has.* That was important because an employer or a business does not fall under the jurisdiction of the federal commerce clause unless it *has* 15 or more employees.

Equal Protection of the Law

Generally, administrative law involves government discrimination rather than private discrimination. The aspiring public administrator ought to have some familiarity with equal protection law generally and as it relates to racial discrimination particularly. That is because, as you will discover in Chapter 10, if administrators illegally discriminate against someone, they can and most likely will be sued personally. A court will simply look to see whether the administrator knew or should have known that his or her actions violated someone's rights. The law presumes that mid-level managers and those above them "know or should know" when actions will violate another's constitutional rights.

Although there is no consensus among the nine members of the Supreme Court on the continued use of a three-tiered analysis, the Court presently applies it to equal protection cases. The first and lowest tier is referred to as *the simple rationality test.* It applies only to state regulation of business and assumes that the state's law is constitutional. The party challenging the law has the burden to prove it unconstitutional. Although there is a lack of consensus regarding the precise legislative intent behind the language *equal protection of the laws,* the Supreme Court has come to interpret it as follows: (a) It does not forbid the states from creating categories and treating people differently among the categories, and (b) in the exercise of their police powers, the states are free to create categories so long as the categories are *reasonable and not arbitrary.*[10]

The simple rationality test, then, merely looks to see whether the state had a reason for the category or, as the Court puts it, "a legitimate governmental objective." The City of New York apparently concluded that advertising on the side of vehicles led to increases in accidents, so it passed an ordinance banning advertisement on vehicles but then exempted business advertising on certain business vehicles.[11] The state of Oklahoma passed several measures aimed at putting opticians out of business but then exempted the ready-to-wear glasses industry from the regulations.[12] The City of New Orleans passed an ordinance banning pushcart vendors in the French Quarter but then exempted any vendor who had been in business prior to January 1, 1972.[13]

In these and similar business regulation cases, the Court simply takes the stated reason for the category and then looks to see whether the legislative body could reasonably have believed, at the time the law was passed, that it would accomplish the goal (e.g., reduce traffic accidents in New York City, protect the eyesight of Oklahoma residents, or preserve the aesthetic character of the French Quarter). The reason this standard of review is so lax is that the Supreme Court is extremely sensitive to charges of substituting its economic preferences for those of a legislative body in the area of business regulation. This is exactly what the Supreme Court did between 1932 and 1937, which is what caused Franklin Roosevelt to propose his "court packing plan." This plan caused Chief Justice Hughes to switch his vote, and that created a majority on the Court willing to accept the expanded role of the federal government discussed in Chapter 1.

The middle-tier equal protection analysis is also a reasonableness test, but here, the Court engages in in-depth analysis to see whether the reason for the category, in fact, will accomplish the desired results. The Court will ask not whether there is simply a *legitimate* governmental objective, but rather whether there is an *important* governmental objective and whether the categories created by the policy are rationally related to the achievement of the important governmental objective. The Court applies this middle-tier analysis to social and economic discrimination that does not fit into either of the other two tiers. Gender discrimination cases are common here, as are cases involving discrimination based on age, legitimate birth, and American citizenship.

The Court found that it was unreasonable for the state of Idaho to give a statutory preference to the male where both a male and female were equally qualified to administer an estate. The Court said Idaho's reason (administrative efficiency) was irrational because it was based on outmoded stereotypes.[14] It was also unreasonable for the military to provide a family allowance to any male who got married, whereas a female had to prove that she supplied over half of the family income before she could qualify for the family allowance.[15] The Court found a Florida scheme that provided a property tax break for widows but not for widowers to be a rational classification. The Court agreed with the Florida legislature that women suffer disproportionately when a spouse dies.[16] The Oklahoma legislature, citing statistics that tended to show drunk driving by young males was a leading cause of accidents, passed a law that banned males from purchasing 3.2% beer until the age of 21 but allowed females to purchase such beer at the age of 18. The Supreme Court said that was an irrational and unreasonable classification.[17] Finally, the Court has said that it is reasonable for a state to require state police to retire at age 50 regardless of physical condition[18] and to limit the teaching profession to U.S. citizens[19] (but it is unreasonable to require notary publics to be U.S. citizens).[20]

The third and highest tier of the equal protection analysis is called *strict scrutiny* or the *compelling interest* test. The Court applies this level of analysis to state discrimination involving a suspect class (i.e., race) or a fundamental right (to vote or to travel).

Here, the assumptions are just the opposite of the first tier. Any state classification based on race is assumed to be unconstitutional, and the state has to show a compelling reason to discriminate on such a basis to save its law. Only rarely can a government meet the compelling-interest standard. The federal government was able to demonstrate a compelling interest in its minority business set-aside program, which required that 10 percent of the funds for public works projects go to minority contractors.[21] The Court allowed this discrimination because the program was experimental and closely supervised, it was intended to remedy past discrimination, and Congress has more constitutional power to do

this sort of thing than the states do. It is extremely difficult for the states to meet the compelling-interest test.

In 1995, the Supreme Court reversed itself on the issue of minority business set-asides (see *Adarand v. Pena,* 515 U.S. 200 [1995]). Subsequently, the Clinton Administration began the process of reviewing all federal contracts to assure compliance with the *Adarand* decision (i.e., no federal contract can be awarded solely on the basis of race, absent verifiable evidence of past racial discrimination).

Instances involving official state discrimination against blacks are rare these days, but one such case is *Palmore v. Sidoti,*[22] a custody suit in which the divorced father sued for custody of his daughter because his Caucasian ex-wife was cohabiting with a man (who happened to be black). By the time of the trial, the ex-wife and the black man had married, and the Court found both parents to be fit, so the case turned on the welfare of the child. The trial court found that, despite racial gains, children of racially mixed marriages are subjected to social pressures that children of one-race marriages do not face, and the judge awarded custody to the father. The Supreme Court reversed that decision because it was based solely on race (had the former Mrs. Sidoti married a similarly respectable Caucasian, the result would have been different), and the state's reason was not compelling. Speculation about the effects of private racial prejudice on children of interracial marriages is not a compelling reason, the Court said. Also, in 1997, the U.S. Department of Agriculture (USDA) settled with 1,000 black farmers who were part of a class action suit claiming that local farm service agencies in the South had delayed their federal farm loan applications or approved smaller amounts than were due and did so out of racial prejudice.[23] After State Police in New Jersey shot three black men on the turnpike in 1998, a statewide investigation led to a finding of systematic racial profiling, and a U.S. Justice Department consent decree imposed training and federal supervision on the agency. A federal report issued in July 2004, at the end of federal supervision, concluded that the agency had made "remarkable" progress in eliminating racial profiling.[24] These are examples of official purposeful racial discrimination that violate the equal protection clause.

Today, most discrimination against racial minorities is what we call de facto discrimination—that is, discrimination in fact but not mandated by law. Some cases involve discrimination in the workplace (when less than 1 percent of skilled labor jobs are held by blacks and blacks constitute 30 to 50 percent of the labor force [*United Steelworkers v. Weber*] or when less than 1 percent of the contractors in a city are owned by blacks and blacks constitute 50 percent of the population [*Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*]). Others involve discrimination in education (all-black and all-white schools within a school district or jurisdiction).

The Court has dealt with this type of racial discrimination by requiring a finding that this discrimination is purposeful before the perpetrator is found to have violated the Constitution.[25] For example, in the city of Topeka, Kansas, 40 years after the famous desegregation decision in 1954 (*Brown v. Board of Education of Topeka*),[26] some schools within the district remained more than 80 percent black or 100 percent white. Because the situation is not mandated by law, it is called de facto segregation, and before it can be found unconstitutional, the plaintiffs have to prove that the segregation exists by design of policymakers. If the racial pattern is the result of forces such as migration and housing patterns, such segregation is not unconstitutional. It was not until the summer of 1999 that the federal court in Topeka finally found, as a matter of fact, that the school district was in compliance with the original *Brown* decision.[27]

Affirmative Action

The most common purposeful discrimination engaged in by state and local governments today is affirmative action. The Court has been badly divided on the question of affirmative action. Its decisions in this area have been unpredictable and make little or no jurisprudential sense. The first Supreme Court case to address the merits of an affirmative action program was *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978). That case involved a special admissions program for admission to medical school at the University of California at Davis. The program was aimed at economically disadvantaged applicants who by virtue of exposure to less sophisticated educational programs could not be expected to perform on the Medical Career Aptitude Test (MCAT) at the same level as those whose socioeconomic level had afforded them private prep schools or public education in the suburbs. Although race was not a written factor in the special admissions process, only blacks had benefited from the affirmative action process. Allan Bakke, a Caucasian who was refused admission twice, had both science and overall grade point averages and MCAT scores in excess of many who were admitted under the special program, and he claimed discrimination on the basis of race. The Court noted that UC Davis proffered laudable reasons for such discrimination (reducing the deficit of minorities in medical school and the medical profession, countering societal discrimination, increasing the number of physicians who will practice in areas currently underserved, and achieving a diverse student body). Of those reasons, the Court found compelling only the diverse student body but declared the affirmative action program unconstitutional anyway because it was not implemented with the least restrictive means. The compelling interest test has two prongs: the state must have a compelling interest, and it must accomplish its program in a way that affects suspect classes or fundamental rights minimally (least restrictive means). The Court said that affirmative action programs may be race conscious so long as race is not the sole criterion. Race may be one among other criteria in affirmative action programs.

In two reapportionment cases in the mid-1990s, the Court moved to a point where it held race-conscious remedies to be valid only in those cases where they were used to eradicate the effects of specifically identifiable past discrimination.[28]

In the summer of 2003, the Court decided two cases involving the University of Michigan's affirmative action program. One case involved the undergraduate school,[29] and the second involved the law school.[30] Although the process was more complex, one facet of the undergraduate affirmative action program awarded 20 admission points to all minority applicants, and this became the focus of the Court's opinion.

The law school's program required a review of every applicant's "hard" and "soft" admissions variables. Hard variables are LSAT score, grade point average, letters of recommendation, and other materials required for an application. Soft variables are things like the enthusiasm of recommenders and the student's own statement on how she/he would contribute to the diversity of the law school. The program called for review of hard and soft variables plus the concept of *critical mass* to make admissions decisions. Critical mass means there must be enough individuals from an underrepresented group so that an admitted individual would not feel like a spokesperson (read token), and there should be enough individuals from an underrepresented group to provide a truly diverse perspective for the other students at the law school. As it had done in *Bakke* 25 years earlier, the Court recognized student body diversity as a compelling enough reason to discriminate on the basis of

race. However, the undergraduate program ran afoul of the least restrictive means prong of the test. The law school's affirmative action program, by way of contrast, met both prongs of the test.

To the degree that administrative law deals with discrimination of any kind, it is always public or governmental discrimination. Private discrimination is a matter of constitutional law and statutory law under the 1964 Civil Rights Act and, to a lesser degree, the Thirteenth Amendment. Some of you are probably wondering: What about quotas and anti-affirmative action propositions on ballots? Although this is not a matter of administrative law, it is important enough to take the time to clear confusion.

First, it should be obvious to you from the preceding discussion that no state government or state government agency can have a quota system. It cannot have an affirmative action program in which race is the sole criterion, although race can be a factor. To the degree that a state's medical school or law school has a set-aside program, race cannot be the sole criterion.

Although it has become popular to refer to it as *reverse discrimination,* the more appropriate descriptive term is *affirmative action.* There are affirmative action programs of all kinds. Harvard University (and most Ivy League universities as well) gives bonus points to applicants who attended public schools in states such as Kansas, Iowa, Texas, Oklahoma, Georgia, and so on. The theory for this is simple. Students who are the product of such schools cannot compete on the SAT exam with students who are the product of the Eastern private academies. If Harvard did not do something to level the playing field, it would still be a homogeneous elitist university filled only with the children of the rich who could afford private academies (where the curriculum is geared to producing high SAT scores). It is because a diverse student body is seen as essential to a well-rounded education that affirmative programs of all kinds are appropriate for universities. Indeed, the Supreme Court has said that a diverse student body constitutes a "compelling state interest."

Quotas, however, to the degree that they exist anywhere (they are few and far between) are found almost exclusively in the private sector. Generally, they are created by an agreement between management and a union, and their purpose is to remedy empirically verifiable past discrimination. For example, the United Steel Workers forced an employer to accept a program ensuring that 50 percent of all trainees in an in-plant craft training program were black. This quota was to remain in effect until the number of black skilled craft workers in the plant matched the proportion of blacks in the local workforce.[31] A federal district court found racial discrimination in a union's admission practices and imposed a goal of 29 percent non-White membership in the union by a set date (the 29 percent matched the non-White percentage in the local labor pool).[32] This is how we get quotas. Although the 1964 Civil Rights Act bans discrimination in interstate commerce, the Supreme Court has noted that the Act's purpose was to promote the employment of Blacks who had previously been excluded from participating in the national economy. So private benign discrimination (to make up for past discrimination) is legal under the 1964 Civil Rights Act.[33] Benign racial discrimination by a government is not constitutional under the equal protection clause.

The final area involving what sounds like quotas is the area of preemployment criteria. Requiring applicants for a job with a state correctional agency to be at least five feet, eight inches tall and weigh at least 160 pounds excludes, without reason, 75 percent of the female population. A specific score on a preemployment examination may disproportionately discriminate against a clearly identifiable minority. In the early 1970s, the Court ruled

unconstitutional preemployment criteria that (a) have a disproportionate impact on a clearly identifiable minority and (b) are not related to job performance.[34] The Court soon overruled that case and began to employ a purposeful discrimination analysis to preemployment criteria cases. That is, preemployment criteria with a clearly identifiable disproportionate impact on a minority were not unconstitutional unless they could be shown to be part of purposeful discrimination. In 1989, the Court decided another case that made it easier for business to justify such criteria.[35] The civil rights bill negotiated and debated so strongly in 1991 (and often referred to as a "quota bill") was meant to reverse decisions of the Rehnquist Supreme Court in this area.[36]

While the Civil Rights Act of 1991 does not impose or even mention quotas, it restores the Court's original two-pronged test (disproportionate impact and criteria unrelated to job performance), and it forbids the application of purposeful discrimination to these kinds of cases. Some have argued that this Act will cause businesses to "voluntarily" impose "quotas" on themselves to avoid a "disproportionate impact."

Sexual Harassment

As a potential public administrator, you should be especially aware that should you make a decision that happens to violate either a client's or an employee's rights, you personally can be held liable. You can also incur liability for the governmental unit that you work for. Given that, you should be well aware of property and liberty interests under the due process clause. You should know enough not to violate someone's rights under the current jurisprudence applicable to the equal protection clause. Equal protection law, however, is beyond the scope of this text but the law will presume that as a trained public administrator you know enough about it to avoid violating someone's rights. An area of the law that is closely related and mushrooming in terms of litigation is gender discrimination in general and sexual harassment in particular.

Constitutionally, government (usually but not always the legislature), cannot create categories of citizens and treat them differently based on gender without a really good reason. The Supreme Court uses the phrase "important governmental objective." Further, the classification scheme must reasonably be a legitimate means of furthering that important objective. By statute, there are two roads to gender discrimination. Title IX of the Education Act prohibits gender discrimination in education. You should already be aware that Title VII of the 1964 Civil Rights Act prohibits gender discrimination in interstate commerce.

Title IX of the Education Act is really an act of Congress under its Article One Section Eight spending power. It applies to any educational institution that receives federal money (almost all public schools from primary, secondary to college), and it forbids gender discrimination. If such discrimination is reported or otherwise suspected, the educational institution is notified and given an opportunity to correct the situation. If no corrective action is taken, federal funds are cut off.[37] There is nothing in the Act that establishes a plaintiff's right to sue an offending educational institution. The Supreme Court, however, in *Franklin v. Gwinett Co. Public Schools* 503 U.S. 60 (1992), said there was an implied private right to sue. The case involved a teacher/coach who allegedly sexually harassed and abused a female high school student. The Plaintiff alleged "coercive intercourse" and that the other faculty and administrators were aware of the harassment and did nothing. Finally she alleged that the school district dropped all internal investigations once the teacher/coach resigned. The decision was unanimous albeit with concurring opinions.

In 1998, in a five to four decision, the Court decided that a school district was not liable for a high school teacher's sexual harassment of a female student. The teacher and student were caught having an affair but the administration was not aware of the situation. See *Gebser v. Lago Vista Independent School District,* 524 U.S. 274 (1998). A year later the Court decided another Title IX case that received some attention from the media. The case of *Davis v. Monroe County Board of Education,* 526 U.S. 629 (1999) involved an allegation that a fifth-grade male student sexually harassed one of his female classmates, thereby creating a hostile environment. The girl's mother alleged that school authorities were told about the situation and they refused to investigate or to separate the two students. In another five to four decision, this time with Justice O'Connor aligning with Stevens, Souter, Ginsburg and Breyer, she turned the *Gebser* majority into dissenters and decided that the school district was liable. The major variables that seem to incur liability in Title IX cases are whether someone with the authority to resolve a sexual harassment situation is made aware of the problem and whether steps are taken to resolve it. If there is no administrative knowledge, then there is no liability. Administrative knowledge along with insufficient or nonexistent remedies constitutes what courts call *deliberate indifference,* and that will bring damages as well as injunctive relief.

Title VII cases under the 1964 Civil Rights Act are not as clear-cut as the Education Act cases. That is because there are two forms of discrimination involved: discrimination against workers because of their gender and discrimination between males and females in terms of compensation, promotion, assignment, and so on. For example, a study of Texas school superintendents showed that women comprised 75 percent of the teachers, 51 percent of the assistant principals, 47 percent of the principals, and 36 percent of assistant superintendents, but only 8 percent of the superintendents.[38] This is what is known as the "glass ceiling." Second and of more importance to our discussion here, the Equal Employment Opportunity Commission has adopted guidelines on sexual harassment that create two forms of sexual harassment.[39] There is quid pro quo harassment where a person in authority over a worker uses that authority in an attempt to extract sexual favors. There is also a hostile environment where again, usually (but not necessarily), a person in authority makes an employee uncomfortable by sexual innuendo, language, or deeds. More cases involve hostile environment than quid pro quo, but an early case of the latter is *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986). The plaintiff was hired by the defendant, who was a bank vice president. She started as a teller trainee and advanced to teller, supervisor, and eventually branch manager over her four-year employment. During that time, she allegedly had sex with the vice president 40 or 50 times out of fear of losing her job. All parties, however, agree that the promotions were based on merit. Her case was dismissed at the trial court because the judge said that she could not recover under Title VII unless she could demonstrate economic or physical injury from the alleged harassment. The Supreme Court reversed and said that the fact of the harassment *is* the injury under Title VII, and a plaintiff need not show economic or psychological injury to sustain the suit.

One of the first hostile work environment cases was *Harris v. Forklift Systems,* 510 U.S. 17 (1993). Here, the plaintiff alleged that the president of the equipment rental company created an abusive work environment that eventually forced her to quit. This is known in legal parlance as a *constructive discharge.* It means in law, if not in fact, or to put it another way, "as if"[40] the employee had been wrongfully terminated. It means that the employer made the work environment so hostile that the employee was left with no choice but to quit. At trial, the plaintiff alleged that the president, in front of other employees, called her

a "dumb ass woman," suggested that they go to a hotel to negotiate her raise, asked her to fetch coins out of his front pants pockets, and threw objects on the floor in front of her and asked her to pick them up. The trial judge sided with Forklift Systems, saying that the plaintiff could not show psychological injury from the treatment she had received, which he called a "close call" on the question of creating a hostile work environment. One of the main issues at the Supreme Court was what the plaintiff must show to establish a hostile work environment. Unanimously reversing the trial judge, the Court said that a hostile work environment depends on how frequent and severe the offensive behavior is, whether the offensive behavior is physically threatening or emotionally humiliating, and whether the behavior interferes with the employee's ability to perform the work.

The question before the Court in *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998), was whether a male plaintiff could sue under Title VII for a hostile work environment created by other male employees. The answer is yes; Title VII's prohibition on sex discrimination is not limited to male/female situations.

The concept of vicarious liability, discussed in Chapter 10, is familiar to managers in either the private or the public/nonprofit sector. The concept simply means that sometimes, an employer is liable for the acts of employees. This is the case whether the employer was aware of the employee's behavior or not. The court heard two cases in 1998 that dealt with situations in which an employer could be held liable for the hostile work environment created by management or other employees. One case, *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998), comes from the private sector, and the other case, *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), originated in the public sector. The 1964 Civil Rights Act applies to both.

In the *Burlington Industries* case, the plaintiff, Ellerth, was allegedly harassed by a supervisor once removed (not her immediate supervisor), who made threats against her continuing employment if she did not "loosen up" and have sex with him. These threats were never carried out, however, and indeed during the period of harassment, the plaintiff was promoted. She was aware that the company had a policy against sexual harassment, but she never lodged a complaint because she knew it would go through the desk of her harasser. She eventually quit (again a potential constructive discharge) and sued. The question was whether Burlington Industries could be held liable for the sexual harassment of a mid-level manager when it had no knowledge of the behavior. To solve this question, the Court turned to the common law of agency or judge-made law about when one person (employee) acts as the agent of another (employer). It also turned to a concept called the *restatement (second)* of agency. A *restatement,* a legal work published by the American Law Institute, is a compilation by judges, lawyers, and legal scholars that describes the law in a given area and suggests the direction it may go.[41] From these sources, the Court indicated that generally an employer is liable for the acts of an employee if the act occurred within the scope of employment. Also, for the most part, when an employee engages in sexual harassment, it is not within the scope of employment.

There are several exceptions regarding when an employee can incur liability against the employer, even acting outside the scope of employment. If supervisors rely on their apparent authority to accomplish the harassment or if they were aided in the harassment by the existence of the agency relationship, the employer may be liable. Ellerth successfully carried her burden of proof to establish potential liability for Burlington. The Court, however, said that an employer could avoid liability by establishing what is now referred to as the *Ellerth/Faragher defense.* First, if an employer can show that it took reasonable measures

to correct the situation and, second, that the allegedly harassed employee failed to take reasonable action to avoid the situation, the employer can avoid liability. This is what is known as an *affirmative defense,* which means that defendants who attempt to use it will need to carry the burden of proof (by a preponderance of the evidence). Because Burlington might be able to prove that Ellerth failed to take reasonable action to avoid the situation (by not going through the complaint channels), the case was returned to the lower courts. In this case, the Court downplayed the importance of the distinction between quid pro quo and hostile environment because what started out as a quid pro quo situation turned out in the end to be a hostile environment because the threats were not carried out.

In the *Faragher* case, a female ocean life guard for the city of Boca Raton was allegedly forced to quit her job due to uninvited and offensive touching and lewd remarks from her three supervisors. She sued both the supervisors and the city (i.e., the employer). The city raised the defense against liability by saying it had a sexual harassment policy in place and the plaintiff did not avail herself of it. The problem was that the city failed to distribute its policy to all employees, so that neither the three supervisors nor the victim were aware of it; hence, the city had failed to meet its burden in raising the affirmative defense. When constructive discharge is caused by *tangible employment action* (the employer fires, demotes, reassigns, transfers, etc., the affected employee), the affirmative defense to vicarious liability for sexual harassment is not available to employers. The 2004 case of *Pennsylvania State Police v. Suders* addresses that issue and appears at the end of this chapter.

Future Issues in the Law of Public Employment

Look for various forms of clashes between public employees and employers over privacy. Expect expanded demands for urine drug tests as a preemployment criterion as well as randomly throughout employment. There could be expanded use of lie detectors and videotaping of employees during their entire shift at work. Finally, employers are increasingly looking to see where their employees go on the World Wide Web. Local governments are increasingly requiring that anyone on the payroll live in the jurisdiction, a concept the Supreme Court has upheld.[42]

Summary

1. Public employees can be categorized as either probationary or permanent employees. Only permanent employees have a property interest in their job.
2. The right to a pretermination hearing is contingent on the ability to demonstrate either a property or a liberty interest.
3. Given a property interest, the right to a predeprivation or predisciplinary hearing depends on the balancing interests from *Mathews v. Eldridge.*
4. Because probationary employees lack a property interest, they must rely on the establishment of a liberty interest.
5. Liberty interests are established in one of two ways: (a) if publicly stated reasons for termination cause damage to one's reputation and/or ability to seek employment in the field, and (b) if the primary reason behind the decision to terminate an employee was the employee's exercise of a constitutionally protected right.

6. The range of constitutionally protected expression is more narrow for public employees than it is for all other citizens (expression that hampers the working relationship between an employee and an administrator is not protected).
7. Employees with a property interest can be terminated for cause (or financial exigency), but a pretermination hearing is required.
8. Government discrimination generally falls under the jurisdiction of the equal protection clause of the Fourteenth Amendment or the Civil Rights Act of 1964. Although the Act was aimed at private discrimination initially, it now applies to government discrimination as well because such discrimination has a significant effect on interstate commerce.
    a. Official (as opposed to private), racial discrimination must be purposeful before it can be illegal. If a plaintiff demonstrates that governmental racial discrimination is purposeful, then the burden of proof switches to the government to demonstrate a compelling interest in the policy. Rarely if ever can states meet the equal protection compelling-interest test.
    b. Other forms of social and economic discrimination must meet the middle tier of equal protection analysis. To have the program or policy survive, government must show: (a) an important governmental objective and (b) that the policy is rationally related to the achievement of that objective.
    c. Affirmative action programs are constitutional so long as race is simply one among many criteria, but race cannot be the sole criterion. Indeed, whether affirmative action, redistricting, child custody, USDA loans to farmers, or racial profiling, race conscious decisions always violate the Constitution. The exception is actions to eradicate the effects of specifically identifiable past invidious discrimination.
9. Sexual harassment falls under the 1964 Civil Rights Act.
    a. There two kinds of sexual harassment, quid pro quo and hostile environment, but the distinction makes no difference in vicarious liability suits.
    b. To sue under quid pro quo, a plaintiff must carry the burden of proof that the harassment happened. The plaintiff need not submit evidence of injury in the form of psychological, physical, emotional, or economic injury. The injury is the sexual abuse.
    c. To succeed in a hostile environment suit, the plaintiff needs to prove the working environment was hostile as opposed to uncivil. To do that, the plaintiff needs to show that the offensive behavior: (a) was either frequent or severe, (b) was either physically threatening or emotionally humiliating; and (c) interfered with the ability to perform the work. If the plaintiff can establish the hostility of the working environment, he or she need not necessarily submit evidence of economic injury. The harassing atmosphere is the injury. Legally, the injury is the change in terms or conditions of employment because of sex, which is what the Civil Rights Act forbids. Often, the concept of a constructive discharge comes into play in these cases.
    d. Vicarious liability for the employer can be established by showing that a supervisor: (a) relied on his or her apparent authority to accomplish the harassment or (b) was aided in the harassment by the existence of the agency relationship to the employer.

(1) An employer can defend against vicarious liability by establishing what is now referred to as the *Ellerth/Faragher* defenses: (a) that the employer took reasonable measures to prevent or discourage employees from engaging in sexual harassment or that it discovered the harassing behavior and took reasonable steps to stop it and (b) that the complaining employee failed to take appropriate steps to alleviate the situation (e.g., failed to file an internal harassment grievance). A strong policy against sexual harassment distributed to all employees along with training and accompanied by a procedural short-circuit, so that a complaining employee will not end up routing the complaint to the harasser, will generally establish the first part of the defense.

(2) The *Ellerth/Faragher* defense is not available to an employer where there was a hostile work environment and tangible employment action (discharge, demotion, reassignment, etc.).

(3) A hostile work environment plaintiff who is also suing for constructive discharge under vicarious liability must show that working conditions were so intolerable that a reasonable person would have felt compelled to resign. If there is no tangible employment action, the *Ellerth/Faragher* defense is available. If there is tangible employment action, the employer is liable (no defense is available).

(4) It is the kiss of death for an employer to have evidence presented that the employer was aware of a harassment situation and did nothing. This is also true where an employer perhaps did not know but *should* have known that a problem might exist. An employer should have known, for example, if there was no harassment policy, it was not distributed to all employees, or it existed but was not taken seriously or not enforced (as in the *Faragher* case).

END-OF-CHAPTER CASES

Bishop v. Wood
426 U.S. 341 (1976)

The facts are contained in the opinion written by Justice Stevens, joined by Justices Burger, Stewart, Powell, and Rehnquist. Justices White, Brennan, Marshall, and Blackmun dissented.

The questions for us to decide are (1) whether petitioner's employment status was a property interest protected by the Due Process Clause of the Fourteenth Amendment, and (2) assuming that the explanation for his discharge was false, whether that false explanation deprived him of an interest in liberty protected by that Clause.

I

Petitioner was employed by the city of Marion as a probationary policeman on June 9, 1969. After six months he became a permanent employee. He was dismissed on March 31, 1972. He claims that he had either an express or an implied right to continued employment. A city ordinance provides that a permanent

termination, which is always effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action. . . .

We note, finally, two recent Court of Appeals decisions that indicate how the "official act" (or "tangible employment action") criterion should play out when constructive discharge is alleged. Both decisions advance the untangled approach we approve in this opinion. In *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (CA1 2003), the plaintiff claimed a constructive discharge based on her supervisor's repeated sexual comments and an incident in which he sexually assaulted her. The First Circuit held that the alleged wrongdoing did not preclude the employer from asserting the *Ellerth/Faragher* affirmative defense. As the court explained in *Reed*, the supervisor's behavior involved no official actions. Unlike, "e.g., an extremely dangerous job assignment to retaliate for spurned advances," the supervisor's conduct in *Reed* "was exceedingly unofficial and involved no direct exercise of company authority"; indeed, it was "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed." In contrast, in *Robinson v. Sappington*, 351 F.3d 317 (CA7 2003), after the plaintiff complained that she was sexually harassed by the judge for whom she worked, the presiding judge decided to transfer her to another judge, but told her that "her first six months [in the new post] probably would be 'hell,'" and that it was in her "'best interest to resign.'" The Seventh Circuit held that the employer was precluded from asserting the affirmative defense to the plaintiff's constructive discharge claim. The *Robinson* plaintiff's decision to resign, the court explained, "resulted, at least in part, from [the presiding judge's] official actio[n] in transferring" her to a judge who resisted placing her on his staff. The courts in *Reed* and *Robinson* properly recognized that *Ellerth* and *Faragher*, which divided the universe of supervisor-harassment claims according to the presence or absence of an official act, mark the path constructive discharge claims based on harassing conduct must follow. . . .

. . . Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. The plaintiff might elect to allege facts relevant to mitigation in her pleading or to present those facts in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement.

We agree with the Third Circuit that the case, in its current posture, presents genuine issues of material fact concerning Suders' hostile work environment and constructive discharge claims.[11] We hold, however, that the Court of Appeals erred in declaring the affirmative defense described in *Ellerth* and *Faragher* never available in constructive discharge cases. Accordingly, we vacate the Third Circuit's judgment and remand the case for further proceedings consistent with this opinion.

[11] Although most of the discriminatory behavior Suders alleged involved unofficial conduct, the events surrounding her computer-skills exams were less obviously unofficial.

NOTES

1. Because it takes, say, five years to get tenure, employment consists of 5 one-year contracts until the tenure decision.
2. 434 F.Supp. 1273 (D. Del., 1977).
3. 469 F.2d 829 (5th Cir., 1972).
4. 439 U.S. 410 (1979).
5. 548 F.2d 857 (9th Cir., 1977).
6. 473 F.2d 988 (2d Cir., 1973).
7. Steven Cann, "A Virus in the Ivory Tower," 18 *Educational Considerations* 43 (1991).