THE *ROTH* CASE: THE BURGER COURT AND JUDICIAL RESTRAINT

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When the United States Supreme Court announced its decision in *Roth v. The Board of Regents of the State Colleges*\(^1\) on June 29, 1972, it made a ruling of landmark significance in the law governing academic personnel matters. The Court held that non-tenured faculty members have no constitutional right to a statement of reasons or to a hearing in cases regarding non-retention.

The *Roth* case was surrounded by a great deal of notoriety and publicity which caused many individuals and groups, in addition to the plaintiff, Dr. David Roth, an Assistant Professor at Oshkosh State University, to become interested in its outcome. Several other non-tenured faculty members whose contracts had not been renewed by the Wisconsin State University System were anxiously awaiting the Court ruling. At the same time, college presidents, vice-presidents, deans, and department chairmen throughout Wisconsin quivered at the mere mention of the possibility that the lower federal courts’ decisions (which maintained that non-tenured faculty were constitutionally entitled to a statement of reasons and a hearing in a non-retention case) would be sustained. Although most college administrators in the rest of the country probably had not heard of the *Roth* case, several state and national associations, representing their interests, had filed *amici curiae* briefs on behalf of the defendant-appellant Wisconsin State University Board of Regents, arguing that detrimental results would occur if the lower court decisions were not reversed.\(^2\)

The *Roth* case is unique because it marked the first time that the Court had addressed itself to the issue of what procedural rights the Constitution guarantees a non-tenured teacher. This paper approaches *Roth* as a case study attempting to identify the kinds of factors and events capable of generating a legal controversy of sufficient magnitude to cause the nation’s highest judicial

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\(^1\) 408 U.S. 654 (1972).

\(^2\) Briefs were filed by the following: the Board of Governors of State Colleges and Universities of Illinois; the Board of Regents of Regency Universities of Illinois; the Board of Trustees of Southern Illinois University; the American Association of State Colleges and Universities; and the American Council on Education and the Association of American Colleges; by Attorneys Albert E. Jenner, Chester T. Kamin, and Richard T. Franch, 135 South La Salle Street, Illinois 60603.
tribunal to deem it worthy of a hearing. The development of the controversy is traced from its origin in late November, 1968 to its final adjudication on June 29, 1972 and includes a description of the original plaintiff, Roth, the charges made against him, and an analysis of the three federal court opinions in the case.

EVENTS LEADING TO THE NON-RETENTION DECISION

The events leading to the non-retention of Dr. David Roth in the Political Science Department at Oshkosh State University, Oshkosh, Wisconsin (now known as the University of Wisconsin—Oshkosh), were extremely complicated, as evidenced by the conflicting interpretations of Roth’s actions as well as the events surrounding the case. Although several of the charges against Roth can be accurately documented, many diverse opinions were offered as to their verity or falsity. Out of the numerous interviews with many of the parties involved, including Roth himself, and through extensive examination of reports, legal briefs, newspaper articles, and federal court opinions, this writer has attempted to make a fair judgment as to why Roth’s contract was not renewed for the 1969–1970 academic year in addition to the important legal and constitutional implications for state control of educational disciplinary matters.

The events leading to Roth’s non-retention initially arose out of the suspension of ninety-four Oshkosh black students after a confrontation involving the occupation of President Roger Guiles’ office on November 21, 1968. The black students were protesting against President Guiles’ alleged insensitivity to their demands for more black instructors, additional black studies courses, a black culture center, and better counseling services for black students. President Guiles, arguing that it was administratively and financially impossible for him to do so, refused to agree to the demands whereupon one student yelled, “Do your thing.” With this, bedlam broke loose. His desk and files were overturned and their contents scattered around the room. Typewriters were thrown on the floor, tables were overturned, draperies were torn, and a calculator was thrown out the window, causing damage in excess of $7,000. All ninety-four students were arrested and immediately suspended from classes.

Although Roth had not been involved with black students on the Oshkosh campus prior to the disturbance in the president’s office, in the two or three weeks following it he became the center of attention. One Oshkosh faculty member maintained that Roth acted more like a student leader than a faculty member during these
weeks. Indeed, Roth, by his own admission, said that he gave advice and support to numerous student groups.

On December 2, 1968, a meeting was scheduled between the Oshkosh administration and the parents of the suspended black students. Roth admitted dismissing his class in International Relations which was scheduled at the same time, and he encouraged his students to join him at the meeting. Three days later Dr. Raymond Ramsden, Vice-President of Academic Affairs, sent Roth a note indicating that he wanted to discuss this action with him. Roth refused to respond to the Vice-President’s request.

Between the end of Thanksgiving recess and Christmas vacation, Roth was accused by the Oshkosh Administration of not teaching material pertinent to his International Relations course. Several students claimed in depositions that fifty to seventy-five per cent of the class time between these periods was devoted to discussing the black student riots and related matters. Roth freely admitted this, arguing that the Oshkosh events constituted a “microcosm of international conflict.” Arthur Darken, Dean of Letters and Science and an international relations scholar, admitted this was a good analogy. But he maintained that Roth greatly overused what should have been an illustrative point in one lecture.

On Friday, December 20, 1968, the Wisconsin State University Board of Regents convened in special session to make a final decision on the academic status of the ninety-four suspended students in response to a court order issued by United States District Judge James Doyle. Roth led a group of students and faculty in presenting a petition to the Board asking for the reinstatement of the ninety-four students. When the petition was being presented to the Board an incident allegedly occurred that compounded David Roth’s problems at Oshkosh. He was accused of saying, “Here it is, you racist pigs.” No administrator or faculty member interviewed at Oshkosh admitted to having heard Roth make the statement. Roth himself denied it. However, two members of the Board of Regents maintained this is what he said. Whether or not he actually made the statement is therefore unclear. As one high administrative official at Oshkosh stated, “I have heard from reliable sources that he did say it, and I have heard from equally reliable sources that he didn’t say it.”

At any rate, no mention of this particular allegation was made in the official memorandum from Dean Darken to President Guiles and Vice-President Ramsden which recommended that Roth not be retained. Instead, Dean Darken emphasized the fact that Roth

\footnote{See Marzette v. McPhee, 294 F. Supp. 562 (1968).}

\footnote{Dated January 28, 1969, and reprinted as Exhibit C in the Appendix to the appellant State of Wisconsin's Brief at pp. 120–126.}
was scheduled for three classes on Friday, December 20, during which time he was in attendance at the Board meeting. He stated:

... if this is to be overlooked or simply 'winked at' because Dr. Roth was casting himself in the role of a 'liberal spokesman' the door is opened to all professors to cut their classes whenever they believe one of their personal or social objectives would be served in this way. Faculty are engaged to teach and it is simply not acceptable that they fail to meet classes for such reasons as prevailed here.°

Roth admitted that he did not teach his classes on the day that the Regents were meeting in Oshkosh. However, he maintained he was absent on December 20 due to illness. He went instead to his office and the Board meeting because he thought that these demands on him would be less than in the classroom. The administration, needless to say, viewed this as a gross breach of professional ethics and responsibility.

Dean Darken was also disturbed by several public statements Roth made to the press. Darken said they “indicate a very unscholarly approach to the truth and the search for knowledge that make it doubtful he has the qualities of scholarship desirable in a faculty member.” The Dean also indicated that Roth said: “Many of us feel that the authoritarian and autocratic structure of this university is no longer tolerable,” and “The state universities will not be able to keep good professors if they are told they can’t teach this or that in their classes.” Darken argued that Roth never made any attempt to specify what was authoritarian and autocratic nor did he mention any instances where any faculty were told “what to teach or what not to teach.”

Furthermore, according to Dean Darken, Roth advised students not to go to an informational meeting to learn of the progress being made on the demands of the black students. He was reported to have said, “We won’t talk to any Mickey Mouse committee.” Darken concluded:

If a college professor cannot be expected to encourage a rational approach to a problem of our day, who can be expected to do it? ... What is involved here is not the freedom of the faculty member to explore competing views in search of the truth in his class or research but the use of unsubstantiated allegations of a grave nature in a tense and possibly inflammatory campus situation. This behavior is not consistent with what the University has a right to expect from a faculty member in the way of scholarship.7

Finally, Roth did not give a two-hour written final examination in his International Relations course for freshmen, which is required at Oshkosh, despite an official directive from the Vice-

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°Ibid., p. 121.
6Dean Darken’s memorandum, pp. 122–123.
7Ibid.
President for Academic Affairs. Instead, Roth used a group project which had been done earlier in the semester in lieu of a final. Dean Darken's memorandum stated:

The final examination, especially in lower level and freshman courses serves an important purpose and it is not tolerable for a first year faculty member in one of his first teaching assignments to cavalierly decide he won't give a final examination to students and breach a major all-university policy that is in the interest of the students.

PROCEDURES LEADING TO THE NON-RETENTION DECISION

The procedures leading to the non-retention of Dr. David Roth began on December 17, 1968 when the Political Science Tenure Committee (composed of the department chairman, who was not tenured, and the four tenured members of the department) voted unanimously to retain all of the non-tenured faculty members, including Roth. Apparently, there were some reservations about retaining Roth, but the general feeling was that there wasn't sufficient evidence of misconduct to warrant non-retention at the time of the December 17 meeting which, of course, was prior to the December 20 incident at the Board of Regents meeting.

Prompted by the December 20 incident, however, as well as by some additional public statements made by Roth early in January, and also by his failure to give a final examination, Dean Darken asked the four tenured members of the department to meet in his office on Friday, January 24, 1969. At this time the Dean informed them of his recommendation not to retain Roth. He then told them, if they chose to do so, they had until 4:00 p.m. Monday, January 27, to reconsider their recommendation in light of Roth’s actions since the December 17 meeting. On Monday the committee cast one vote for retention and two against it, with two abstaining. Roth was informed of his non-retention for the 1969–1970 academic year both by telephone and by registered letter on January 30.

DAVID ROTH IN THE FEDERAL COURTS

On February 14, 1969, through attorneys provided by the Wisconsin Chapter of the American Civil Liberties Union, David Roth filed suit in the Federal District Court for Western Wisconsin, Judge James Doyle presiding. In the complaint it was alleged that Roth’s contract had not been renewed merely because he had exercised his constitutional rights of freedom of speech on matters of

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*Vice-President Ramsden wrote, in a memorandum to all faculty, dated December 17, 1968: "Every class, with exceptions listed below, will end with a 2-hour final written examination to be given during the time arranged for it in the schedule. If you are of the opinion that a two-hour final written examination is inappropriate for a course not listed, please make this known to me by 4:00 p.m. Friday, December 20."

*Dean Darken's memorandum, p. 120.
university policy and practice. Furthermore, it argued that to refuse to renew his contract without providing him a statement of the charges made against him and an opportunity to respond to them at a formal hearing was a denial of his constitutional right to due process of law.

Judge Doyle unexpectedly held this case under advisement for a whole year, finally handing down a decision on March 12, 1970. Judge Doyle agreed with Roth’s complaint and ordered:

Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, and a hearing if the professor appears at the appointed time and place.\textsuperscript{10}

He further stated that if the defendants, that is, the university officials, elected not to abide by the above order requiring a statement of reasons and a hearing, they

\ldots shall be required, on or before June 1, 1970 to offer the plaintiff a contract as a member of the faculty of the university for the academic year 1970–1971, on terms and conditions no less favorable to him than those contained in his contract for the academic year 1968–1969.\textsuperscript{11}

The Wisconsin Attorney General applied to the Seventh Circuit Court of Appeals for a stay of execution of the lower court’s decision pending appeal, which was routinely granted. The case was argued before the Seventh Circuit Court of Appeals on December 5, 1970. The Seventh Circuit Court issued its opinion on July 1, 1971, sustaining Judge Doyle’s decision. Speaking for a divided court, Judge Thomas Fairchild agreed that a hearing and a statement of reasons were constitutionally required. He said:

Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant cases, and others with a background of controversy and unwelcome expressions of opinion is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights.\textsuperscript{12}

Chief Circuit Judge F. Ryan Duffy dissented on the grounds that the decision would have the effect of making the federal courts the “final arbiters of all similarly situated cases.” Duffy added:

In my view, the state’s interest in preserving a workable system of tenure which includes, almost by definition the ability to select freely and maturely its non-tenured teaching personnel, far outweighs any expectancy which the plaintiff David Roth might have had in continued employment at Wisconsin State University \ldots I further believe that the majority's

\textsuperscript{10} 310 F. Supp. 972 (1970), 978.

\textsuperscript{11} \textit{Ibid.}, p. 980.

\textsuperscript{12} 446 F. 2d. 806 (1970), Circuit Judge Otto Kerner sided with Judge Fairchild.
holding is both unprecedented and represents an unwarranted intrusion of the Federal Judiciary into state educational systems.\textsuperscript{13}

The stage was set, then, for an appeal to the United States Supreme Court, and the Board of Regents decided almost immediately to go ahead with an appeal.

THE SUPREME COURT DECISION

The United States Supreme Court granted \textit{certiorari} on October 26, 1971.\textsuperscript{14} Oral arguments in the case were presented on January 18, 1972, and a decision was handed down on June 29, 1972.\textsuperscript{15}

The opinion of the court was delivered by Justice Stewart and joined in by Justices White, Blackmun, and Rehnquist. Chief Justice Burger filed a concurring opinion. Justices Douglas, Brennan, and Marshall dissented. Justice Powell did not participate in the decision.

Stewart’s opinion began with a brief statement of the facts, a review of applicable state statutes, and a summary of the lower court opinions. Clearly, according to Stewart’s opinion, Roth did not have any tenure rights to continued employment. At that time all teachers in the Wisconsin State University System were governed by statutory tenure which said that a teacher acquired tenure after being employed continuously for four years.\textsuperscript{16} A non-tenured teacher under Wisconsin law was entitled to nothing more than his initial one-year appointment. State statutes definitely gave university officials complete discretion over whether or not to renew a non-tenured teacher’s contract. While the Board of Regents rules did not provide any protection for a non-tenured teacher whose contract was not renewed, the Court indicated that they did provide for a hearing and a statement of reasons if a teacher was dismissed during the school year before the term of his contract was up.\textsuperscript{17}

According to the Court, the main issue was whether Roth “had a constitutional right to a statement of reasons and a hearing on the University’s decision not to rehire him for another year. We hold that he did not.”\textsuperscript{18} The remainder of the opinion is devoted to a statement of the rationale for this conclusion. While the Court did not disagree with Judge Doyle’s standard of simply weighing the interest of the plaintiff in having his contract renewed against the university’s interest in refusing to renew his contract, it held that it was necessary to go beyond this. Before weighing the inter-

\textsuperscript{12} \textit{Ibid}.
\textsuperscript{13} 404 U.S. 909 (1971).
\textsuperscript{14} 408 U.S. 593 (1972).
\textsuperscript{15} 1969 Wisconsin Statutes, Chapter 37.31.
\textsuperscript{16} 408 U.S. 567 (1972).
\textsuperscript{17} \textit{Ibid}., 569.
ests, the Court held that it was necessary to first determine "the nature of the interest at stake."\(^{19}\)

In order to determine "the nature of the interest at stake" the Court specified that it had to be decided whether or not the interest was specifically protected under the Fourteenth Amendment's protection of liberty and property. The Court first considered the liberty aspect. It stated that liberty included:

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.\(^{20}\)

If the university had made charges against him which could seriously damage his position in the community by implying, for example, that "he had been guilty of dishonesty and immorality," then, the Court concluded, that would have been a completely different situation. The Court would also have disapproved if the university had in some way placed a stigma on him that took away his freedom to continue engaging in his profession.\(^{21}\) However, the Court decided that the university had done neither of these things. In finalizing its discussion of the liberty issue the Court held:

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.\(^{22}\)

The Court also maintained that the plaintiff had not proven that the decision not to renew his contract was based on his free speech activities. The Court stated: "Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest."\(^{23}\)

Next, the Court's opinion discussed the property issue, admitting that an individual's property rights or interests may take a wide variety of forms. The Court cited several cases defining those property interests. For example, the Court said that it had held that welfare benefits are a property interest safeguarded by procedural due process.\(^{24}\) Similarly, the Court stated that it has held that public college professors cannot be dismissed from their positions

\(^{19}\) Ibid., 570–571.
\(^{21}\) 408 U.S. 564 (1972), 573–574.
\(^{22}\) Ibid., 575.
\(^{23}\) Ibid.
\(^{24}\) Ibid.
without procedural due process and that they cannot be summarily dismissed during the terms of their contracts. Moreover, the Court has maintained that even a substitute teacher who had been employed two months could not be dismissed because of her refusal to sign a loyalty oath. From these decisions, the Court argued that a definition of property interests emerged:

To have a property interest in a benefit, a person must have more than an abstract need or desire for 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.

The Court then made the distinction that property interests are not created by the Constitution but by laws or rules enacted or understandings promulgated by states. Hence, the plaintiff-respondent’s property interest in having his contract renewed at Oshkosh State University was created and limited by the terms of his appointment which specifically secured his interest in employment from September 1, 1968 to June 30, 1969. Indeed, the Court indicated the terms “made no provision for renewal whatsoever.” Thus, it concluded its assessment of the property interest and the entire opinion by saying:

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 non-retention 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.

DISSENTING AND CONCURRING OPINIONS IN ROTH

Justices Brennan and Marshall filed separate dissenting opinions. They argued for a broader definition of liberty and property, saying that both plaintiffs were entitled to a statement of reasons and

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28 408 U.S. 564 (1972), 577.
29 408 U.S. 564 (1972), 577-578.
30 Ibid., 578-579.
a hearing on the disputed issues. Justice Douglas in a more lengthy opinion argued that a statement of reasons and a hearing were necessary to guarantee individual rights against arbitrary action. He stated:

When a violation of First Amendment rights is alleged, the reasons for dismissal or for non-renewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution.  

Chief Justice Burger wrote a concurring opinion for the express purpose of emphasizing one central point that he felt had been obscured in the majority opinion. That point was that disputes between a state educational institution and one of its teachers is a matter of state concern and state law. Burger raised the doctrine of abstention, as he has done in many other opinions since being appointed to the Court. He concluded:

If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law.  

ASSESSMENT OF ROTH DECISION

The Roth case was an extremely complicated controversy arising out of unusually explosive circumstances. As is true in any emotionally-charged crisis, whether it be an automobile accident, a robbery, or a riot, reasonable men can view the same factual circumstances and come to completely opposite conclusions. This was certainly true of the Roth case, and it became more and more apparent with every individual interviewed, and every document, report, newspaper article, or legal brief. A deep schism was created over the personality of David Roth between those who regarded him as politically naive and those who saw him as a political revolutionary.

To the people of Oshkosh, Wisconsin, Roth presented himself as a true revolutionary bent on the complete destruction of the university and the American political system. His public statements, which were widely published in the press in Oshkosh and in Madison and Milwaukee, lent a good deal of substance to that collective impression.

One faculty member characterized Roth as a “bright, personable, abrasive bastard.” Another observed that:

when he set his mind to it he could be very charming, but when he got fired-up he was a real fire eater. When there was controversy he seemed

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n 408 U.S. 564 (1972), 587-592, 604-605.
n Ibd., 579.
n Ibd., 592.
to thrive on the smoke of the battle. He had a sort of 'Dr. Jekyll—Mr. Hyde personality.'

Roth characterized himself as having been "very immature and naive" throughout the whole Oshkosh crisis. He felt that "speaking out against injustice" was his responsibility as a member of the academic community:

My non-retention resulted from a personality conflict because I embarrassed the administration by criticizing their policies and their lack of sensitivity to blacks. This was perceived by them as disloyalty to the university and being in favor of violence.

During the four hours this writer spent with Roth, he certainly gave the impression of being naive and trusting. For example, in the middle of the evening he suddenly announced that he had to leave to meet a friend but that I was free to go through all of his files on my own. He was gone for over two hours. Needless to say, this was quite surprising in that I was a total stranger to him. Throughout the interview he came across as a very personable, calm, and likable individual. Indeed, the evening was a very pleasant one.

However, if Roth had been more politically astute he could very easily have taken many of the same stands, while remaining within the bounds of professional ethics and responsibility as well as civil discretion. In fact many of the things that he did and said (and allegedly did and said) demonstrate such incredible naiveté that one might begin to question whether he might not have been deliberately projecting this as a facade in the hope that it might advance his cause.

After all, David Roth was definitely not a provincial person from the homogeneous socio-economic political environment of a rural community. He had graduated from Claremont Men's College, a small liberal arts college with a reputation for academic excellence located in Claremont, California (on the eastern edge of Los Angeles County). He had gone to the University of California Law School at Berkeley for two years. He had lived in cosmopolitan San Francisco, while obtaining a master's degree from San Francisco State College. He had traveled extensively in the Philippines and the Far East, while doing research for his doctoral dissertation at the Claremont Graduate School, Claremont, California. Finally, he had spent a year in Berkeley, California doing research, prior to coming to Oshkosh. With this kind of background he should have been able to discern the legitimate modes and boundaries of dissent in a more sophisticated manner than he demonstrated in the 1968–1969 academic year at Oshkosh.

Whatever David Roth's intent was, however, an extensive investigation of the circumstances and events surrounding and lead-
ing up to the federal litigation in the Roth case leaves little doubt
that the Oshkosh administration acted in a reasonable manner.
They made the decision not to renew Roth’s contract mainly because
this was the most rational action they could take. Had they allowed
Roth to remain on the faculty, they would have been taking a
calculated risk of his escalating his protest actions and thus in-
flaming an already dangerous situation. Roth’s actions in dismiss-
ing classes on two separate occasions in order to pursue his own
political objectives, his extensive use of the classroom podium to
discuss irrelevant material, his failure to give a final examination,
and his refusal to honor a request from the Vice-President of
Academic Affairs for a meeting all forced the Oshkosh adminis-
tration to refuse to renew his contract.

IMPLICATIONS OF THE ROTH DECISION

The United States Supreme Court’s decision in Roth was char-
acteristic of the reasonable restraint the Burger Court has
demonstrated in matters of federal-state relationships. Its stance
regarding judicial activism is quite different from that of the
Warren Court. If this case had come before the Court one or two
years earlier, a vastly different decision would probably have been
reached. However, the majority opinion rightly recognized the
difficulties likely to be created when a federal court involves itself
in matters that might more prudently be left to the states.

One problem that would probably have occurred if the lower
court decision in Roth had been sustained is that an administrator
would be extremely reluctant to decide against renewing an indi-
vidual’s contract if he knew that this would oblige him to file formal
charges and go through a formal hearing. By the nature of the
case the definition of good teaching is rather subjective and precise
documentation of bad teaching is very difficult. After all, a teacher
can always be defended by such arguments as (1) every instructor
has some bad days, (2) he was not feeling well, (3) some students
think he is wonderful, or (4) whatever his faults, he is improving.
The burden of proof in a formal, adversary hearing procedure thus
falls on the administrator instead of the teacher. As a practical
matter probably very few contracts would go unrenewed given
this kind of situation. How many administrators could reasonably
be expected to non-retain a professor when the benefits of his non-
retention might very well be overshadowed by the bitter rhetoric
and controversy caused by the hearing? If, as a matter of policy,
an administrator did decide to proceed with hearings under such
circumstances, he would probably have to keep a dossier on every
faculty member, dating and documenting every incident that might
conceivably bear upon a teacher’s competence. This is a prospect that would not be welcomed by many, especially not by those who are the strongest advocates of extensive hearing procedures.

Moreover, if Roth had been upheld, faculty members who would ordinarily be releasable would have an incentive to create ambiguous and volatile situations which would make it very difficult, if not impossible, to remove them. A dissident faculty member could, for example, set himself up as an outspoken defender of a minority group in order later to be able to accuse the administrators of being racist or bigoted for not renewing his contract, and in many respects Roth did exactly that.

Justice Douglas’ dissenting opinion in Roth is a classic example of the limits of adjudication arising from our judicial adversary system. The Court simply does not have the required investigatory powers similar to those available to state (and national) legislatures. For example, his opinion flippantly glosses over the events and circumstances in the case that could not be covered adequately in the appellate briefs and oral arguments. This is how he characterized Roth’s behavior:

Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 black students without determining individual guilt. He also criticized the university’s regime as being authoritarian and autocratic. He used to discuss what was being done about the Black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.34

As a result, he concluded that the district and circuit court decisions should be sustained.

The problem with his capsulization is that is grossly oversimplifies a very complex set of circumstances and events. It completely ignores the intensity and the magnitude of Roth’s actions and the context in which they occurred. The fact that Roth attended a Board of Regents meeting is portrayed as a petty irregularity instead of the blatant breach of professional responsibility that it seemed to be according to most reports. Moreover, it ignores the other occasion when he failed to meet his classes, that is, when he attended the meeting between the Oshkosh president and the parents of the black students. It also fails to note the fact that he violated an explicit university rule by failing to give a written final examination. And it fails to mention his insubordination when he cavalierly spurned the request to meet with his Vice-President for Academic Affairs.

Finally, if the lower courts’ decisions had been sustained, the traditional distinction between tenured and non-tenured faculty

34 408 U.S. 564 (1972), 576.
would have been obliterated. Instant tenure, with all its ensuing rights and privileges, would have been created for all faculty merely upon signing an initial employment contract. Such a rule would have been in direct contradiction of accepted practice on the part of 1,080 colleges and universities with 300,000 faculty members and 6,000,000 students. It would have meant that all non-tenured, non-retained faculty members could have appealed their cases.

The amount of administrative and faculty time that would have had to go into investigating, documenting, and holding hearings would have been staggering. In the Wisconsin State University System, for example, there were some 206 non-tenured faculty contracts that were not renewed for the 1970–1971 academic year alone. The cost of paying the investigating administrators’ salaries as well as the legal expenses incurred would have been overwhelming. The federal courts, of course, would not have ever had to face these particular consequences.

In short, the Roth case raised this basic question: is there any rational justification for distinguishing between the rights enjoyed by tenured faculty and those to which non-tenured faculty should be entitled? Why should one group of faculty members have greater rights than another? In criminal law the granting of certain procedural rights to one group of alleged criminals, while granting a different set to another, would be considered unconstitutional because it would be a denial of “the equal protection of the law.” In Roth Judge Doyle and the Seventh Circuit Court of Appeals said in effect that there was really no rational basis for making such a distinction, although they never specifically discussed whether the distinction was constitutionally valid or even rationally defensible. By so doing they seemed to make educational disciplinary cases more closely akin to criminal proceedings and, in the process, take away the right of a professional group to organize and regulate their profession according to their own free choice.

The primary reason for differentiating between the rights of tenured faculty and non-tenured faculty is, of course, that only performance or experience can provide a sound basis for the presumption by an institution that a new teacher has attained a degree of excellence deserving of tenure. Initial appointments cannot ordinarily be made on grounds providing sufficient assurance that a person will reach this standard of excellence. For this reason it

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36 Ibid., p. 13.
is inherently unfair to assume that a non-retention decision, made early in an instructor’s affiliation with an institution, represents a denial of academic freedom rather than a reasonable assessment of his ability as a teacher and a scholar.\textsuperscript{87}

If the Supreme Court had affirmed the \textit{Roth} decision, the federal judiciary would have been allowed to expand its role in school disciplinary cases, and where some federal judges might have gone from this point, if given encouragement, is anyone’s guess. Public policy would have gradually ceased to reflect the wishes of the people as expressed through their elected representatives on state and local governing boards. Instead, it would have reflected the judgment of a few appointed federal judges far removed from the express wishes of the people.

Fortunately, the Supreme Court made a decision in \textit{Roth} that promises to arrest the continued expansion of the federal judiciary in educational disciplinary cases. The Court seems to be moving in the direction of giving the job of policy-making back to state and local governments not only in the area of educational discipline but also in other areas where continued expansion of judicial policy-making occurred during the Warren Court era.

There is no doubt that local and state governing boards, as well as the voters who either directly or indirectly select them, occasionally make decisions that by most rational standards of measurement are wrong. But in a democratic republic such as the United States, do they not have the right to be wrong? And do they not have the right to be free from having a decision superimposed on them by federal courts against deliberate policy decisions they have made? Then, too, careful analysis of the two lower court decisions in the \textit{Roth} case demonstrates that it is at least an open question whether they will be any less reasonable in their decisions than some federal judges have been.

To the extent that federalism has been challenged by the lower federal court decisions in \textit{Roth} and in numerous other educational disciplinary cases at both the secondary and higher educational levels, federal judges (and to some extent the legal profession itself) have done a disservice to American society. They have raised relatively minor injustices into constitutional issues which have strained the federal system. If the Burger Court had not reversed the district and circuit court’s decisions in \textit{Roth} and hence reversed the trend established in educational disciplinary cases in the later 1960’s, the state and local governments’ ability to control educational policy in their own schools and colleges would have continued to decrease. Further erosion of state control of educa-

tional disciplinary matters could have contributed to the death of federalism which the framers of the Constitution believed vital to the cause of freedom.

REFERENCES

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FINAL REPORT OF THE SPECIAL PROBLEMS COMMISSION, P. J. Thompson, Chairman. Released by Wisconsin State University—Oshkosh, December 15, 1969. (Mimeographed)


ADDENDUM

After this paper went to press, a federal court jury in Madison, Wisconsin, on November 9, 1973, awarded David Roth, now an assistant professor of political science at Purdue University, $6,746 in damages because, in their judgment, his constitutional rights of free speech were violated. The damages were assessed against Oshkosh administrators, President Roger Guiles, Vice-President Raymond Ramsden, Dean Arthur Darken, and two members of the Oshkosh Political Science Tenure Committee, David Chang and Charles Goff, all of whom participated in the decision not to retain Roth.

It must be understood that Roth was awarded these damages in a civil suit which he filed after the United States Supreme Court
in 1972 had ruled on the procedural question that the due process clause of the Fourteenth Amendment did not require that a nontenured professor be given a hearing in a non-retention proceeding. Hence, it must be emphasized that the civil suit for damages, concerning the substantive question as to whether Roth's constitutional right of free speech had been violated, has no direct legal bearing on the procedural decision handed down by the Supreme Court.

In spite of the jury's verdict to the contrary, I must respectfully disagree and stand by my own conclusions which are based upon an extensive investigation of the events and related constitutional issues.