IN THE SUPREME COURT OF THE STATE OF NEVADA

JEROME MORETTO, Trustee of the Jerome F. Moretto 2006 Trust,

Appellant,

v.

ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC.,

Respondent.

Electronically Filed
Sep 08 2021 08:38 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No.: 82565

District Court Case No.: 19-CV-0242

EXHIBITS TO ANSWERING BRIEF -- VOLUME 1

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CASE NO. 19-CV-0242

DEPT. NO. I

IN THE NINTH JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

****

JEROME MORETTO, Trustee of the Jerome F. Moretto 2006 Trust,

Plaintiff,

v.

ELK POINT COUNTRY CLUB HOMEOWNERS, ASSOCIATION, INC., a Nevada non-profit corporation , and DOES 1-10, inclusive,

Defendants.

_____/

PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

Plaintiff, JEROME MORETTO, Trustee of the Jerome F. Moretto 2006 Trust, by and through his attorney, KAREN L. WINTERS of the Law Office of Karen L. Winters, hereby requests this Court take Judicial Notice of the following, in support of Plaintiff's Motion for Summary Judgment filed concurrently herewith, pursuant to NRS 47.150(2):

1. *Bd. of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972));
2. *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621 (1950);
3. *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979);
4. *Monterey Mechanical Co. v. Wilson,* 125 F.3d 702, 715 (9th Cir. 1997);
5. *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001);
6. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998);
7. *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946);
8. *Restatement (First) of Property § 7* (1936);
9. *Restatement (Third) of Property (Servitudes)* § 6.7 (2000), comment (b); and

10. 11A *Fed. Prac. & Proc. Civ.* § 2948.1 (Wright & Miller) (3d ed., Oct. 2020).

NRS 47.150(2) states: "A judge or court shall take judicial notice if requested by a party and supplied with the necessary information." Attached hereto as exhibits in the order stated above are the legal publications for which Judicial Notice is sought, therefore this request complies with the requirements stated.

DATED: November 2, 2020.

RESPECTFULLY SUBMITTED:

Karen L. Winters, Esq.
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(a), I certify that I am over the age of 18 years, an employee of the LAW OFFICE OF KAREN L. WINTERS, and that on this date, I caused to be deposited for mailing at the United States Post Office at Minden, Nevada, with postage thereupon fully prepaid, a true and correct copy of the **PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** addressed as follows:

Prescott Jones, Esq.
Joshua Ang, Esq.
Resnick & Louis, P.C.
8925 W. Russell Road, Suite 220
Las Vegas, NV 89148

Dated: November 2, 2020

Judy M. Sheldrew

EXHIBIT 1

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta 303 Creative LLC v. Elenis, D.Colo., May 17, 2019

92 S.Ct. 2701
Supreme Court of the United States

The BOARD OF REGENTS OF STATE COLLEGES et al., Petitioners,

v.

David F. ROTH, etc.

No. 71—162.

Argued Jan. 18, 1972.

Decided June 29, 1972.

Synopsis
Action by assistant professor at state university, who had no tenure rights to continued employment and who was informed that he would not be rehired after first academic year, alleging that decision not to rehire him infringed his Fourteenth Amendment rights. The United States District Court for the Western District of Wisconsin, 310 F.Supp. 972, granted summary judgment for assistant professor on procedural issue, ordering university officials to provide him with reasons and a hearing, and appeal was taken. The Court of Appeals, 446 F.2d 806, affirmed the partial summary judgment, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that where state did not make any charge against assistant professor that might seriously damage his standing and associations in his community and there was no suggestion that state imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities, he was not deprived of 'liberty' protected by the Fourteenth Amendment when he simply was not rehired in the job but remained as free as before to seek another. The Court further held that where terms of appointment of assistant professor secured absolutely no interest in reemployment for the next year and there was no state statute or university rule or policy that secured his interest in reemployment or that created any legitimate claim to it, he did not have a property interest protected by Fourteenth Amendment that was sufficient to require university authorities to give him a hearing when they declined to renew his contract of employment.

Judgment of Court of Appeals reversed and case remanded.

Mr. Justice Douglas filed a dissenting opinion.

Mr. Justice Marshall filed a dissenting opinion.

For concurring opinion of Mr. Chief Justice Burger, see 92 S.Ct. 2717.

For dissenting opinion of Mr. Justice Brennan in which Mr. Justice Douglas joined, see 92 S.Ct. 2717.

Mr. Justice Powell took no part in decision of case.

West Headnotes (10)

[1] Constitutional Law—Rights, Interests, Benefits or Privileges Involved in General
Constitutional Law—Notice and Hearing

Requirements of procedural due process apply only to deprivation of interests encompassed by Fourteenth Amendment's protection of liberty and property, and when protected interests are implicated the right to some kind of prior hearing is paramount. U.S.C.A.Const. Amend. 14.

4225 Cases that cite this headnote

[2] Constitutional Law—Rights, Interests, Benefits or Privileges Involved in General

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To determine whether due process requirements apply in the first place, court must look not to the "weight" but to the nature of the interest at stake and must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property. U.S.C.A.Const. Amend. 14.

1991 Cases that cite this headnote

[3] Constitutional Law⇨Liberties and liberty interests
Constitutional Law⇨Property Rights and Interests

Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money, and due process protection is required for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process. U.S.C.A.Const. Amend. 14.

1102 Cases that cite this headnote

[4] Constitutional Law⇨Reputation; defamation

Where 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. U.S.C.A.Const. Amend. 14.

716 Cases that cite this headnote

[5] Constitutional Law⇨Employees

Whatever may be a teacher's right of free speech, interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.

42 Cases that cite this headnote

[6] Constitutional Law⇨Reputational interests, protection and deprivation of

Where state in declining to rehire assistant professor at state university, who had no tenure rights to continued employment, did not make any charge against him that might seriously damage his standing and associations in his community and there was no suggestion that state imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities, he was not deprived of "liberty" protected by the Fourteenth Amendment when he simply was not rehired but remained as free as before to seek another. U.S.C.A.Const. Amend. 14; W.S.A. 37.31(1).

1490 Cases that cite this headnote

[7] Constitutional Law⇨Benefits, rights and interests in

Fourteenth Amendment's procedural protection of property is a safeguard of security of interests that a person has already acquired in specific benefits. U.S.C.A.Const. Amend. 14.

581 Cases that cite this headnote

[8] Constitutional Law⇨Benefits, rights and interests in
Constitutional Law⇨Notice and Hearing

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To have a property interest in a benefit, a person must have more than an abstract need or desire for it or a unilateral expectation of it, and he must have a legitimate claim of entitlement to it, it is a purpose of ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined, and it is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. U.S.C.A.Const. Amend. 14.

4086 Cases that cite this headnote

[9] Constitutional Law⇐Source of right or interest
Constitutional Law⇐Benefits, rights and interests in

Property interests are not created by the Constitution; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. U.S.C.A.Const. Amend. 14.

4629 Cases that cite this headnote

[10] Constitutional Law⇐Tenure

Where terms of appointment of assistant professor at state university, who had no tenure rights to continued employment and who was informed that he would not be rehired after first academic year, secured absolutely no interest in reemployment for the next year and there was no state statute or university rule or policy that secured his interest in reemployment or that created any legitimate claim to it, he did not have a property interest protected by Fourteenth Amendment that was sufficient to require university authorities to give him a hearing when they declined to renew his contract of employment. U.S.C.A.Const. Amend. 14; W.S.A. 37.31(1).

2933 Cases that cite this headnote

**2702 Syllabus

*564 Respondent, hired for a fixed term of one academic year to teach at a state **2703 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 a nontenured 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 a nontenured 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 nonretention 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. Held: The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment, despite the lack of tenure or a formal

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contract. Here the nonretention of respondent, absent any charges against him or stigma or disability foreclosing other employment, is not tantamount to a deprivation of 'liberty,' and the terms of respondent's employment accorded him no 'property' interest protected by procedural due process. The courts below therefore erred in granting summary judgment for the respondent on the procedural due process issue. Pp. 2705—2710.

446 F.2d 806, reversed and remanded.

Attorneys and Law Firms

*565 Charles A. Bleck, Asst. Atty. Gen., Madison, Wis., for petitioners.

Steven H. Steinglass, Milwaukee, Wis., for respondent.

Opinion

*566 Mr. Justice STEWART delivered the opinion of the Court.

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

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a 'permanent' employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment 'during efficiency and good behavior.' A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing **2704 beyond his one-year appointment.[2] There are no statutory *567 or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be 'discharged except for cause upon written charges' and pursuant to certain procedures.[3] A nontenured teacher, similarly, is protected to some extent during his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher 'dismissed' before the end of the year may have some opportunity for review of the 'dismissal.' But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February 1 'concerning retention or non-retention for the ensuing year.' But 'no reason for non-retention need be given. No review or appeal is provided in such case.'[4]

*568 In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969—1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech.[5] **2705 *569 Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F.Supp. 972. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. 446 F.2d 806. We granted certiorari. 404 U.S. 909, 92 S.Ct. 227, 30 L.Ed.2d 181. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[6] We hold that he did not.

I

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[1] The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right *570 to some kind of prior hearing is paramount.[7] But the range of interests protected by procedural due process is not infinite.

[2] The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F.Supp., at 977—979. Undeniably, the respondent's re-employment prospects were of major concern to him—concern that we surely cannot say was insignificant. And a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process.[8] But, to determine whether *571 due **2706 process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake. See Morrissey v. Brewer, 408 U.S. 471, at 481, 92 S.Ct. 2593, at 2600, 33 L.Ed.2d 484. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

[3] 'Liberty' and 'property' are broad and majestic terms. They are among the '(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience. . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights.[9] The Court has also made clear that the property interests protected by *572 procedural due process extend well beyond actual ownership of real estate, chattels, or money.[10] By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[11]

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

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 **2707 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, 43 S.Ct. 625, 626, 67 L.Ed. 1042. 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, 74 S.Ct. 693, 694, 98 L.Ed. 884; Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551.

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

[4] 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, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; United States v. Lovett, 328 U.S. 303, 316—317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252; Peters v. Hobby, 349 U.S. 331, 352, 75 S.Ct. 790, 801, 99 L.Ed. 1129 (Douglas, J., concurring). See Cafeteria & Restaurant Workers v. McElroy,

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367 U.S. 886, 898, 81 S.Ct. 1743, 1750, 6 L.Ed.2d 1230. In such a case, due process would accord an opportunity to refute the charge before University officials.[12] 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 *574 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, supra, 341 U.S. at 185, 71 S.Ct. at 655 (Jackson, J., concurring). See Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131. 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, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, and, specifically, in a manner that denies the right to a full prior hearing. Willner v. Committee on Character, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224. See Cafeteria Workers v. McElroy, supra, 367 U.S. at 898, 81 S.Ct. at 1750. In the present case, however, this principle does not come into play.[13]

**2708 [5] To be sure, the respondent has alleged that the nonrenewal 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 *575 the decision not to rehire him was, in fact, based on his free speech activities.[14]

[6] 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, 367 U.S. at 895—896, 81 S.Ct. at 1748—1749, 6 L.Ed.2d 1230.

*576 III

[7] 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, 90 S.Ct. 1011, 25 L.Ed.2d 287.[15] **2709 See Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435. 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, 76 S.Ct. 637, 100 L.Ed. 692, and college professors and *577 staff members dismissed during the terms of their contracts, Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, 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, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418.

[8] 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 vendicate those claims.

[9] 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

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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.

*578 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.
**2710 [10] 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.[11] 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 *579 colleges and universities.[12] 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. Reversed and remanded.

Mr. Justice POWELL took no part in the decision of this case.

Mr. Justice DOUGLAS, dissenting.

Respondent Roth, like Sindermann in the companion case, had no tenure under Wisconsin law and, unlike Sindermann, he had had only one year of teaching at Wisconsin State University-Oshkosh—where during 1968—1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the *580 black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in Sindermann, an action was started in Federal District Court under 42 U.S.C. s 1983[1] claiming in part that the decision of the school authorities not to rehire was in retaliation for his expression of opinion. The District Court, in partially granting Roth's motion for summary judgment, held that the Fourteenth Amendment required the university to give a hearing **2711 to teachers whose contracts were not to be renewed and to give reasons for its action. 310 F.Supp. 972, 983. The Court of Appeals affirmed. 446 F.2d 806.

Professor Will Herberg, of Drew University, in writing of 'academic freedom' recently said:
'(I)t is sometimes conceived as a basic constitutional right guaranteed and protected under the First Amendment.

'But, of course, this is not the case. Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable human or constitutional right to remain a member of a university faculty. Clearly, the right to academic freedom is an acquired one, yet an acquired right of such value to society that in the minds of many it has verged upon the constitutional.'

Washington Sunday Star, Jan. 23, 1972, B-3, col. 1.

*581 There may not be a constitutional right to continued employment if private schools and colleges are involved. But Prof. Herberg's view is not correct when public schools move

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against faculty members. For the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to freedom of speech and of press and the related freedoms guaranteed by the First Amendment; and the Fourteenth protects 'liberty' and 'property' as stated by the Court in Sindermann.

No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools, if through the device of financing or other umbilical cords they become instrumentalities of the State. Mr. Justice Frankfurther stated the constitutional theory in Sweezy v. New Hampshire, 354 U.S. 234, 261—262, 77 S.Ct. 1203, 1217, 1 L.Ed.2d 1311 (concurring in result):

> 'Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquires into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered *582 as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.'

We repeated that warning in Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629:

> 'Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.'

When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal 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. A statutory analogy is present under the National Labor Relations Act, 29 U.S.C. s 151 et seq. While discharges of employees for 'cause' are **2712 permissible (Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 217, 85 S.Ct. 398, 406, 13 L.Ed.2d 233), discharges because of an employee's union activities are banned by s 8(a)(3), 29 U.S.C. s 158(c)(3). So the search is to ascertain whether the stated ground was the real one or only a pretext. See J. P. Stevens & Co. v. NLRB, 380 F.2d 292, 300 (2 Cir.).

In the case of teachers whose contracts are not renewed, tenure is not the critical issue. In the Sweezy case, the teacher, whose First Amendment rights we honored, had no tenure but was only a guest lecturer. In the Keyishian case, one of the petitioners (Keyishian himself) had only a 'one-year-term contract' that was not renewed. 385 U.S., at 592, 87 S.Ct., at 678. In Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, one of the petitioners was *583 a teacher whose 'contract for the ensuing school year was not renewed' (id., at 483, 81 S.Ct., at 249) and two others who refused to comply were advised that it made 'impossible their re-employment as teachers for the following school year.' Id., at 484, 81 S.Ct., at 250. The oath required in Keyishian and the affidavit listing memberships required in Shelton were both, in our view, in violation of First Amendment rights. Those cases mean that conditioning renewal of a teacher's contract upon surrender of First Amendment rights is beyond the power of a State.

There is sometimes a conflict between a claim for First Amendment protection and the need for orderly administration of the school ststem, as we noted in Pickering v. Board of Education, 391 U.S. 563, 569, 88 S.Ct. 1731, 1735, 20 L.Ed.2d 811. That is one reason why summary judgments in this class of cases are seldom appropriate. Another reason is that careful factfinding is often necessary to know whether the given reason for nonrenewal of a teacher's contract is the real reason or a feigned one.

It is said that since teaching in a public school is a privilege, the State can grant it or withhold it on conditions. We have, however, rejected that thesis in numerous cases, e.g., Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439 (1968). In Hannegan v. Esquire, Inc., 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586, we said that Congress may not by withdrawal of mailing privileges place limitations on freedom of speech which it could not do constitutionally if done directly. We said in American Communications Ass'n v. Douds, 339 U.S. 382, 402, 70 S.Ct. 674, 685, 94 L.Ed. 925, that freedom of speech was abridged

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when the only restraint on its exercise was withdrawal of the privilege to invoke the facilities of the National Labor Relations Board. In Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, we held that an applicant could not be denied the opportunity *584 for public employment because he had exercised his First Amendment rights. And in Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, we held that a denial of a tax exemption unless one gave up his First Amendment rights was an abridgment of Fourteenth Amendment rights.

As we held in Speiser v. Randall, supra, when a State proposes to deny a privilege to one who it alleges has engaged in unprotected speech, Due Process requires that the State bear the burden of proving that the speech was not protected. '(T)he 'protection of the individual against arbitrary action' . . . (is) the very essence of due process,' Slochower v. Board of Higher Education, 350 U.S. 551, 559, 76 S.Ct. 637, 641, 100 L.Ed. 692, but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such 'arbitrary action.'

**2713 Moreover, where 'important interests' of the citizen are implicated (Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90) they are not to be denied or taken away without due process. Ibid. Bell v. Burson involved a driver's license. But also included are disqualification for unemployment compensation (Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965), discharge from public employment (Slochower v. Board of Education, supra), denial of tax exemption (Speiser v. Randall, supra), and withdrawal of welfare benefits (Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287). And see Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515. We should now add that nonrenewal of a teacher's contract, whether or not he has tenure, is an entitlement of the same importance and dignity.

Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230, is not opposed. It held that a cook employed in a cafeteria in a military installation was not entitled to a hearing prior *585 to the withdrawal of her access to the facility. Her employer was prepared to employ her at another of its restaurants, the withdrawal was not likely to injure her reputation, and her employment opportunities elsewhere were not impaired. The Court held that the very limited individual interest in this one job did not outweigh the Government's authority over an important federal military establishment. Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State.

If this nonrenewal implicated the First Amendment, then Roth was deprived of constitutional rights because his employment was conditioned on a surrender of First Amendment rights; and, apart from the First Amendment, he was denied due process when he received no notice and hearing of the adverse action contemplated against him. Without a statement of the reasons for the discharge and an opportunity to rebut those reasons—both of which were refused by petitioners—there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees.

The District Court held, 310 F.Supp., at 979—980:

> '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, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed *586 time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.'

It was that procedure that the Court of Appeals approved. 446 F.2d, at 809—810. The Court of Appeals also concluded that though the § 1983 action was pending in court, the court should stay its hand until the academic procedures **2714 had been completed.[8] As stated by the Court of Appeals in Sindermann v. Perry, 430 F.2d 939 (CA5):

'School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination.' Id., at 944—945.

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That is a permissible course for district courts to take, though it does not relieve them of the final determination *587 whether nonrenewal of the teacher's contract was in retaliation for the exercise of First Amendment rights or a denial of due process.

Accordingly I would affirm the judgment of the Court of Appeals.

Mr. Justice MARSHALL, dissenting.

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

While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented, and also with those portions of Parts II and III of the Court's opinion that assert that a public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely, or whenever the State deprives him of a property *588 interest. I would go further than the Court does in defining the terms 'liberty' and 'property.'

The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling—i.e., federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory[2] or contractual[3] controls, a government employer is different. The government may only act fairly and reasonably.

**2715 This Court has long maintained that 'the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure.' Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915) (Hughes, J.). See also Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be 'discharged at any time, for any reason or for no reason.' Truax v. Raich, supra, 239 U.S., at 38, 36 S.Ct., at 9.

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the 'property' right that I believe is protected by the Fourteenth Amendment and that cannot be denied 'without due process of law.' And it is also liberty— *589 liberty to work—which is the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment.

This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. See, e.g., Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185, 71 S.Ct. 624, 655, 95 L.Ed. 817 (1951) (Jackson, J., concurring); United States v. Lovett, 328 U.S. 303, 316—317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252 (1946). Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

Mr. Justice Douglas has written that:
'It is not without significance that most of the provisions of the

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Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.' Joint Anti-Fascist Refugee Committee v. McGrath, supra, 341 U.S., at 179, 71 S.Ct., at 652 (concurring opinion).

And Mr. Justice Frankfurter has said that '(t)he history of American freedom is, in no small measure, the *590 history of procedure.' Malinski v. New York, 324 U.S. 401, 414, 65 S.Ct. 781, 787, 89 L.Ed. 1029 (1945) (separate opinion). With respect to occupations controlled by the government, one lower court has said that '(t)he public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.' Hornsby v. Allen, 326 F.2d 605, 610 (CA5 1964).

We have often noted that procedural due process means many different things in the numerous contexts in which it applies. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). Prior decisions have held that an applicant for admission to practice as an attorney before the United States Board of Tax Appeals may not be rejected without a statement of reasons **2716 and a chance for a hearing on disputed issues of fact; that a tenured teacher could not be summarily dismissed without notice of the reasons and a hearing; that an applicant for admission to a state bar could not be denied the opportunity to practice law without notice of the reasons for the rejection of his application and a hearing; and even that a substitute teacher who had been employed only two months could not be dismissed merely because she refused to take a loyalty oath without an inquiry into the specific facts of her case and a hearing on those in dispute. I would follow these cases and hold that respondent was denied due process when his contract was not renewed and he was not informed of the reasons and given an opportunity to respond.

*591 It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. Cf. Goldberg v. Kelly, supra. The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever an application for employment is denied, an employee is discharged, or a decision not to rehire an employee is made, there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action. Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error. 'Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits *592 from occurring.' Silver v. New York Stock Exchange, 373 U.S. 341, 366, 83 S.Ct. 1246, 1262, 10 L.Ed.2d 389 (1963). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.

Professor Gellhorn put the argument well:
'In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice Jackson in saying: 'Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice'—blunders which are **2717 likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own. . . .' Summary of Colloquy on Administrative Law, 6 J. Soc. Pub. Teachers of Law, 70, 73 (1961).

Accordingly, I dissent.

All Citations

408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, 1 IER Cases 23

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.
The notice of his appointment provided that: 'David F. Roth is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) Oshkosh as (Rank:) Assistant Professor of (Department:) Political Science this (Date:) first day of (Month:) September (Year:) 1968.' The notice went on to specify that the respondent's 'appointment basis' was for the 'academic year.' And it provided that '(r)egulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made.' See n. 2, infra.

2 Wis.Stat. s 37.31(1) (1967), in force at the time, provided in pertinent part that:
'All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher.'

3 Wis.Stat. s 37.31(1) further provided that:
'No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision.'

4 The Rules, promulgated by the Board of Regents in 1967, provide:
'RULE I—February first is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date.'
'RULE II—During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.
'RULE III—'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenure faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only.
'RULE IV—When a non-tenure faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case.'

5 While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the non-retention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. 'In the present case,' it stated, 'it appears that a determination as to the actual bases of (the) decision must await amplification of the facts at trial. . . . Summary judgment is inappropriate.' 310 F.Supp. 972, 982.

6 The courts that have had to decide whether a nontenured public employee has a right to a statement of reasons or a hearing upon nonrenewal of his contract have come to varying conclusions. Some have held that neither procedural safeguard is required. E.g., Orr v. Trinter, 444 F.2d 128 (CA6); Jones v. Hopper, 410 F.2d 1323 (CA10); Freeman v. Gould Special School District, 405 F.2d 1153 (CA8). At least one court has held that there is a right to a statement of reasons but not a hearing. Drown v. Portsmouth School District, 435 F.2d 1182 (CA1). And another has held that both requirements depend on whether the employee has an 'expectancy' of continued employment. Ferguson v. Thomas, 430 F.2d 852, 856 (CA5).

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7 Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113. 'While '(m)any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate (a protected) interest . . ., it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective.' Bell v. Burson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, e.g., Central Union Trust Co. v. Garvan, 254 U.S. 554, 566, 41 S.Ct. 214, 215, 65 L.Ed. 403; Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 597, 51 S.Ct. 608, 611, 75 L.Ed. 1289; Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088.

8 'The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' Boddie v. Connecticut, supra, 401 U.S., at 378, 91 S.Ct. at 786. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287; Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307. The constitutional requirement of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process. See n. 7, supra.

9 In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a 'privilege,' not a 'right,' and that procedural due process guarantees therefore were inapplicable. Bailey v. Richardson, 86 U.S.App.D.C. 248, 182 F.2d 46, aff'd by an equally divided Court, 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed. 1352. The basis of this holding has been thoroughly undermined in the ensuing years. For, as Mr. Justice Blackmun wrote for the Court only last year, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534. See, e.g., Morrissey v. Brewer, supra, 408 U.S., at 482, 92 S.Ct., at 2600; Bell v. Burson, supra, 402 U.S., at 539, 91 S.Ct., at 1589; Goldberg v. Kelly, supra, 397 U.S., at 262, 90 S.Ct., at 1017; Shapiro v. Thompson, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600; Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811; Sherbert v. Verner, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965.

10 See, e.g., Connell v. Higginbotham, 403 U.S. 207, 208, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418; Bell v. Burson, supra; Goldberg v. Kelly, supra.

11 'Although the Court has not assumed to define 'liberty' (in the Fifth Amendment's Due Process Clause) with any great precision, that term is not confined to mere freedom from bodily restraint.' Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884. See, e.g., Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551.

12 The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

13 The District Court made an assumption 'that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career.' 310 F.Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that 'the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor' amounts to a limitation on future employment opportunities sufficient invoke procedural due process guarantees. 446 F.2d, at 809. But even assuming, arguendo, that such a 'substantial adverse effect' under these circumstances would constitute a state-imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' Cf. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796.

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14 See n. 5, supra. The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here 'as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights.' 446 F.2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made 'with a background of controversy and unwelcome expressions of opinion.' Ibid.
When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth. A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809; Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649; Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584. See generally Monaghan, First Amendment 'Due Process', 83 Harv.L.Rev. 518.
In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. 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.

15 Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had 'published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the states, and the District of Columbia, as well as certified public accountants duly qualified under the law of any state or the District are made eligible. . . . The rules further provide that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission.' Id., at 119, 46 S.Ct., at 216. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power 'must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.' Id., at 123, 46 S.Ct., at 217.

16 To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a 'common law' of re-employment, see Perry v. Sindermann, 408 U.S. 593, at 602, 92 S.Ct. 2694, at 2705, 33 L.Ed.2d 570, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

17 See, e.g., Report of Committee A on Academic Freedom and Tenure, Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, 56 AAUP Bulletin No. 1, p. 21 (Spring 1970).

1 Section 1983 reads as follows:
'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

1a Such a procedure would not be contrary to the well-settled rule that s 1983 actions do not require exhaustion of other remedies. See, e.g., Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 419 (1971); Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967); McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). One of the allegations in the complaint was that respondent was denied any effective sate remedy, and the District Court's staying its hand thus furthered rather than thwarted the purposes of s 1983.

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

2 See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); 42 U.S.C. s 2000e.

3 Cf. Note, Procedural 'Due Process' in Union Disciplinary Proceedings, 57 Yale L.J. 1302 (1948).

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4 Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926).

5 Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956).

6 Wilner v. Committee on Character, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963).

7 Connell v. Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971).

End of Document

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EXHIBIT 2

KeyCite Yellow Flag - Negative Treatment

Distinguished by Chapman v. El Paso Natural Gas Co., D.C.Cir., March 26, 1953

70 S.Ct. 392
Supreme Court of the United States

CHAPMAN, Department of Interior,
v.
SHERIDAN-WYOMING COAL CO., Inc.
No. 60.

Argued Jan. 9, 1950.

Decided Feb. 6, 1950.

Synopsis
Action by Sheridan-Wyoming Coal Company, Incorporated, a lessee of coal mining rights in public lands, against Oscar L. Chapman, Department of Interior, to prevent leasing of coal mining rights in other lands to a competitor.

The District Court denied permission to the plaintiff to amend its complaint and the plaintiff appealed. The Court of Appeals reversed, 84 U.S.App.D.C. 172, 172 F.2d 282, and, in substance, held that the amended complaint stated a cause of action. Oscar L. Chapman, Department of Interior, brought certiorari.

The Supreme Court, Mr. Justice Jackson, held that although plaintiff's lease was made subject to Mineral Leasing Act pursuant to which Secretary of Interior had promulgated a regulation restricting additional coal leases on federal lands unless satisfactory showing was made that additional coal mine was needed, the proposed lease would not breach any contract right or invade any property right of the plaintiff and did not violate any law.

Reversed.

West Headnotes (8)

[1] Federal Courts—Need for further evidence, findings, or conclusions

Where appellate court affirmed order dismissing complaint but granted leave to apply to district court to amend, district court's denial of privilege on ground that proposed new matter added nothing material was equivalent to sustaining a demurrer to amend complaint and required Supreme Court to treat well-pleaded facts as true.

17 Cases that cite this headnote

[2] Mines and Minerals—Judicial Remedies

Where plaintiff's lease of federal coal lands was made subject to Mineral Leasing Act pursuant to which Secretary of Interior had promulgated a regulation directing General Land Office to find need for additional capacity before recommending new leasing, proposed lease to plaintiff's competitor which had established mines on partially exhausted state owned land did not breach any contract right or invade any property right of plaintiff and did not violate law, and, therefore, leasing was within discretionary power of Secretary and courts would not review its exercise. Mineral Lands Leasing Act, as amended, 30 U.S.C.A. § 181 et seq.

14 Cases that cite this headnote

[3] Easements—Subject-matter and parties in general

Where a right consists in restraining an owner from doing that with, and upon, his property which, but for the grant or covenant he might lawfully have done, it is an "easement" sometimes called a "negative easement" or an "amenity".

11 Cases that cite this headnote

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[4] Covenants Covenants as to Use of Property

An equitable restriction which prevents development of property is part and parcel of land to which it is attached and passes by conveyance.

2 Cases that cite this headnote

[5] Covenants Conveyance as transfer of covenant

A contractual restriction which limits the use one may make of his own lands in favor of another and his lands is an interest in lands which can pass only by deed and is an incumbrance.

5 Cases that cite this headnote

[6] Mines and Minerals Construction and effect in general

Although plaintiff's lease of federal coal lands was made subject to Mineral Leasing Act pursuant to which Secretary of Interior had promulgated a regulation directing General Land Office to find need for additional capacity before recommending new leasing, a restrictive covenant or property right against leasing other public lands to a competitor was not created. Mineral Lands Leasing Act, §§ 2, 13, 27, 30 U.S.C.A. §§ 184, 201, 202, 221.

4 Cases that cite this headnote

[7] Equity Complete Relief

Equity will administer such relief as exigencies of case demand at close of trial.

9 Cases that cite this headnote

[8] Mines and Minerals Construction and effect in general

Even if regulation promulgated by Secretary of Interior prohibited additional coal leases on federal lands unless a satisfactory showing was made that an additional coal mine was needed and there was an actual need for coal which could not otherwise be reasonably met, the regulation did not prohibit a lease which would only enable an existing mine and established business to continue. Mineral Lands Leasing Act, as amended, 30 U.S.C.A. § 181 et seq.

2 Cases that cite this headnote

Attorneys and Law Firms

**393 Mr. *622 Roger P. Marquis, Washington, D.C., for petitioner.

Mr. T. Peter Ansberry, Washington, D.C., for respondent.

Opinion

Mr. Justice JACKSON delivered the opinion of the Court.

[1] This action by a lessee of coal-mining rights in public lands seeks to prevent leasing of similar rights in other lands to a competitor. The case is before us only on pleadings. The original complaint was dismissed by the District Court on several grounds but the Court of Appeals affirmed only on the ground that the complaint showed no standing to sue, there being no allegation of special injury to any property right of plaintiff. Sheridan-Wyoming Coal Co. v. Krug, 83 U.S.App.D.C. 162, 168 F.2d 557. It gave leave to apply to the District Court to amend in this respect. The District Court denied the privilege, however, holding that the proposed new matter added nothing material, and that amendment would be idle and needlessly prolong the litigation. This, we think, was equivalent in effect to sustaining a demurrer to the amended complaint and requires us to treat well pleaded facts as true. On this basis, the Court of Appeals reversed and, in substance, held that the amended complaint does state a cause of action. 84 U.S.App.D.C. 288, 172 F.2d 282. We granted certiorari. 338 U.S. 810, 70 S.Ct. 54.

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The hypothesis on which the legal issues are to be decided is this:
[2] At all relevant times the following regulation, promulgated by the Secretary of the Interior, has been in effect:

*623 'Showing reguired that an additional coal mine is needed. The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met.' 43 CFR 1938, s 1933. It originated in 1934, when the coal industry was demoralized by excess production capacity described in opinions of this Court. Appalachian Coals, Inc., v. United States, 288 U.S. 344, 361, 53 S.Ct. 471, 474, 77 L.Ed. 825; Carter v. Carter Coal Co., 298 U.S. 238, opinion of Cardozo, J., 324, 330, 56 S.Ct. 855, 878, 881, 80 L.Ed. 1160; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 395, 60 S.Ct. 907, 913, 84 L.Ed. 1263. The policy which the Department embodied in this regulation, and to which it has since adhered, was stated in letters of the Secretary set forth in the margin.[1]

**394 *624 In September, 1943, the Sheridan-Wyoming Coal Company leased additional lands located in Wyoming for coal mining purposes from the Government and, 'in reliance upon the Regulation,' has expended large sums in development and built up a prosperous business in the rather low-grade coal mined and largely consumed in that region.

In December, 1943, the Big Horn Company applied for a lease of nearby lands for production of competitive coal, and in 1945 applied for additional lands. Meanwhile Big Horn already had established mines on partially exhausted state-owned lands and desired the federal lands to prolong its business. The Sheridan-Wyoming Company, among others, protested on the basis of the regulation. The protest, after hearings, was overruled and, *625 unless prevented, the Secretary will lease to Big Horn. The Secretary has made no finding that there is need for any additional supply of coal and, in fact, there is no such need. If he leases to Big Horn, the two companies will have capacity to produce in excess of the demand for that grade of coal in the limited market. The investment of Sheridan-Wyoming will be substantially impaired and its volume of sales decreased and profitable markets lost. About these three ultimate facts—the regulation, the lease and the threatened lease to a competitor—the parties have argued several intricate and interesting questions as to the standing of the plaintiff to sue, whether the suit really is one against the United States without sovereign consent and whether the Secretary has abused his power in entertaining the application of Big Horn. These questions we do not need to discuss because of the view we take of more fundamental aspects of the case. We think the facts give rise to no cause of action, because the proposed lease does not breach any contract right or invade any property right of plaintiff and does not violate any law. Hence, the leasing is within the discretionary power of the Secretary and courts will not review its exercise.

I. Contract Rights.

The court below has sustained the complaint for the principal reason that a lease to Big Horn would breach the lease to plaintiff and that plaintiff has a property **395 right to have the lands involved withheld from lease.

It is only on this basis of its property rights, created by contract, that plaintiff has been held to have standing to sue; for, if it has such rights, the court below truly said (172 F.2d 282, 288), 'The prevention of a breach of a restrictive provision in a contract is one of equity's most usual functions.' Credited with 'the status of one claiming a property right by contract, threatened with invasion,' the plaintiff has been termed by the Court of Appeals 'possessor of *626 a valuable right, created by contract in the presence of valid and binding restrictive regulations.'

Of course, no express covenant of plaintiff's lease restricts the Secretary from leasing other lands to other applicants. The restrictive covenant is sought to be supplied by implication. The lease, it is reasoned, was expressly made subject to the Mineral Leasing Act, 41 Stat. 437, as amended, 30 U.S.C. ss. 181 et seq., 30 U.S.C.A. s 181 et seq.; the lease constructively includes the statute; the regulation which was not referred to in the lease nevertheless had the force and sanction of statute; hence, the restrictive regulation was a covenant of the lease. It is said the threatened lease would violate the regulation. For the purpose of testing the contract-right theory, we shall assume that it does so.

What is the contract property right assumed? It is a right to

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nondevelopment of coal reserves in an indeterminate but substantial part of the public domain for benefit of its own lease. It is not a right necessary to the fullest physical development and enjoyment of all the lands plaintiff acquired for itself, and is one not normally appurtenant to real estate. The assumed covenant is purely negative in character and its whole burden is upon other premises owned by the United States in which the plaintiff has no other interest. They are premises, moreover, in which it is doubtful whether plaintiff could lawfully acquire any other interest in view of the limited areas which the statute allows to one lessee. By the assumed covenant, alienation and utilization of public lands in the manner authorized by Congress is restricted. This is for an unstated and indeterminable period. And it is accomplished not by a covenant expressed in the lease itself, but by one read into it from the regulations.

[3] [4] [5] A competent grantor by appropriate covenants could, of course, convey the right claimed here, and equity would enforce it. But when a right 'consists in restraining the *627 owner from doing that with, and upon, his property which, but for the grant or covenant, he might lawfully have done,' it is an easement, sometimes called a negative easement, or an amenity. Trustees of Columbia College v. Lynch, 70 N.Y. 440, 447, 26 Am.Rep. 615. 'An equitable restriction,' which prevents development of property by building on it, has been said to be 'an easement, or servitude in the nature of an easement,' a 'right in the nature of an easement,' and an 'interest in a contractual stipulation which is made for their common benefit.' Such 'equitable restrictions' are real estate, part and parcel of the land to which they are attached and pass by conveyance. River-bank Improvement Co. v. Chadwick, 228 Mass. 242, 246, 117 N.E. 214, 345, L.R.A. 1918B, 55. A contractual restriction which limits the use one may make of his own lands in favor of another and his lands is 'sometimes called a negative easement, which is the right in the owner of the dominant tenement to restrict the owner of the servient tenement in the exercise of general and natural rights of property.' It is an interest in lands which can pass only by deed and is in every legal sense an incumbrance. Uihlein v. Matthews, 172 N.Y. 154, 158, 64 N.E. 792, 793.

But whatever we might determine to be the technical nature of the collateral property right claimed to result from Sheridan's lease, to any extent that it added a property right to the plaintiff's lands it **396 created an incumbrance or subtraction from the aggregate of rights in the United States. Courts would not lightly imply against any land owner a covenant which would restrict alienation or enjoyment of his estate. There are even stronger reasons against implied covenants imposing easements, servitudes, amenities or restrictions upon the public lands.

The Mineral Leasing Acts confer broad powers on the Secretary as leasing agent for the Government. We find nothing that expressly prevents him from taking into consideration whether a public interest will be served or *628 injured by opening a particular mine. But we find no grant of authority to create a private contract right that would override his continuing duty to be governed by the public interest in deciding to lease or withhold leases.

The leasing Acts strictly limit the area which any one lessee may acquire, either directly or indirectly. 30 U.S.C. s 184, 30 U.S.C.A. s 184. But if, in taking up a permitted allotment of public lands, one may acquire a right that other areas far more extensive must lie fallow and unused for the benefit of his lands, he is acquiring an interest in prohibited lands and an interest that may be worth many times that interest which the statute allows him. And it is acquired without additional purchase price, rental, or royalty.

Moreover, it is not denied that the effect of sustaining plaintiff's suit would be to create a monopoly. Of course, it is a little one, limited to low-grade coal and to an advantageous shipping zone. Big Horn, if it gets no lease, must eventually go out of business, leaving its customers to Sheridan. And the United States could not for some period—we do not know how long—admit any other competitor to the field, unless it can be shown that Sheridan's supply is not equal to the market. It may, however, continue to acquire additional reserves as its own approach exhaustion. The whole claim of damage here is that competition from Big Horn will impair this snug little monopoly of the market to which plaintiff thinks it has acquired a property right.

[6] But the policy of the leasing statute looks the other way. Besides limiting the leasehold of any one lessee, it prevents mineral rights, on pain of forefeiture, from passing into the hands of any unlawful trust or becoming the subject of any contract or conspiracy in restraint of trade. 30 U.S.C. s 184, 30 U.S.C.A. s 184. Its whole policy seems to contemplate the opening of the public domain to competitive exploitation. It nowhere authorizes anyone to grant or to obtain *629 exclusive rights of access to these coal resources. What lessees can acquire from the Government is a supply of coal, not an exclusive market. We do not say that the Secretary may not withhold, or by regulation provide for withholding, lands from lease because the public interest would be injured, through impairing private business, from excess production capacity.

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But we find no authority to freeze this public interest into an irrevocable private property right.

The allegations of the amended complaint therefore do not show a cause of action to enforce a restrictive covenant or property right against leasing other public lands as authorized by statute.

II. Violation of Law or Regulation.

Since the District Court was overruled by the Court of Appeals only because of the latter's property rights theory and since the complaint without these allegations had earlier been held insufficient, it may be questioned whether other grounds to sustain the judgment below can be availed of. But even if the allegations fail to show a property right that equity will protect, they might be sufficient to show a special injury or interest, such as would enable plaintiff to raise the question of violation of law or regulation in the proposed leasing. To end a litigation already pending too long, we assume, without deciding, that plaintiff may raise this issue which we now consider.

The only claim of law violation is that the Secretary is proposing to violate his **397 own regulation, promulgated pursuant to the Act and hence having the force of law. That it binds him as well as others while it is in effect is not doubted.

The regulation on literal reading does not purport to prohibit the Secretary from any leasing unless need for new mines be shown. It does direct the General Land *630 Office (now the Bureau of Land Management) to find need for additional capacity before recommending new leasing. Its recommendation, however, is only advisory and can be overruled or disregarded. On its face, therefore, the regulation would seem to be directed primarily to a procedural matter within the Department of the Interior. However, it is claimed that the letters of Secretary Ickes at the time it was adopted and the uniform practice since, show it to have been a regulation fixing a controlling policy. We proceed on that assumption.

In the case before us the Secretary neither repudiates the regulation nor stands upon any right to depart from it. He says that, properly construed, it does not apply to the proposed Big Horn lease. It only prevents a lease which will introduce a new competitor to the filed and not, he says, a lease which would only enable an existing mine and an established business to continue. Sheridan argues that this reasoning sanctions an evasion of the regulation in that Big Horn opened its mine on partially depleted state lands knowing it must get federal lands also or quit. The implication is that state lands were used as a sort of portal in which to stand while prying a federal lease out from under the regulation. Plaintiff insists that the Secretary is required to act in the light of conditions when Big Horn first applied, and not as of now when it has built up a going business on the inadequate state leases, aided by war conditions.

[7] [8] But the action is one in equity, and 'equity will administer such relief as the exigencies of the case demand at the close of the trial.' Bloomquist v. Farson, 222 N.Y. 375, 380, 118 N.E. 855, 856; Lightfoot v. Davis, 198 N.Y. 261, 273, 91 N.E. 582, 586, 29 L.R.A.,N.S., 119, 139 Am.St.Rep. 817, 19 Ann.Cas. 747. The question on injunction is whether the action threatened will be a violation if it now takes place in light of conditions shown by the proposed amended complaint. That pleads findings of the Department which show what has happened *631 since the Big Horn application was filed. Without recourse to federal lands, it has established a mine and a business in the face of Sheridan competition. If time has improved Big Horn's position in this respect, it must be noted that the delay in acting on its application has been largely due to plaintiff's protests and litigations.

We think a court of equity cannot term unreasonable the view of the Secretary that Big Horn's lease is not for 'an additional coal mine,' need for which must be proved. It does not use federal reserves to add a new competitor to the market. It uses them to keep one there. We think the distinction is substantial and the Secretary's interpretation of the regulation is permissible, even if not inevitable. The declining market following the war and the growing use of oil may present difficult problems of survival for government lessees and of fair dealing for the Secretary. But courts can intervene only where legal rights are invaded or the law violated.

We think the District Court rightly concluded that the amended complaint fails to state a legal case for the relief asked. Accordingly, the judgment below is reversed.

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Reversed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

All Citations

338 U.S. 621, 70 S.Ct. 392, 94 L.Ed. 393

Footnotes

1 'Exhibit 'A'
'Excerpt From Letter of January 24, 1934, From the Secretary of the Interior to the Director of the Bureau of Geological Survey.
'The question of the advisability of withholding new leases of coal lands of the United States has been presented to me.
'It is clear from the language of section 2 of the leasing act of February 25, 1920 (41 Stat. 437 (30 U.S.C.A. ss 201, 202)), and from the interpretation given to Section 13 of that act (30 U.S.C.A. s 221), relating to oil and gas, by the Supreme Court in the case of United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 51 S.Ct. 502, 75 L.Ed. 1148, that it is within the discretionary authority of the Secretary of the Interior whether he shall issue any coal leases and coal prospecting permits. In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.
'Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order should be issued in effect suspending the operation of the leasing act as to new coal leases and prospecting permits. It is believed that substantially the same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need for coal which cannot otherwise be reasonably purchased or obtained is shown. * * *
'Hereafter the offering of coal lands for lease by competitive bidding or the granting of prospecting permits should not be recommended unless you have reliable information that there is an actual need for coal which cannot otherwise be reasonably met.'
'Exhibit 'B'
'Excerpt From Letter of January 24, 1934, From the Secretary of the Interior to the Commissioner of the General Land Office.
'In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.
'Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order should be issued in effect suspending the leasing act as to new coal leases and prospecting permits. It is believed that substantially the same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need is shown for coal which cannot otherwise be reasonably purchased or obtained. * * *
'It is advisable that you in the first instance require lease applicants to show fully the need for additional production of coal.'

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EXHIBIT 3

KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Yim v. City of Seattle, Wash., November 14, 2019

100 S.Ct. 383
Supreme Court of the United States

KAISER AETNA et al., Petitioners,
v.
UNITED STATES.
No. 78-738.

Argued Oct. 1, 1979.
Decided Dec. 4, 1979.

Synopsis
United States brought action against owners of marina seeking to resolve dispute as to whether owners were required to obtain authorization from Corps of Engineers before making future improvements in the marina and whether owners could deny public access to marina because, as result of improvements, marina had become a navigable water of United States. The United States District Court for the District of Hawaii, 408 F.Supp. 42, ruled that the marina was "navigable water of the United States," but further ruled that Government lacked authority to open it to the public without payment of compensation. On appeal, the United States Court of Appeals for the Ninth Circuit, 584 F.2d 378, reversed, and ruled that the public had right of access to the marina. On certiorari, the Supreme Court, Mr. Justice Rehnquist, held that although marina fell within definition of "navigable waters of the United States" when owners dredged it and then connected it to a bay in the Pacific Ocean, so as to be subject to regulation by Corps of Engineers, acting under authority delegated it by Congress in Rivers and Harbors Appropriation Act, Government could not require owners to make marina open to the public without compensating the owners.

Reversed.

Mr. Justice Blackmun dissented and filed opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined.

West Headnotes (4)

[1] Eminent Domain—Navigation

Federal navigational servitude does not create a blanket exception to the takings clause of the Fifth Amendment whenever Congress exercises its commerce clause authority to promote navigation. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 5.

173 Cases that cite this headnote

[2] Eminent Domain—Navigation

Although marina fell within definition of "navigable waters of the United States" when owners dredged it and then connected it to a bay in the Pacific Ocean, so as to be subject to regulation by Corps of Engineers, acting under authority delegated it by Congress in Rivers and Harbors Act Appropriation, Government could not require owners to make marina open to the public without compensating the owners. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 5; Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 403.

261 Cases that cite this headnote

[3] Commerce—Public highways, navigable waters, and state lands
Water Law—Power to control and regulate

Commerce includes navigation; all navigable waters of United States which are accessible from state other than those in which they lie are the public property of the nation and subject to all requisite commerce legislation by Congress. U.S.C.A.Const. art. 1, § 8, cl. 3.

81 Cases that cite this headnote

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