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NOTES

A CONSTITUTIONAL INTEREST IN PUBLIC EMPLOYMENT: THE LAST HURRAH?—

BISHOP V. WOOD

The desire for efficient and flexible governmental procedures, and the need to recognize and protect the rights of the individual, often emerge as conflicting interests. One of the most difficult questions generated by these interests and presented to the courts for resolution has been whether a public employee has a constitutionally protected interest in his job. In *Bishop v. Wood*, the Supreme Court dealt with the plaintiff’s contention that the failure to provide him notice and a hearing regarding his dismissal from his job deprived him of property and liberty without due process as guaranteed by the Fourteenth Amendment. Carl Bishop had been a police officer for the City of Marion, North Carolina, and had been classified as a permanent employee. On March 31, 1972, the City Manager privately notified him that he was being discharged due to his failure to follow orders, poor attendance at police training classes, causing low morale and conduct unbecoming to an officer. Bishop was allowed neither a pre-termination nor a post-termination hearing during which he could refute the charges against him.

Bishop brought a §1983 suit in federal district court against the City Manager, the Police Chief and the City, and that court granted summary judgment to the defendants. Applying North Carolina state law, the court held that Bishop did not have either a property interest or a liberty interest in his employment. Since he had not alleged that he was

1. 96 S. Ct. 2074 (1976).

   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.

Section 1331(a) provides for federal court jurisdiction when a “federal question” is involved and the matter in controversy exceeds the value of $10,000. Section 1343(3) provides for federal court jurisdiction to redress state deprivation of equal rights secured by the Constitution or federal law.

fired for impermissible constitutional reasons or as retribution for exercising First Amendment rights, he was not entitled to a formal hearing either prior to or after his dismissal. This decision was affirmed by the Fourth Circuit Court of Appeals. The Supreme Court granted certiorari and in a five to four decision affirmed the district court’s holding.

This Note will examine Bishop’s claims to Fourteenth Amendment property and liberty interests in light of recent Supreme Court precedent. It will argue that the Court incorrectly adopted the reasoning of the district court. Finally, it will offer some suggestions as to the general implications of Bishop, as well as reasons why procedural protections are desirable in public employee discharge cases.

**Bishop’s Property Right Claim**

In cases involving the discharge of government employees, courts have distinguished between employment at the pleasure of the employer, and situations in which the job is held subject to certain requirements being met by the employee so that discharge must be “for cause.” If causes of removal are specified in a statute, there is an express property right and notice and hearing are required. Additionally, an implied property right

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4. *Id.* at 505. The court implied that if Bishop had claimed his dismissal was based upon his exercise of other constitutionally protected rights, he might have fared better in seeking to invoke procedural due process protections. *Id.* This follows earlier cases holding that a government cannot deny a job on any basis that infringes constitutional freedoms, regardless of the employee’s contractual or other claim to the job. See Perry v. Sindermann, 408 U.S. 593 (1972) (freedom of speech); Pickering v. Board of Educ., 391 U.S. 563 (1968) (freedom of speech); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (freedom of speech); Torcaso v. Watkins, 367 U.S. 488 (1961) (freedom of religion); Shelton v. Tucker, 364 U.S. 479 (1960) (freedom of association); Slochower v. Board of Educ., 350 U.S. 551 (1956) (right against self-incrimination). On the other hand, the exercise of First or Fifth Amendment rights may not always provide absolute protection against dismissal. A balancing of interests test has been held appropriate in some cases. See Pickering v. Board of Educ., 391 U.S. 563, 568-69 (1968). Some of the factors to be considered by the court include: (1) need for maintaining discipline among co-workers; (2) need for confidentiality; (3) statements which impede employee’s proper performance of his duties; (4) statements that tend to show incompetency to perform the job; and (5) situations which require close and personal working relationships. Donahue v. Staunton, 471 F.2d 475, 481 (7th Cir. 1972), *cert.* denied, 410 U.S. 955 (1973).

5. Bishop v. Wood, 498 F.2d 1341 (4th Cir. 1974) (per curiam), *aff’d, 96 S. Ct. 2074 (1976).* The dissenting opinion of Judge Winter agreed with Bishop’s claims that he had both an interest in property and that he had been deprived of his liberty as a result of the dismissal. *Id.* at 1341-42.

6. It should be noted that the City also raised jurisdictional issues in its defense. Petitioner’s Brief at 3-7, 96 S. Ct. 2074 (1976). Since the Court ignored these arguments, this Note will not deal with them.

7. See Arnett v. Kennedy, 416 U.S. 134 (1974); Shurtleff v. United States, 189 U.S. 311
has been found when circumstances create an expectation that employment will continue.\(^8\)

Bishop based his claim to the right of a pre-termination hearing upon both an express and an implied property right to continued employment. He alleged that the City of Marion's Personnel Ordinance\(^9\) conferred an express property right by limiting discharges to specific "for cause" reasons. Bishop also alleged that his classification as a "permanent" employee and his length of service impliedly created a sufficient expectancy of continued employment to constitute a protected property interest. He relied upon the Court's holding in Perry v. Sindermann,\(^10\) in which proof of an implied agreement or unwritten "common law" was found to be equivalent to tenure. In Perry's companion case, Board of Regents v. Roth,\(^11\) the Court stated that "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law . . . ."\(^12\) How-

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\(^8\) See notes 10-13 and accompanying text infra.

\(^9\) Article II, §6 of the Personnel Ordinance of the City of Marion, reads as follows:

\textit{Dismissal.} A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.

\(^{96}\) S. Ct. at 2077, citing Marion, N.C., PERSONNEL ORDINANCE art. II, §6.

\(^{10}\) Bishop v. Wood, 377 F. Supp. 501, 503 (W.D. N.C. 1973), citing Perry v. Sindermann, 408 U.S. 593 (1972). In Perry, a discharged university professor alleged a right to a pre-termination hearing, claiming that his dismissal was in retaliation for his public criticism of the Board of Regents. He alleged a violation of Fourteenth Amendment due process rights. The Court held that his lack of tenure did not defeat his procedural due process claim because of an established de facto tenure system at the college. The Court stated that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit. . . ." 408 U.S. at 601.


\(^{12}\) 408 U.S. at 577.
ever, Bishop's claim of entitlement would have to be more than an abstract need or desire.\textsuperscript{13}

The Bishop Court followed Roth by stating that the existence of any property interest must be determined by reference to state law.\textsuperscript{14} The Court stated that state law in this matter had been established by Still v. Lance,\textsuperscript{15} a North Carolina Supreme Court decision. Based on Still, the Bishop Court stated that its impression of North Carolina law was that a property right in public employment can exist "only if the employer, by statute or contract, has actually given some form of guarantee."\textsuperscript{16} However, the Court also noted that no North Carolina court had interpreted the ordinance involved in Bishop. Therefore, the Court deferred to the district court's interpretation of the Marion ordinance, in reliance on that court's expertise in North Carolina law.\textsuperscript{17}

An examination of the district court's opinion in Bishop indicates that the Supreme Court's deference to that opinion was an unfortunate error. The district court had examined Still in reaching its decision in Bishop. In Still, a non-tenured teacher dismissed at the end of the school year claimed the right to a hearing. The state statute governing teacher termination contained no "cause" requirement which would confer a property right in continued employment. The North Carolina court therefore concluded that a contract of employment which expressly refers to the employment as a "regular, permanent job," but which contains no provision for the job's duration or termination is "terminable at the will of either party."\textsuperscript{18} The court in Still had reached its conclusion after an analysis of the terms of the state statute involved, the legislative history of the statute, the consequences of a teacher being terminated at the end of the school year, and the nature of school operations.\textsuperscript{19} However, unlike the Still court, the district court in Bishop did not undertake any type of similarly comprehensive analysis. Most importantly, the district court did not analyze the terms of the Marion

\textsuperscript{13} Id. See note 45 infra for cases in which courts have found the existence of an implied property interest.

\textsuperscript{14} 96 S. Ct. at 2077-78.

\textsuperscript{15} 279 N.C. 254, 182 S.E.2d 403 (1971).

\textsuperscript{16} 96 S. Ct. at 2078.

\textsuperscript{17} Id.

\textsuperscript{18} N.C. GEN. STAT. §115-142 (1975).

\textsuperscript{19} 279 N.C. at 257, 182 S.E.2d at 406. It should be noted that the statute construed in Still dealt with school teachers' contracts and not with municipal employees. This holding was reaffirmed by the North Carolina Supreme Court in Nantz v. Employment Security Comm'n, 290 N.C. 473, 266 S.E.2d 340 (1976), in a case involving a discharged state employee.

\textsuperscript{20} 279 N.C. at 259-63, 182 S.E.2d at 406-10.
ordinance to determine if a "cause" requirement was contained therein. Rather, the district court begged the entire question, by simply repeating in Bishop the Still conclusion that "the plaintiff held his position at the will and pleasure of the city."21

While the Bishop district court did not analyze the ordinance for "cause" provisions, it did examine the procedural protections provided in the ordinance and found that notice and hearing were not thereby required.22 This finding of a lack of procedural protection was put forward as further support for the conclusion that no property right existed.23 As Justice White argued in his dissent in Bishop,24 the district court's analysis, which based the existence of a property right on procedural provisions, is exactly the type of reasoning rejected by six members of the Supreme Court in Arnett v. Kennedy.25 In Arnett, the petitioner claimed entitlement to a pre-termination hearing to protect his property interest. A divided Court held that the statute in question, the Lloyd-LaFollete Act,26 did have a "cause" requirement for discharge, thus creating a property interest in continued federal employment.27

21. 377 F. Supp. at 504. The majority's conclusion in Bishop can be criticized further on the ground that due to factual distinctions between the two cases, the district court's reliance on Still was misplaced. See 96 S. Ct. at 2086 (Blackmun, J., dissenting). Bishop's situation was more nearly analogous to that of a teacher dismissed during the term of his contract. In that situation, a teacher would be entitled to notice and a pre-termination hearing. N.C. GEN. STAT. §§115-142(f) (1975). It also could be argued that Bishop's situation is not comparable at all with that of a discharged school teacher. In most states, public education is considered to be a responsibility of the state, whereas public safety is essentially a local government function. Compare Ill. CONST. art. X, §1 and art. VII, §8, with art. VII, §6(a). Thus, reliance on a teacher tenure statute to determine whether a municipality's police employee has a property interest in his job may not be justified.

22. 377 F. Supp. at 504.
23. Id.
24. 96 S. Ct. at 2083-85 (White, J., dissenting).
25. 416 U.S. 134 (1974). In Arnett, a non-probationary federal employee was discharged as a result of his accusations against his supervisor relating to an alleged bribe offer to a third party. Arnett was found not to be entitled to a pre-termination hearing, because he had a statutory right to a trial-type post-termination hearing which was deemed to be sufficient procedural protection. If Arnett prevailed at the hearing, both his property and liberty interests would be vindicated by the opportunity to clear his reputation and by reinstatement with back pay. The Court's finding was achieved by a balancing of interests test applied by three concurring Justices. For an in-depth discussion of the case, see Comment, Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 472 (1975). Bishop, unlike Arnett, received no hearing.
26. 5 U.S.C. §7501(a) (1970). The Act provides that "[a]n individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service."
27. 416 U.S. at 151-52.
Nevertheless, no due process protection beyond that provided for in the Act was required.28

The plurality opinion in Arnett stated that the protection to be accorded Arnett's property interest could constitutionally be defined by the procedural provisions in the Act. However, six Justices, in concurring and dissenting opinions, expressly disclaimed the plurality's theory.29 They found that a property right is expressly created by the inclusion of a "cause" requirement in the statute, independent of any statutory procedural provisions.30 It was stressed that once the substantive property right is found, the right to procedural due process, including notice and a hearing, is conferred by constitutional guarantee, not by legislative grace.31


29. Justice White stated:

I differ basically with the plurality's view that ... "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest. ..." The rationale of this position quickly leads to the conclusion that even though the statute requires cause for discharge, the requisites of due process could equally have been satisfied had the law dispensed with any hearing at all .... 416 U.S. at 177-78 (White, J., concurring in part, dissenting in part).

Justice Marshall agreed, saying "[a]lthough appellee's property interest arose from statute, the deprivation of his claim of entitlement to continued employment would have to meet minimum standards of procedural due process regardless of the discharge procedures provided by the statute." Id. at 211 (Marshall, J., dissenting).

Justice White also noted that "[w]hile the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition." Id. at 185.

30. Id. at 166 (Powell, J., concurring).

31. Id. at 167. After Arnett, federal courts generally followed the opinions expressed by the six Justices and rejected the Arnett plurality's theory that the statute creating a right also can limit the procedures for vindicating the right. See, e.g., Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976); Jones v. Penny, 387 F. Supp. 383 (M.D. N.C. 1974); Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974); Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), aff'd mem., 510 F.2d 975 (7th Cir. 1975). But see Ring v. Schlesinger, 502 F.2d 479 (D.C. Cir. 1974). Note that some courts construed Arnett as holding simply that pre-termination hearings are not required. See, e.g., McFarland v. United States, 517 F.2d 938, 944-45 (Ct. Cl. 1975), cert. denied, 423 U.S. 1049 (1976); Brubaker v. Board of Educ., 502 F.2d 973, 988 (7th Cir. 1974), cert. denied, 421 U.S. 965 (1975). Other courts found that the procedures upheld in Arnett defined minimal due
Justice Stevens, writing for the majority in Bishop, distinguished Arnett on the grounds that in the latter case the entire Court had recognized that the cause requirements of the statute created a property right in continued employment. Therefore, the only remaining question was whether the protection of that right could be defined and limited by statutory provisions. Six Justices concluded that it could not. Justice Stevens emphasized that in Bishop the district court had determined that no property right existed. Therefore, any procedures set forth in the ordinance were merely legislative provisions to be complied with and irrelevant to Bishop's constitutional claims.

The attempted distinction of Arnett is logically unsound, due to the defects in the opinion of the district court, upon which it is based. First, the district court's conclusion that in Bishop no property right existed was reached without an examination of the Marion ordinance for "cause" requirements, and was therefore faulty and incomplete. A proper analysis reveals that the Marion ordinance does appear to condition dismissals on cause, by citing negligence, inefficiency or unfitness as grounds for removal. Therefore, the district court should have found that Bishop was granted a property right in his job. Further, the district court did not merely cite the ordinance as containing procedural protections which demanded compliance. Instead, the district court found that virtually no procedural protections were required and therefore concluded that no property right existed. The plurality in Arnett proposed to limit an admittedly existing property right by the procedural provisions of the statute. The Bishop district court proposed to consider procedural protections in determining whether a property right existed. Neither of these two propositions can succeed in light of the opinion of the six Justices in Arnett that a property right is established by a statute's "cause" provisions, not by its procedural allowances. Once the property right in employment is found to exist, it is the Federal Constitution, rather than state law, which should be used to determine the procedures required for the termination of that employment and the extinction of that property right.

The district court's Bishop opinion, as subsequently adopted by the Supreme Court, was issued prior to the Arnett decision. This fact clearly
should have been sufficient grounds for the Supreme Court to conduct its own analysis of the Bishop problem, in light of Arnett.37 The Supreme Court, by simply adopting the district court's opinion, has completely disregarded the concept of constitutionally mandated procedural due process, as described by the six Justices in Arnett. The effect of Bishop could be that property rights will be defined through legislative enactment and limited or even determined simply by failure of the legislature to provide a procedure whereby the interest can be vindicated.38

Although the Supreme Court found that Bishop had no express property right in his job, the effect of that finding could have been nullified through a full analysis of Bishop's other property right claim. Such an analysis would have dealt with Bishop's allegation, under Perry and Roth, that the facts surrounding his employment had created an implied property right.39 In dealing with this claim, the Court should have looked for "rules or understandings that stem from an independent source such as state law . . . ." 40 However, the Bishop Court apparently read this phrase very narrowly, and took the words "such as state law" to be words of exclusion, rather than words of example. The Court therefore failed to analyze the surrounding circumstances or the ordinance to determine whether Bishop had any legitimate expectancy of continued employment. Instead, the Court looked only to the district court's interpretation of state law and prior Supreme Court cases, and ignored the clearly implied promise of continued employment, the past

37. Such an approach would have been the most desirable way to deal with the problem; the Court also could have reversed the district court's decision and remanded the case for further proceedings not inconsistent with Arnett.

38. It also can be asserted that with the Bishop holding, the Court is further strengthening the once-discredited "right-privilege" doctrine. Historically, public employment was considered to be a privilege, not a right, and the employees' rights could be infringed by the state as an employer. See Bailey v. Richardson, 341 U.S. 918 (1951) (per curiam); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). The doctrine gradually had been eroded as the expansion of government into the private sector of society created a dependency relationship between citizens and the state. See Reich, The New Property, 73 YALE L.J. 733 (1964). See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968). By extending constitutional protection to state-created entitlements, the state was foreclosed from arbitrarily depriving citizens of opportunities and monetary benefits. The "right-privilege" distinction was rejected in Goldberg v. Kelly, 397 U.S. 254, 262 (1970). It was repeatedly disapproved in subsequent cases. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972). See also Keyishian v. Board of Regents, 385 U.S. 589 (1967); Greene v. McElroy, 360 U.S. 474 (1959); Wieman v. Updegraff, 344 U.S. 183 (1952).

39. See notes 10-13 and accompanying text supra.

40. Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (emphasis added).
employment practices of the City\textsuperscript{41} and the objective expectations of Bishop arising out of his classification as a permanent employee.\textsuperscript{42}

Under a more expansive approach, the Court could have examined the surrounding facts and inquired as to whether it was "objectively reasonable for [Bishop] to believe he could rely on continued employment."\textsuperscript{43}

The classification of permanent employee could be said to be a guarantee of removal only for cause and lends credibility to Bishop's claim of entitlement.\textsuperscript{44}

The state of the law regarding property interests in public employment under \textit{Perry} and \textit{Roth} was confused and had led to conflicting decisions in the lower courts.\textsuperscript{45} \textit{Bishop} works both to clarify and reduce

\textsuperscript{41} Bishop was the only officer discharged, for cause or otherwise, from the time of his hiring in June, 1969, until pretrial discovery. 96 S. Ct. at 2082 n.5.

\textsuperscript{42} The district court based its analysis of Bishop's claim to an implied property right on \textit{Perry}. See note 10 supra. The court found Bishop distinguishable because Perry contended his discharge was based on his exercise of First Amendment rights, whereas Bishop made no such constitutional claim. 377 F. Supp. at 503-04. The district court was clearly in error, for the Supreme Court stated in \textit{Perry} that "the respondent's lack of a contractual or tenure 'right' to re-employment for the 1969-1970 academic year is immaterial to his free speech claim." 408 U.S. at 597-98. The Supreme Court considered Perry's free speech claim separately from his right to a hearing based on the existence of an implied property right through the de facto tenure system. \textit{Id.} at 599.

Because of its interpretation of \textit{Perry}, the district court failed to examine either the Marion Personnel Ordinance as an "independent source" or the surrounding circumstances, thus foreclosing any finding of an implied property right. Instead, the district court looked only to \textit{Still}, in which the existence of an implied property right was not at issue. See notes 18-21, and accompanying text supra.

\textsuperscript{43} \textit{Id.} at 2082 (Brennan, J., dissenting).

\textsuperscript{44} The existence of an implied property right can be determined by an examination of the particular statutory enactment involved. \textit{Still} would not foreclose finding an implied right in \textit{Bishop} because it did not interpret the Marion ordinance, but dealt with a state statute.

Perhaps the \textit{Bishop} Court's approach could have been foreseen, for Chief Justice Burger filed a concurring opinion to both \textit{Roth} and \textit{Perry} in which he made it clear that state law, not constitutional common law, should govern the public employee's job security. Further, he felt that federal courts should abstain from determining entitlement to due process and defer to state interpretation when the question arises. 408 U.S. at 603-04 (Burger, C.J., concurring). The result in \textit{Bishop} was predicted by two commentators, based upon Burger's concurrence. Smith & Gebala, supra note 11, at 559. The authors saw deference to state law as a retreat from the Court's earlier willingness to develop judge-made rules to implement constitutional rights, concluding that "[t]he result may be a substantial limitation on the potential impact of these two important decisions on the rights of public employees." \textit{Id.}

\textsuperscript{45} In analyzing the lower federal court cases which have dealt with this issue, one must compare those situations in which a discharged employee has some form of tenure or other protections, as in \textit{Buhr} v. Buffalo Public School Dist., 509 F.2d 1196 (8th Cir. 1974), or \textit{Eley} v. Morris, 390 F. Supp. 913 (N.D. Ga. 1975), with those in which there is no formal
the rights of public employees to notice and hearing before discharge.\textsuperscript{46} Unlike \textit{Perry} and \textit{Roth}, \textit{Bishop} indicates that the Court will not be willing to examine the totality of the circumstances to determine whether a public employee has a legitimate claim of entitlement to continued employment.\textsuperscript{47} Not only will \textit{Bishop} provide guidance to lower...

\textit{Bishop} is an example of the latter situation. In such cases, some courts have found the requisite expectancy of continued employment or a de facto tenure system which would give rise to due process requirements. An interesting North Carolina case interpreted Still (the cornerstone of the \textit{Bishop} holding) and found a protected property interest. See Thomas v. Ward, 374 F. Supp. 206 (M.D. N.C. 1974). There the court found that language in a pamphlet distributed by the school system was sufficient to lead the plaintiff to believe that he had tenure. Another court found that a Police Chief had a justifiable expectancy of continued employment which necessitated a full pre-termination hearing complying with procedural due process. Dahlinger v. Town Bd. of Delavan, 381 F. Supp. 474 (E.D. Wis. 1974). \textit{See also} Roane v. Callisburg Ind. School Dist., 511 F.2d 633 (5th Cir. 1975); Muir v. County Council, 393 F. Supp. 915 (D. Del. 1975). However, other courts have refused to find an implied property interest, absent a formal contract or some other form of statutory entitlement. In McNeil v. Butz, 480 F.2d 314 (4th Cir. 1973), the court held that no property interest was created, despite plaintiff's longevity, based on fourteen years of service. Another court refused to order a pre-termination hearing because plaintiff had no formal employment contract, despite a city ordinance allowing removal only "for cause." \textit{See} Schoonfield v. Mayor of Baltimore, 399 F. Supp. 1068 (D. Md. 1975). That court followed \textit{Arnett}, by holding that a post-termination hearing was enough due process.

In Illinois, non-probationary municipal police and fire employees (in cities over 5,000 population) are protected under a statute which allows dismissals only for cause and provides for notice and a pre-termination hearing. ILL. REV. STAT. ch. 24, § 10-2.7-17 (1975). Other municipal employees are protected only if the municipality passes a referendum to establish a Civil Service System. ILL. REV. STAT. ch. 24, §§10-1-1, 10-1-18, 10-1-43 (1975). Probationary or untenured employees generally have no property interest in continued employment. \textit{See, e.g.}, Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. 1975); Canty v. Board of Educ. 470 F.2d 1111 (2d Cir. 1972), cert. denied, 412 U.S. 907 (1973). For other instances where courts have refused to find a protected property interest, see Brouilette v. Board of Directors, 519 F.2d 126 (8th Cir. 1975) (automatic renewal of teaching contract creates no expectation of continued re-employment); Slegeski v. Ilg, 395 F. Supp. 1253 (D. Conn. 1975) (no formal contract or mutually explicit understandings protected probationary police officer); Weyenberg v. Menasha, 401 F. Supp. 801 (E.D. Wis. 1975) (contract terminable at will of board creates no property interest).

In a footnote, the majority noted that the impression created by the dissenting opinions is that the holding is a significant retreat from past practice. Cases requiring reinstatement of discharged employees were said to be extremely rare. 96 S. Ct. at 2080 n.14. Technically, the statement is correct—few lower courts have ordered reinstatement as a remedy. Yet many have ordered the employing agency to provide some kind of procedural protection, including notice and a hearing. \textit{See} note 45 \textit{supra}.

One commentator had read into \textit{Perry} the Court's recognition of an implied contractual right to continued employment. \textit{Note}, \textit{Implied Contract Rights to Job Security}, 26 STAN. L. REV. 335 (1974). Such a right was to be determined by the common law of the job, including the nature of the job and the treatment of other similarly situated employ-
courts, but it also could result in a reduction in the number of similar federal court actions in the future.48

BISHOP'S DEPRIVATION OF LIBERTY CLAIM

Bishop, relying upon Roth, also claimed that his discharge amounted to a deprivation of liberty because the seriousness of the reasons given for the discharge constituted a stigma which severely damaged his reputation. Roth had enunciated the criteria to be applied when a deprivation of liberty was alleged, which included a consideration of whether

es. Id. at 356. See also Frels, Teachers' Rights, 39 Tex. B.J. 508 (1976). Longevity might also be considered when determining the legitimacy of an employee's expectation of job security. It also was suggested that once an employee completes his probationary period and is classified as a permanent employee, he should be regarded as having attained an objective expectancy of continued employment. Smith & Gebala, supra note 11, at 562. It should be noted that the "expectancy doctrine" was adopted by the Fifth Circuit Court of Appeals in Sindermann v. Perry, 430 F.2d 943 (5th Cir. 1970), and by some other circuits, but was never expressly adopted by the Supreme Court. See generally Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947).

Under Bishop, however, these suggested tests for defining a property right are no longer operable.

48. The effect of the holding in Bishop may be a restricted willingness of the courts to require that due process rights be granted in other substantive areas where claims of property or liberty infringement are made. See Morrissey v. Brewer, 408 U.S. 471 (1972) (right to hearing before revocation of parole); Fuentes v. Shevin, 407 U.S. 67 (1972) (right to notice and hearing before repossession of chattels); Bell v. Burson, 402 U.S. 535 (1971) (right to due process procedures prior to suspension of driver's license); Goldberg v. Kelley, 397 U.S. 254 (1970) (right to a hearing before termination of welfare benefits); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (right to notice and hearing before garnishment of wages). As late as 1975, the Court held that due process protections are required when liberty interests are infringed by governmental action. Goss v. Lopez, 419 U.S. 565 (1975) (notice and hearing required before public school can suspend student for less than ten days).

However, in a decision rendered just before Bishop, the Court held that a hearing is not required prior to termination of disability benefits under Social Security. Mathews v. Eldridge, 96 S. Ct. 893 (1976). The Court delineated three factors which must be examined in such cases: (1) the private interest affected by the action; (2) the risk of erroneous deprivation by the procedures used and the value of additional safeguards; and (3) the government's interest and the burdens that additional procedures would entail. Id. at 903. Perhaps this indicates an attempt by the Court to chart separate courses, insofar as liberty and property interests are concerned. However, the future of new claims to procedural protections, especially when a purported property interest is involved, can only be termed unsettled. For example, some commentators have claimed that Fuentes was reversed by Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). See Note, Provisional Remedies and Due Process in Default—Mitchell v. W. T. Grant Co., 1974 WASH. U. L.Q. 653 (1974). But see Comment, Creditor Remedies and Due Process: Comparing Mitchell and Fuentes, 10 URBAN L. ANN. 243 (1975).
petitioner's standing in the community was damaged; whether his good name, reputation or honor was at stake; and whether any stigma attached to the discharge. The Bishop Court did not examine the facts to determine whether these criteria applied to Bishop. Instead, the Court found that Bishop was still free to seek another position, since the City Manager had not publicized the reasons for his dismissal and, therefore, had not damaged his reputation.

The Bishop Court's publication requirement is yet another prerequisite to the finding of a deprivation of liberty. Neither Roth nor Arnett specifically stated that in order for a deprivation of liberty to occur the employer had to publicize the reasons for the discharge. In fact, Arnett appeared to continue a somewhat expansive construction of the concept that "[l]iberty is not offended by the dismissal itself, but instead by a dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee." Yet, the Bishop majority indicates that publication is of crucial importance, and that an independent examination of the factual circumstances is not to be undertaken by the court when analyzing a deprivation of liberty claim.

The concept of due process rights attaching when petitioner claims a deprivation of liberty in an employment discharge situation has definitely been restricted by Bishop. As early as 1959, the Court in Greene v. McElroy, held that Greene had been deprived of his liberty and property by the revocation of his security clearance, which severely limited his employment opportunities. This concept continued to be viable in discharge cases, for courts were normally willing to examine the

49. 408 U.S. at 573.
50. 96 S. Ct. at 2079-80.
51. See text accompanying note 49 supra.
52. 416 U.S. at 157.
53. See text accompanying notes 49-50 supra. Bishop was one of three cases decided during the Court's 1975 term which dealt with procedural protections to be accorded under the Fourteenth Amendment. See Paul v. Davis, 96 S. Ct. 1155 (1976) (inclusion of plaintiff's name on an "Active Shoplifter's" list distributed to merchants not a deprivation of liberty which required due process protection); Meachum v. Fano, 96 S. Ct. 2532 (1976) (transfer of a state prisoner from one institution to another not a deprivation of liberty requiring due process protection). In all three cases, the Court's concern over federal judicial interference in state affairs contributed to a restrictive view of what constitutes a protected liberty interest. 96 S. Ct. at 1159, 2080, 2540. The Court's analysis indicates that the existence of a protected interest under the Fourteenth Amendment will depend more upon the presence of positive state enactments rather than upon informal indications that a right has been created.
55. It should be noted that the expansive interpretation of "deprivation of liberty" accorded plaintiffs in actions against the state in other than employment situations has
facts of each situation to decide whether employment opportunities were limited or whether other stigmatizing effects would result. It is

recently been restricted by the Court. Compare Wisconsin v. Constantineau, 400 U.S. 433 (1971) (posting of plaintiff's name in liquor stores with the command that she could not be sold liquor held to be sufficient deprivation of liberty to require notice and an opportunity to be heard), with Paul v. Davis, 96 S. Ct. 1155 (1976) (inclusion of plaintiff's name on "Active Shoplifters" list distributed to merchants did not deprive him of liberty because injury to reputation alone, without injury to some other tangible interest such as employment, is not sufficient to invoke the procedural protections of the Fourteenth Amendment). Dissenting at the appellate court level in Bishop, Judge Winter relied upon Constantineau to find a deprivation of liberty. 498 F.2d at 1342 (Winter, J., dissenting). However, Judge Winter's opinion was written prior to Paul.

56. Actual loss of employment opportunities or the existence of allegations as to the employee's integrity, veracity, professional competence, intelligence or mental stability have usually been sufficient to establish a deprivation of liberty. For example, the Fourth Circuit Court of Appeals found that the liberty interests of two non-civil service employees were deprived when they were terminated without a hearing and disqualified permanently from future employment with the agency. McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973). The court surmised that their disqualifications would foreclose them from employment opportunities with other governmental units and would prejudice their private employment prospects. The court followed the normal procedure and utilized a balancing test to find that the plaintiffs' interests outweighed the government's interest in the efficient and orderly discharge of unsatisfactory employees. Id. at 322-23. Another court found a protected liberty interest where a probationary deputy sheriff was fired and sought a hearing. Osmer v. Moiles, 409 F. Supp. 675 (E.D. Mich. 1975). The court held that the plaintiff's claim of inability to obtain any position in law enforcement because of the discharge fell within the Roth exception and entitled him to a hearing. Id. at 676. For other instances where courts have found protected liberty interests, see Weyenberg v. Menasha, 401 F. Supp. 801 (E.D. Wis. 1975) (elimination of police superintendent's job impeached his integrity and pre-termination hearing required); Morris v. Board of Educ., 401 F. Supp. 188 (D. Del. 1975) (non-renewal of teacher's contract held potential for severely impairing her ability to pursue her profession); Rew v. Ward, 402 F. Supp. 331 (D. N.M. 1975) (discharge of airman could impair civilian employment with federal government and in private sector because of likelihood that government would communicate derogatory information in the future); Buggs v. City of Minneapolis, 358 F. Supp. 1340 (D. Minn. 1973) (court found protected liberty interest despite City's argument that charges not made public). See also Rolles v. Civil Serv. Comm'n, 512 F.2d 1319 (D.C. Cir. 1975); Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975); Huntley v. Board of Educ., 493 F.2d 1016 (4th Cir. 1974).

Other courts, however, have found no protected liberty interest which would entitle plaintiff to notice and hearing prior to dismissal. The reasoning employed by such courts was recently stated by the Ninth Circuit: "Nearly any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual's ability, temperament, or character." Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 806 (9th Cir. 1975). However, the evidence in Gray did not import serious defects such as dishonesty or immorality. See also Slegeski v. Ilg, 395 F. Supp. 1253 (D. Conn. 1975), in which the court held that a §1983 suit was an improper forum to remedy subsequent statements by the employer that the discharged employee was "no good." Since the employer's statements were informal, and not part of any official record or reduced to writing, the plaintiff
logical to assume that Carl Bishop's job prospects were limited by his discharge, since prospective police employees usually are investigated thoroughly by potential police employers.\(^7\) Even though the majority opinion was predicated upon the fact that the reasons for Bishop's discharge had not been published, the Court ignored the probability that the City would convey those reasons to prospective employers. Justice Brennan therefore argued that the Court's decision in *Bishop* has destroyed the last vestige of protection for liberty, since an employer "may tell an employee that he is being fired for some nonderogatory reason, and then turn around and inform prospective employers that the employee was in fact discharged for a stigmatizing reason that will effectively preclude future employment."\(^8\)

The Court also was not sympathetic to Bishop's claim that his liberty was deprived because the reasons asserted for his dismissal were false.\(^9\) The Court stated that "[t]he truth or falsity of the City Manager's statement . . . neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired."\(^10\) In dealing with Bishop's allegations that the reasons for his discharge were false, the Court could have analyzed the dismissal to determine whether Fourteenth Amendment due process guarantees of a substantive nature were violated.\(^1\) Using this approach, the Court could have had no liberty interest to protect. See also Brouilette v. Board of Directors, 519 F.2d 126 (8th Cir. 1975) (charges against dismissed employees were minor and not made public); Hostrop v. Board of Jr. College Dist., 523 F.2d 569 (7th Cir. 1975) (liberty interest not deprived because plaintiff publicized Board's charges).

57. 96 S. Ct. at 2080 (Brennan, J., dissenting). A similar argument was the basis of the Second Circuit's noting that a discharged employee may suffer deprivation of liberty. Velger v. Cawley, 525 F.2d 334, 336 (2d Cir. 1975), cert. granted, 96 S. Ct. 3188 (1976).

58. 96 S. Ct. at 2081 (Brennan, J., dissenting). This becomes an even harsher result when it is considered that the truth or falsity of the stigmatizing reasons will have no bearing on any deprivation of liberty claim. See notes 59-60 and accompanying text infra.

59. Plaintiff introduced evidence showing justification for missing the training classes, plus affidavits from fellow officers regarding his co-operative nature, etc. Petitioner's Brief at 9-12, 96 S. Ct. 2074 (1976).

60. 96 S. Ct. at 2080. The Court did concede that Bishop might have a claim in a state court if he could prove that the City Manager deliberately lied.

61. The Court's approach to substantive due process review is similar to that employed in a traditional equal protection analysis. In a case not involving a "suspect" classification or a "fundamental" interest, the Court applies minimal scrutiny by following the "rule of reasonableness." See *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970). Cases which do involve a "suspect" classification or a "fundamental" interest are reviewed under a strict scrutiny test. The state must advance a compelling interest which the Court balances against the asserted individual interest. See *Roe v. Wade*, 410 U.S. 113 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Loving v. Virginia*, 388 U.S. 1...
determined whether the discharge was a rational means of advancing a valid interest of the City in providing good police protection, rather than being based on an arbitrary, bureaucratic whim. Courts generally have not had the occasion to extend such protection to public employees absent an infringement of some other constitutional right, such as speech, association or privacy. Yet the Court has held that "constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory." In Thompson v. Gallagher, the Fifth Circuit utilized a Fourteenth Amendment substantive due process argument, although no other constitutionally protected right had been impaired. The court interpreted the Fourteenth Amendment to be a "general prohibition against arbitrary and unrea-


62. In such an analysis the Court would consider the particular job held, the grounds for discharge, the city's interests impaired by Bishop's continued employment and the strength of the impairment from the cause given for discharge. In 1974, the Supreme Court used a substantive due process analysis in Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974), wherein it indicated that a substantive due process right, forbidding arbitrary dismissal, exists and is to be defined independently of the procedural safeguards that surround it. Id. at 648-50. For discussion as to how substantive due process doctrine could be developed for public employees, see Comment, Substantive Due Process: The Extent of Public Employees' Protection from Arbitrary Dismissal, 122 U. Pa. L. Rev. 1647 (1974).


65. Wieman v. Updegraff, 344 U.S. 183, 192 (1952) (Oklahoma statute which required each state officer and employee to take loyalty oath, in violation of First Amendment rights of speech and association, violates Due Process Clause of Fourteenth Amendment, as an assertion of arbitrary power). For other decisions based on substantive due process grounds, see Connell v. Higginbotham, 403 U.S. 207 (1971); Slochower v. Board of Educ., 350 U.S. 551 (1956).

66. 489 F.2d 443 (5th Cir. 1973) (City's rule barring employment of veterans with less than honorable discharges not a reasonable means of advancing a valid state interest, even where no constitutionally protected interest other than the due process guarantee of the Fourteenth Amendment was involved).
sonable government action" in a discharge situation.\textsuperscript{67}

A substantive due process analysis, similar to the one used in Thompson, could have been used by the Court in Bishop.\textsuperscript{68} Such analysis would have required the City to advance at least a minimal argument that the dismissal would further its interests in maintaining an efficient police force and would have required some showing by the City that its action was neither arbitrary nor discriminatory.\textsuperscript{69} However, the Bishop Court did not utilize such an approach. The Court indicated that it feared the federal courts could be flooded with suits by discharged public employees. Such suits could be based upon nothing more than a simple assertion that the dismissed employee's supervisor made a mistake.\textsuperscript{70}

\section*{Conclusion}

Bishop has significantly clarified the state of the law regarding the protections of property and liberty interests to be accorded public employees. Bishop indicates that to find a deprivation of liberty interest, which will trigger procedural due process requirements, a fairly serious charge against the employee will be required. The charges will have to have been made public by the employer prior to or at the time of the discharge. Being rendered effectively unable to find employment in one's chosen profession will no longer suffice as proof of deprivation.\textsuperscript{71} Additionally, the Court has signaled a strong warning to the lower courts to approach future deprivation of liberty claims with caution, as evidenced by the majority's statement that "[w]e must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. . . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions."

\textsuperscript{67} Id. at 446. Note that Thompson differs significantly from earlier cases which, in addition to a substantive due process argument, involved violations of other constitutionally protected rights. See note 65 supra.

\textsuperscript{68} The substantive due process approach was re-affirmed by the Supreme Court in Kelley v. Johnson, 96 S. Ct. 1440 (1976), where the Court noted "[t]he constitutional issue to be decided . . . is whether [the] determination that such regulations should be enacted is so irrational that it may be branded 'arbitrary' . . . ." Id. at 1446.

\textsuperscript{69} In essence, Bishop claimed his discharge was discriminatory, being based upon the reasons that "he enforced the law fairly and equally and without evincing any political or social favoritism." Brief for Petitioner at 12, 96 S. Ct. 2074 (1976).

\textsuperscript{70} 96 S. Ct. at 2080. See note 72 and accompanying text infra.

\textsuperscript{71} See notes 57-58 and accompanying text infra.

\textsuperscript{72} 96 S. Ct. at 2080. One concept which has not yet been negated by the Supreme Court is that the Administrative Procedure Act provides a judicial remedy for a discharged
A more far-reaching effect of *Bishop* could be that the Supreme Court has placed extensive power to define property rights and the procedural protection to be accorded them in the hands of state and local legislative bodies. This would be accomplished through a legislative decision as to the inclusion of "cause" provisions and procedural protections in the governing statute. The effect of this legislative power could well be that those groups of public employees without political clout to affect changes, such as collective bargaining statutes or civil service systems, will be at the mercy of majoritarian sentiment. Such a result is ironic in light of the express provisions of the Fourteenth Amendment.

Legislatures should be encouraged to grant procedural protections to public employees.¹³ Recent psychological studies have noted several interrelated factors which lead to the conclusion that both the employer and the employee benefit significantly when there exists some protection against arbitrary discharge.¹⁴ It also can be argued from a moral basis that a rational decision serves the ultimate goals of government better than one which is arbitrary. Requiring a certain modicum of due process in discharge cases should enhance the reasonableness and fairness of the decision-maker. Finally, because being fired from a job has such a tremendous impact upon an individual's self-esteem, procedural

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¹³. Federal employee, 5 U.S.C. §706 (Supp. V 1971). In states with administrative review acts, the same theory could be applied. This idea could have some import due to the Court's expansive review of agency administrative actions. Judicial review, however, would be limited to a determination of whether there was any basis in fact for the conclusion supporting the discharge. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-16 (1971).

¹⁴. It should be noted, however, that no equivalent constitutional protections are provided to employees in the private sector. See note 63 supra. While they do not have constitutional protections, those private sector employees who work in unionized plants have many procedural rights, as well as protection from arbitrary or capricious discharges. These rights are embodied in a final and binding grievance arbitration clause in most contracts, which usually includes discharge cases. For a sample of contract clauses relating to discharge, see Labor Law Course ¶2581.01, 2581.07, 2586 (23d ed. CCH 1976). Not only does the union employee receive notice and a hearing, but he also is assured that the decision will be made by an impartial third party. This can be contrasted to the public sector where, even if an employee has a right to a hearing, a third-party decision-maker is not required. Hortonville Joint School Dist. v. Hortonville Educ. Ass'n., 96 S. Ct. 2308 (1976).

protections can be said to be of indirect benefit to mental health and well-being.\footnote{75} This analysis would not be complete without some discussion of the difficulties faced by public administrators in a discharge situation when a trial-type pre-termination hearing \textit{is} required. A government’s ability to function effectively demands considerable flexibility in managing its day-to-day operations. While an employee should have notice of the reasons for his discharge, being locked into an indelibly cast set of procedures may not always serve the goal of efficient delivery of services to the public.\footnote{76}

Central to providing an optimal level of service is the government’s ability to enforce a specified quality of job performance. In Bishop’s case, one can assume that the decision of the City Manager and the Police Chief to discharge him was based on a good faith assessment of inadequate job performance.\footnote{77} This conclusion can be fairly drawn because public administrators are generally subject to intense scrutiny of their daily operational decisions by their boss, the city council.\footnote{78} The political realities in most municipalities are such that arbitrary discharges will not be tolerated. Thus, it can be argued that the Court in \textit{Bishop} finally recognized that the efforts of governments to perform the services for which they were created often were being significantly im-

\footnote{75. Similar reasons have been advanced for according substantive due process rights to public employees in order to protect against discharges unrelated to job performance or for reasons which have no effect on the agency’s efficiency. “Such a legal theory . . . would protect the individual’s and society’s right to maintaining competent, efficient workers . . . [and] would also discourage discharges based, in reality, on the exercise of a constitutional right, but disguised in other terms.” \textit{The Unclear Boundaries of the Constitutional Rights of Public Employees}, 44 U.M.K.C. L. Rev. 389, 414 (1976). See generally Comment, \textit{Substantive Due Process: The Extent of Public Employees’ Protection from Arbitrary Dismissal}, 122 U. Pa. L. Rev. 1647 (1974).}

\footnote{76. Pre-termination hearings may be costly, both in terms of direct dollar costs and indirect costs resulting from the diversion of staff time from other productive work. Direct costs include a court reporter, transcript and legal fees. Examples of indirect costs include the staff time for investigation of incident, time lost preparing for and attending the hearing by the personnel officer, supervisor, hearing officer and witnesses, and time lost from work if the discharged employee is reinstated with back pay. Interview with former Village Manager, Maywood, Illinois, in Maywood, Illinois (Jan. 30, 1977).}

\footnote{77. \textit{See Frug, Does the Constitution Prevent the Discharge of Civil Service Employees?}, 124 U. Pa. L. Rev. 942, 944 (1978), in which the author suggests a distinction be made in discharge cases between those alleging employee misconduct and those alleging only inefficiency or inadequate performance.}

\footnote{78. Interview with former Village Manager, Maywood, Illinois, in Maywood, Illinois (Jan. 30, 1977). \textit{See also Managing the Modern City} 96-98, 101 (J. Banovetz ed. 1970); \textit{E. Schulz, American City Government} 401, 409 (1949); \textit{H. Zink, Government of Cities in the United States} 338 (2d ed. 1949).}
paired by trivial complaints of unsatisfactory employees.

An assessment of whether the Bishop holding was "correct" or "incorrect" must depend upon one's own value judgments. On the one hand, procedural protections of an individual's source of livelihood assume paramount importance, especially in an era of high unemployment and instant communications among employers. Yet, as a citizen, the individual wants assurance that his tax dollars are being wisely spent.

From a constitutional viewpoint, Bishop clearly signals a narrow construction of the procedural due process rights of public employees. While this decision will not likely result in a wholesale rewriting of personnel ordinances or statutes, public employers definitely will have the dominant role in determining the extent of an employee's property interest in his job and the procedural protections to be accorded him when facing discharge.

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