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"No Right To Be a (Long Haired) Policeman": The Constitutional Dimensions Of Public Employment Under the Burger Court

Linda R. Hirshman†

This article discusses the recent Burger Court opinions regarding the substantive and procedural constitutional rights of public employees. Examining these decisions, the author demonstrates how principled constitutional analysis can be employed to protect the rights of public employees without interfering with the operations of government.

In the 1975 and 1976 Terms, the Burger Court devoted considerable attention to the question of the constitutional status of government employees. The Court's actions in this area are of great legal and social significance. The explosive growth of government as an employer is but one example of the expansion of government into numerous other areas, such as welfare, insurance, medical care, and licensing regulation. In each case, the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

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4. In Illinois alone, the State of Illinois Department of Registration and Education licenses and regulates 33 professions.
the expansion raises the question of whether the government is to be
carefully restrained by the strict application of constitutional limitations
traditionally applied to the state, or whether it should be treated like any
private provider of goods and services, free to fix its relations with its
employees based on ordinary economic and social considerations.5

As many early commentators argued,6 nothing in the Constitution
establishes a separate standard for government when acting in its proprietary
capacity. With growth in all roles of government, the constitutional struc-
ture is seriously threatened by the carving out of exceptions for the different
incarnations of government.7

In 1972, in the companion cases of Board of Regents v. Roth8 and
Perry v. Sindermann,9 the United States Supreme Court expanded the
constitutional scrutiny to be exercised over government actions toward its
employees. Although the Court had previously granted limited protection to
the first amendment and due process rights of public employees,10 Roth and
Perry fully and finally rejected the concept—long in disrepute11—that
government employment is merely a privilege which may be revoked by the
government at will.12 By abandoning this analytic framework, the Court
indicated its willingness to give serious protection to public employees' constitutional rights.

5. See Reich, The New Property, supra note 1.
7. As Van Alstyne noted, 81 Harv. L. Rev. at 1441 n.7, the doctrine of unprotected governmental privileges, applied strictly to the public sector, would devastate constitutional claims. As of 1968, a search revealed that 77% of all cases which cited Justice (then Judge) Holmes' famed statement of this principle in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), were decided against the constitutional claim.
10. In Pickering v. Board of Educ., 391 U.S. 563 (1968) and Keyishian v. Board of Regents, 385 U.S. 589 (1967), the Court had maintained that under some circumstances the government may not deny public employment on a basis that infringes upon the employee's first amendment rights. In Slochower v. Board of Educ., 350 U.S. 551 (1956) and Wieman v. Updegraff, 344 U.S. 183 (1952), the Court had held that public employees dismissed under tenure provisions or during the terms of their employment had interests in continued employment which were safeguarded by the requirements of due process.
11. See note 6 supra.
12. "[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the application of procedural due process rights." 408 U.S. at 571.
Roth and Perry presented the Court with two of the most common questions arising from the application of constitutional standards to government employment: (a) whether the due process clause requires the government to provide a public employee with fair procedures of notice and hearing when he is separated from his employment, and (b) whether a public employee may constitutionally be separated from his employment for engaging in speech ordinarily protected by the first amendment. In Perry, the Court ruled, in accordance with earlier holdings, that a public employee may not be terminated from his employment for engaging in constitutionally protected speech, since the government may not produce indirectly a result which it could not constitutionally produce directly. More significantly, both the Roth and Perry decisions expanded the rights of public employees, holding that public employees are entitled to due process protections whenever a "liberty" or "property" interest cognizable under the fourteenth amendment is implicated. Moreover, the decisions made it clear that the existence of a property interest is not to be determined solely by whether explicit contractual or statutory provisions grant the employee tenure, but is to be determined by reference to the circumstances and legitimate understandings of the parties.

Roth and Perry, by announcing the rejection of the right-privilege distinction in the public employment sphere, appeared to enlarge the judicial safeguards to be applied to public employees' substantive and procedural rights. However, the Court left open the question of what circumstances

13. Both Roth and Perry were nontenured college professors who had been notified without explanation that they would not be rehired at the end of their terms of employment. Perry had been teaching in the Texas State College System for ten years under successive one-year contracts when he was informed that he would not be offered another contract at the expiration of the academic year. 408 U.S. at 594-95.
14. Perry had been teaching with apparent success until the last academic year, when he was publicly critical of the Regents of the state college system on policy decisions with which he disagreed. He left his teaching duties on several occasions to testify before the state legislature, and a newspaper advertisement criticizing the Regents was published over his signature. 408 U.S. at 594-95. Roth's allegation that the nonrenewal of his contract was based on the exercise of his free speech rights was not before the court. 408 U.S. at 568-69.
15. See note 10 supra and accompanying text.
16. 408 U.S. at 597.
17. Id. at 599.
18. We have made it clear in Roth that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." 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 and that he may invoke at a hearing. 408 U.S. at 601 (citations omitted).

The Court held that Roth had no "liberty" interest if he could not show any charges against him or stigma foreclosing other employment, and that the terms of his employment supported no possible claim to entitlement to re-employment, nor was there any state statute or university rule or policy that did so. 408 U.S. at 578. Perry, on the other hand, was entitled to a hearing where he could be told, and challenge, the grounds for his nonretention if he could prove that there was a de facto tenure policy at the college, as he alleged. 408 U.S. at 603.
give rise to "liberty" or "property" interests in continued employment deserving of protection under the fourteenth amendment. In addition, while holding that public employees have interests in free speech which deserve constitutional protection, the Court failed to define what level of judicial scrutiny should be applied when the free speech claims of public employees are implicated.

In the 1975 and 1976 Terms, the Burger Court made a major effort to address these questions. The Court considered cases raising public employees' claims to "liberty interests" in matters of personal appearance and to "property interests" in continued employment. In both areas, the Court limited the constitutional protections of the plaintiff employees. In so doing, the Court failed to exercise the exacting scrutiny over the alleged governmental restrictions of the plaintiffs' constitutional interests traditionally applied to the constitutional claims of members of the citizenry at large. At the same time, the Court failed to identify characteristics unique to government in its role as public employer which explain the unique treatment of public employees' constitutional claims. As a result, the decisions seem to indicate that the expansion of government into new relationships with its citizens also may not be accompanied by constitutional protections.

After examining the Supreme Court's 1975 and 1976 decisions regarding public employees' substantive and procedural rights, this article will demonstrate how constitutional interests of public employees can be protected by the application of traditional constitutional analysis without crippling the operation of government or abandoning fundamental rights.

I
PUBLIC EMPLOYEES AND PERSONAL APPEARANCE: Kelley v. Johnson

In Kelley v. Johnson, the Supreme Court held that the dress code of the Suffolk County New York Police Department did not violate the constitutional rights of its employees. Since 1971, the Department had required its members to wear hair above the collar and to be clean-shaven, except for an optional mustache. The plaintiff, Eugene R. Kelley, sued

22. 425 U.S. at 239-40 n.1. Specifically, the Department requirements at issue in Kelley were:
1. Order No. 71-1, amending Chapter 2 of the Rules and Procedures, Police Department, County of Suffolk, N.Y., provided:
   2/75.0. Members of the Force and Department shall be neat and clean at all times while on duty. Male personnel shall comply with the following grooming standards unless excluded by the Police Commissioner due to special assignment.
   2/75.1. HAIR: Hair shall be neat, clean, trimmed, and present a groomed appearance. Hair will not touch the ears or the collar except the closely cut hair on the back of the neck. Hair in front will be groomed so that it does not fall below the band of properly worn headgear. In no case will the bulk or length of the hair
individually and as president of the patrolmen’s union to challenge the constitutionality of the restrictions. The district court dismissed the action, but the Court of Appeals for the Second Circuit reversed and remanded, ruling that the right to determine one’s personal appearance is a protected element of liberty under the fourteenth amendment.23 Accordingly, the case was tried on the question of whether or not there was a “genuine public need” for such a restriction. The district court found there was no such need; the court of appeals affirmed, and the Supreme Court granted certiorari.

The Supreme Court reversed in a 6 to 2 opinion24 delivered by Justice Rehnquist. At the outset, the Court cited Roth for the broad proposition that the fourteenth amendment “affords not only a procedural guarantee against the deprivation of ‘liberty,’ but likewise protects substantive aspects of liberty against unconstitutional restriction by the State.”25 The Court expressed doubt, however, whether even the citizenry at large has a liberty interest within the fourteenth amendment in matters of personal appearance.26 The Court found it unnecessary to resolve this question. Instead, the Court ruled that even assuming the existence of such a right in the citizenry at large, the Department could still regulate the appearance of its employees, because public employees are not entitled to the same constitutional protections as general citizens.

To reach this result, the Court relied on language from Pickering v.

interfere with the proper wear of any authorized headgear. The acceptability of a member’s hair style will be based upon the criteria in this paragraph and not upon the style in which he chooses to wear his hair.

2/75.2. SIDEBURNS: If an individual chooses to wear sideburns, they will be neatly trimmed and tapered in the same manner as his haircut. Sideburns will not extend below the lowest part of the exterior ear opening, will be of even width (not flared), and will end with a clean-shaven horizontal line.

2/75.3. MUSTACHES: A short and neatly trimmed mustache may be worn, but shall not extend over the top of the upper lip or beyond the corners of the mouth.

2/75.4. BEARDS & GOATEES: The face will be clean-shaven other than the wear of the acceptable mustache or sideburns. Beards and goatees are prohibited; except that a Police Surgeon may grant a waiver for the wearing of a beard for medical reasons with the approval of the Police Commissioner. When a surgeon prescribes that a member not shave, the beard will be kept trimmed symmetrically and all beard hairs will be kept trimmed so that they do not protrude more than one-half inch from the skin surface of the face.

2/75.5. WIGS: Wigs or hair pieces will not be worn on duty in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration. If under these conditions, a wig or hair piece is worn, it will conform to department standards. Id.


24. Justice Stevens took his seat on the Supreme Court after argument in Kelley and took no part in the decision.

25. 425 U.S. at 244.

26. Id. “[W]hether the citizenry at large has some sort of ‘liberty’ interest within the Fourteenth Amendment in matters of personal appearance is a question on which this Court’s cases offer little, if any guidance.”
Board of Education\textsuperscript{27} and subsequent cases\textsuperscript{28} involving the first amendment rights of public employees. In these cases, the Court had noted that while state employment may not be conditioned on the relinquishment of first amendment rights, "[a]t the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."\textsuperscript{29} The Kelley Court reasoned that if "state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment."\textsuperscript{30}

Immediately after asserting that the constitutional rights of public employees in general are thus limited, the Court shifted its line of reasoning to focus on the identity of plaintiffs as policemen:

The hair length regulation here touches respondent as an employee of the county, and, more particularly, as a policeman. Respondent's employer has, in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large.\textsuperscript{31}

The Court observed that the maintenance of a police force was an unassailable exercise of the state's "'police power'" and concluded that, as an exercise of the police power, the state's regulation of its employees' appearances was entitled to a presumption of legislative validity.\textsuperscript{32} Under this undemanding standard of review, the Court found that the question was not, as the court of appeals had held, whether the state could establish a genuine public need for each regulation, but whether the plaintiff challenging the regulation could demonstrate that there was no rational connection between the regulation and the promotion of the safety of persons and property.\textsuperscript{33} The Court held that the limitations on plaintiff's appearance in Kelley could readily be sustained either as a method of making police recognizable or of increasing "'esprit de corps.'"\textsuperscript{34}

The Court concluded its opinion by rejecting the court of appeals'
reliance on the language in the 1967 decision in *Garrity v. New Jersey*35 that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."36 The Court distinguished the cases on the basis of the categories of rights at issue:

*Garrity*, of course, involved the protections afforded by the Fifth Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment. Certainly its language cannot be taken to suggest that the claim of a member of a uniformed civilian service based on the "liberty" interest protected by the Fourteenth Amendment must necessarily be treated for constitutional purposes the same as a similar claim by a member of the general public.37

The Court's decision in *Kelley* thus denied that the Constitution protects the right of policemen to determine their personal appearance. In so doing, the Court refused at the outset to rule that no one enjoys the constitutional right to determine his personal appearance,38 asserting instead that the *Kelley* case could rest on the limited constitutional entitlement accorded to public employees, particularly policemen. However, at the end of its opinion, in distinguishing *Garrity*, which held that policemen are entitled to the same fifth amendment protections as any other citizens, the Court apparently relied on the distinction between the rights involved. Thus, by the end of the brief opinion, *Kelley* seems to stand for both the reduced constitutional status of public employees and the reduced constitutional status of the liberty clause of the fourteenth amendment.39

The Court's assertion that public employees may be subjected to more restrictive regulation than the public at large rested on the authority of two precedents: *Pickering v. Board of Education*40 and *United States Civil Service Commission v. Letter Carriers*.41 In *Pickering*, the Court had held that a public school teacher could not be discharged for sending a letter critical of the school to the local newspaper. In sustaining the teacher's speech rights, the Court noted, in dicta, which became central to the holdings in *Letter Carriers* and *Kelley*, that under some circumstances a

35. 385 U.S. 491 (1967).
36. Id. at 500.
38. Id. at 244.
39. The Court's treatment of *Garrity* seems to imply that while policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights when fundamental fifth amendment rights are implicated, they may be relegated to such a watered-down version when fourteenth amendment "liberty" interests are implicated. However, earlier in the opinion, in its discussion of *Pickering* and its progeny, the Court had implied that the first amendment rights of public employees may also be "watered down." If one takes the Court's discussion of *Garrity* seriously, the logical conclusion seems to be that fifth amendment rights of public employees will be accorded greater constitutional protection than either fundamental first amendment rights or the fourteenth amendment liberty interest.
41. 413 U.S. 549 (1973).
governmental body might have a greater right to regulate the constitutionally protected speech of employees than the speech of private citizens. The Court's reasoning in *Pickering* had made it clear, however, that this dicta was intended neither to eliminate strict scrutiny by the courts in cases involving public employees' first amendment rights nor to create for constitutional purposes a second class of citizens consisting of public employees. In its analysis of the *Pickering* facts, the Court emphasized that the plaintiff's public statements had not interfered with the operation of the schools or with the plaintiff's performance of his day-to-day teaching duties. The *Pickering* Court had further observed that the public statements were not so closely related to the day-to-day operations of the school that they would be difficult to counter because of the plaintiff's presumed great access to the facts. Under these circumstances, the Court had concluded, the interest of the school board in limiting the plaintiff's opportunities to speak was not significantly greater than its interest in limiting the speech of the general public.

Under the Court's reasoning, therefore, a serious restriction of public employees' freedom of speech would require proof of actual disruption of the employment function, a standard akin to the clear and present danger test applied to limit the first amendment rights of the general citizenry. Both the holding and the dicta in *Pickering* established that public employees' rights may be restricted more severely than those of the general public only for reasons relating directly and nontangentially to the particular employment undertaking at issue. Thus, the dicta in *Pickering* merely indicated that the facts involved in public employment may justify a restriction of first amendment rights that meets the traditional standard of scrutiny.

In *Letter Carriers* and its companion case of *Broadrick v. Oklahoma*, the Court limited the first amendment protections of public employees, relying on the dicta from *Pickering*. In *Letter Carriers*, plaintiffs challenged the constitutionality of the Hatch Act. This legislation consist-

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42. [It cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees.

391 U.S. at 568.

43. *Id.* at 572-73.

44. *Id.* at 572.

45. *Id.* at 573.


47. 413 U.S. 601 (1973).


(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(2) take an active part in political management or in political campaigns.
ed of extensive prohibitions against federal public employee participation in partisan politics. The prohibitions were defended as essential to the protection of a nonpartisan, merit-oriented civil service system. Although the prohibitions clearly infringed upon the exercise by public employees of first amendment rights, the Court sustained them. The conclusion in Letter Carriers that the asserted governmental interest was sufficient to justify the restriction of acknowledged first amendment rights was central to the outcome in Kelley.

Justice White opened the opinion on Letter Carriers with a history of the independent merit-oriented civil service and of the Hatch Act provisions

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

The Regulations prescribed by the Civil Service Commission, 5 C.F.R. § 733.121-.122 (1970), were:

PROHIBITED ACTIVITIES

§ 733.121 Use of official authority; prohibition.

An employee may not use his official authority or influence for the purpose of interfering with or affecting the result of an election.

§ 733.122 Political management and political campaigning; prohibitions.

(a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.

(b) Activities prohibited by paragraph (a) of this section include but are not limited to—

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club;

(5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office;

(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

(9) Driving voters to the polls on behalf of a political party or partisan candidate;

(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate, or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

49. In the companion case to Letter Carriers, Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court sustained similar state prohibitions of public employees' partisan political activities.

50. Prior to the Court's decisions in Roth and Perry, the Court had rejected a first amendment challenge to the Hatch Act on the grounds that, inter alia, regulation of the
restricting partisan political activities. He made the crucial transition to approval of such restraints on federal employees' first amendment rights on the authority of the dicta from *Pickering* which the *Kelley* Court later used in a similar fashion.\(^5\) Having established, through *Pickering*, that governmental interests as an employer may justify restraints on the first amendment rights of public employees, Justice White identified the governmental interests which justified such restrictions in *Letter Carriers*: (1) the politically neutral enforcement of the laws; (2) the appearance of political neutrality in government; (3) the politically neutral promotion and advancement of civil servants. He concluded that the balance struck by Congress between the interests of the employee as citizen and the interests of the government as employer could be sustained and that the restrictions of the Hatch Act were justified.\(^5\)

The problem with *Letter Carriers* rests not so much with its result as with its reasoning. Arguably, the Court could have sustained the restrictions on the plaintiffs' rights to free political activity as a matter of "vital or paramount state interest" under a principled strict scrutiny test.\(^5\) As the *Letter Carriers* Court recognized, partisan political associations of public employees may have a major impact on society's interests in the neutral administration of the laws, in the appearance of honesty in government and in the preservation of a civil service based on employee merit.\(^5\) For example, as an employer in the business of public administration, the government is responsible for the fair administration of laws and programs which are developed through the political process. The government may be required to impose some limits on political associations of employees responsible for the administration of such laws and programs in order to avoid charges of political corruption. Similarly, the fragility of any merit

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activities of public employees is required only to meet the standard of reasonableness. United Pub. Workers v. Mitchell, 330 U.S. 75, 101 (1947). *Letter Carriers*, as it came to the Supreme Court, accepted the precedent of *Mitchell* as binding, challenging the statute and regulations on the more recently developed grounds of vagueness and overbreadth.

51. "But as the Court held in *Pickering*, the government has an interest in regulating the conduct and the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general. . . ." 413 U.S. at 564. See note 47 *supra* and accompanying text.

52. 413 U.S. at 564.

53. As an example of the application of such a strict scrutiny analysis in the context of public employment, see Justice Brennan's plurality opinion in *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976):

It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. . . . "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment Rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. . . ." Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest. . . ." The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.

For a discussion of *Elrod* v. *Burns*, see text accompanying notes 94-130, *infra*.

54. 413 U.S. at 564-67.
system in which management is selected by the political process may require
unique safeguards. Thus, governmental interests which are unaffected by
the political associations of the general citizenry may warrant some kind of
governmental restriction of the first amendment interests of public employ-
ees which would be impermissible if applied to the citizenry at large.

Alternatively, Letter Carriers could properly have been treated as an
instance of rights in conflict. Arguably, the rights of government employees
to engage freely in political activity are at odds with the constitutional
operation of the political system for all citizens. As the legislative history
demonstrates, the Congress which enacted the Hatch Act was extremely
concerned that the expansion of the federal bureaucracy to meet the de-
mands of World War II might result in a vast patronage army which would
pose a serious threat to the continued operation of a democratic govern-
ment.\textsuperscript{55} Under these circumstances, the Court could properly have sustained
some restrictions on the first amendment rights of public employees by
balancing the constitutional interests of the citizenry at large against the
interests of the plaintiffs in Letter Carriers.\textsuperscript{56}

Although the Court could have identified legitimate competing public
interests, a further inquiry is necessary. In order to give serious protection to
the plaintiffs' first amendment rights, the Court should have determined
whether the prohibitions embodied in the Hatch Act constituted the least
drastic means of protecting those governmental interests.\textsuperscript{57} For example, if
the justification for the restrictions on public employees' rights to political
association was the governmental interest in neutral administration of the
laws, the Court should have considered whether the restrictions should
apply to employees performing low-level ministerial functions. Even a brief
examination of federal bureaucracy should have indicated to the Court
categories of employees whose authority over the administration of the laws
or over matters of partisan political concern was negligible.\textsuperscript{58} If the justifica-
tion for the restrictions was the danger of a patronage bureaucracy, the Court
should have considered other, less drastic means of approaching the prob-
lem. To begin with, the Court should have considered the direct prohibition
of coerced and rewarded partisan service.\textsuperscript{59} Another less restrictive safe-

\textsuperscript{55} 84 CONG. REC. 9595, 9598, 9603-04 (1939).
\textsuperscript{56} For cases applying the rights-in-conflict analysis, see, Cox Broadcasting Co. v. Cohn,
420 U.S. 469 (1975); Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969), and Sheppard v.
\textsuperscript{57} Shelton v. Tucker, 364 U.S. 479 (1960), enunciated the rule that incursions upon
fundamental rights must be drawn as narrowly as possible to achieve the compelling state
interest at issue. See, Elrod v. Burns, 427 U.S. at 363 quoting Kusper v. Pohnkes, 414 U.S. 51,
59 (1973): "If the State has open to it a less drastic way of satisfying its legitimate interest, it
may not choose a legislative scheme that broadly stifles the exercise of fundamental personal
liberties."

\textsuperscript{58} For instance, it is difficult to imagine a partisan issue arising from the delivery of
mail, which is the dominant obligation of the National Association of Letter Carriers.

\textsuperscript{59} This was one of the central provisions of the original civil service formulation, Civil
Service Act of 1883, ch. 27, 22 Stat. 403 (Pendleton Act).
guard against corruption in the governmental bureaucracy would be the enactment of procedures for merit selection and promotion. Indeed, the federal civil service system was constructed to establish a merit system to eliminate partisan patronage in government employment. It took the Court a leap of considerable proportions to conclude that only the wholesale restrictions embodied in the Hatch Act could satisfy its concerns.

The *Letter Carriers* Court declined to exercise exacting scrutiny over the governmental interest alleged to justify the Hatch Act restrictions or to explore possible less drastic alternatives to the restrictions. Instead, the Court ruled that the restrictions were acceptable because they "will reduce the hazards to fair and effective government."60 The Court thereby reduced the standard required to justify incursions upon fundamental rights from the customary "compelling state interest" standard to a relaxed requirement that the restraint "reduce the hazards to government."61 Having set the substantive standard so low, the Court found that the standard had been satisfied because Congress and the executive branch had found it to be so over the years:

> [F]or many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee to attempt to influence or coerce another.62

The *Letter Carriers* Court thus deferred to the decisions of the other two branches of government on a question of fundamental first amendment rights.

*Letter Carriers* failed to provide any guidance to future courts faced with governmental restrictions on public employees’ fundamental rights. Almost any restriction could be justified under the *Letter Carriers* reasoning as "reducing the hazards to fair and effective government," especially if the Court were to continue to defer to the other branches of government as to whether the standard has been fulfilled. By enunciating this unsatisfactory standard, the *Letter Carriers* Court failed to delineate what weight of governmental interest will justify restrictions of employees’ constitutional interests. As a corollary, the Court failed to define under what circumstances a citizen’s identity as a public employee will give rise to such a governmental interest, and under what circumstances restrictions of public employees’ constitutional rights will not be justified because no sufficient governmental interest is implicated.

The *Letter Carriers* opinion may reflect nothing more than the Court’s reluctance to overturn longstanding arrangements affecting thousands of

60. 413 U.S. at 565.
61. In support of its approval of the substantial restraints on political activity embodied in the Hatch Act, the Court stated: "Neither the right to associate nor the right to participate in political activities is absolute in any event." *Id.* at 567.
62. *Id.* at 566.
employees. However, when the Court considered *Kelley v. Johnson* in 1976, the *Letter Carriers* reasoning provided a ready precedent for severe restrictions of the plaintiff employee’s fundamental rights. While a principled weighing of the governmental and individual interests at issue in *Letter Carriers* might have sustained the Hatch Act restrictions, such an analysis would never have produced the outcome in *Kelley*.64

Perhaps because the government’s justifications for the hair regulations in *Kelley* were so much less convincing than the rationale supporting the Hatch Act restrictions in *Letter Carriers*, Justice Rehnquist did not base his holding in *Kelley* entirely on the theory of the reduced constitutional status of public employees. Rather he used *Letter Carriers* as a springboard to create an even less protected class than public employees: individuals employed to carry out the “‘police powers’” of the states.

The hair length regulation here touches respondent as an employee of the county and, more particularly as a policeman. . . .

The promotion of safety of persons and property is unquestionably at the core of the state’s police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose. Choice of organization, dress and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the state’s police power.65

Justice Rehnquist concluded, therefore, that the state need not establish, as the court of appeals had required, a genuine public need for the regulation restricting plaintiff’s liberty interest in determining his personal appearance. Rather, the plaintiff had the burden of demonstrating that there was no rational connection between the regulation and the promotion of safety of persons and property.66

Since 1937, when the Supreme Court abandoned its practice of subjecting economic regulation to strict scrutiny,67 the Court has routinely deferred to the judgment of the other branches of federal and state government in determining the constitutionality of economic regulation enacted pursuant to

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64. This point is conclusively demonstrated by the history of *Kelley*. The court of appeals, in *Dwen v. Berry*, 483 F.2d 1126 (2d Cir. 1973), remanded the case to the district court with instructions to demonstrate a legitimate state interest in the hair regulations at issue. The district court struck down the hair rules. *Dwen v. Berry*, No. 74-1900 (E.D. N.Y. 1975), and the circuit court affirmed, *Dwen v. Berry*, 508 F.2d 836 (2d Cir. 1975) (per curiam).
66. *Id.* at 247.

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by
the "police power" of the state. The phrase "police power" is a term of art that originates in the landmark Supreme Court decision of *Munn v. Illinois*,68 sustaining one of the early state laws regulating the private economy. The Court in *Munn* described the "police power" of the state as:

"nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good.69

Where citizens' economic interests are at stake, the Court has for forty years required only a rational basis for governmental action.70 Until *Kelley*, this low standard stood in direct contrast to the almost insurmountable requirement of proving a compelling state interest, where fundamental personal civil rights are involved. At the outset of his opinion in *Kelley*, Justice Rehnquist assumed that the right to determine personal appearance was a protected civil right. Nonetheless, citing three decisions sustaining state economic regulations (the latest from 1952), he held in *Kelley* that the state's regulation of appearance was entitled to the same deference accorded other state actions under its "police power."

In the first of Justice Rehnquist's authorities, *Daybrite Lighting, Inc. v. Missouri*,71 the Court upheld a state statute which provided that any employee entitled to vote could absent himself from work on election day for four hours without suffering a penalty. The *Daybrite Lighting* Court reasoned that it is not the function of the court to weigh the wisdom of legislation enacted pursuant to the police power so long as specific constitutional prohibitions are not violated.72 The Court found that the only objection to the statute in question was that it reduced the profits of the employer's business, and held that reduced profits give rise to no constitutional infirmity. The Court concluded, therefore, that the statute in question was entitled to a presumption of legislative validity. Similarly, in the second of Justice Rehnquist's authorities, *Olsen v. Nebraska*,73 the Court upheld a state statute which fixed the maximum prices for employment agencies' legislation adapted to its purpose. . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . .

See also *West Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937), upholding state regulation of women's wages: "Legislative response . . . cannot be regarded as arbitrary and capricious and that is all that we have to decide. Even if the wisdom of the policy be regarded as debatable . . . still the legislature is entitled to its judgment."

68. 94 U.S. 113 (1876).
69. Id. at 125.
70. See note 67 supra and accompanying text.
72. Id. at 423.
73. 313 U.S. 236 (1941).
services as economic regulation enacted pursuant to the state police power. In neither of these cases were constitutional interests, such as the liberty interest in determination of one's personal appearance, at issue in *Kelley*, implicated.

In *Prince v. Massachusetts*, 74 the third case relied on by the *Kelley* Court, the Court sustained the validity of child labor laws which incidentally precluded Jehovah's Witnesses from using their children to sell religious pamphlets. The plaintiff alleged that the labor laws violated his religious freedom guaranteed under the first amendment. The Court upheld the labor law as permissible economic regulation which had only an incidental, and nondiscriminatory, impact on the plaintiff's civil rights. 75 However, in *Prince*, the Court carefully weighed the "sacred private" interest of the plaintiff in freedom of religion against the "interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunity for growth into free and independent citizens." 76 In weighing these interests, the Court in effect found a compelling state interest in the maintenance of the health of children which was sufficient to override the incidental impact of the regulation on plaintiff's practice of his religion. Thus, nothing in the authorities cited by the Court in *Kelley* supported the establishment of a lower standard for the intrusion upon fundamental constitutional rights where the state's police power is involved.

Having set the standard of review so low, the *Kelley* Court exercised no review at all. The district court in *Kelley* had held a complete trial to establish the employment-related justifications for the Department appearance rules. The Department could produce nothing more persuasive than the argument that restrictions on hair length produce a relatively uniform appearance rendering the police identifiable, and that limited hair styles promote Departmental "'esprit de corps.'" As the dissenters pointed out, the justification of promoting esprit de corps was particularly vulnerable, since the corps of police themselves, through their association, were the ones challenging the regulation. 77 Moreover, the government's argument in *Kelley* that the hair length regulations rendered the police more identifiable to the public is tenuous at best. As Justice Marshall observed, "'Surely the fact that a uniformed policeman is wearing his hair below his collar will make him no less identifiable as a policeman.'" 78 Finally, the *Kelley* opinion is silent regarding the relationship of the substantive restriction to the employment function of the police force. Although Justice Rehnquist alluded to plaintiffs' role as "'keepers of the peace,'" 79 he nowhere indicated why that function would require greater uniformity or esprit de corps than any other

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74. 321 U.S. 158 (1944).
75. *Id.* at 170.
76. *Id.* at 165.
77. 425 U.S. at 255 (Marshall, J. dissenting).
78. *Id.* at 254.
79. *Id.* at 255.
function. The court of appeals had ruled that the Department was not a para-
military institution, and while upholding the hair length restrictions set by
the Department, the Supreme Court did not overturn that finding.

It is evident that the hair regulation at issue in Kelley could never have
survived the strict scrutiny which is traditionally exercised when fundamen-
tal rights are at issue. The failure to exercise such scrutiny suggests that the
Court, despite its initial assumption that such a "liberty interest" exists, did not seriously consider the right to determine one's personal appearance
to be a fundamental civil right.

Such a conclusion seems highly inconsistent with the values of auton-
omy and privacy which the Constitution was designed to protect and with
recent case law which has recognized and extended the right to privacy implicit in the fourteenth amendment. As Justice Marshall argued in his
dissenting opinion, "'Liberty under law extends to the full range of conduct
which the individual is free to pursue.' . . . It seems to me manifest that
'full range of conduct' must encompass one's interest in dressing according
to his own taste." As Justice Marshall concluded, if the right to determine
one's personal appearance is not specifically protected by the Bill of Rights,
the undoubted reason is that the Framers assumed the existence of such an
obvious personal liberty.

Moreover, although the parties did not argue first amendment issues in
Kelley, it is arguable that the governmental restrictions at issue implicated
first amendment rights as well as fourteenth amendment liberty interests. As
the history of litigation of the hair issue demonstrates, the adoption of long
hair styles diverging from the norms of the early sixties was associated with
a challenging attitude toward authority. Thus, even where, as in Kelley, the
plaintiff does not present his personal appearance as symbolic speech under

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80. Id. at 244.
81. This appears to have been the inference drawn by Justice Marshall, who devoted
several pages of his dissenting opinion to the argument that a fourteenth amendment liberty
interest in matters of personal appearance in fact exists. Justice Powell, in his concurring
opinion, went out of his way to counter this interpretation of the majority opinion: "Contrary to
the concern expressed by the dissent, I find no negative implication with respect to a liberty
interest within the Fourteenth Amendment as to matters of personal appearance." 425 U.S. at
249.
82. See Roe v. Wade, 410 U.S. 113, 153 (1973), "this right of privacy, whether it be
founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state
action, as we feel it is, or . . . in the Ninth Amendment . . . is broad enough to encompass a
woman's decision whether or not to terminate her pregnancy."
See also Stanley v. Georgia, 394 U.S. 557, 564 (1969), holding that the first and fourteenth
amendments prohibit ruling private possession of obscene material a crime: "[A]s fundamental
is the right to be free, except in very limited circumstances from unwarranted governmental
intrusions into one's privacy . . . [T]he makers of the Constitution conferred as against the
government, the right to be left alone."
See also Griswold v. Connecticut, 381 U.S. 479 (1965), holding that a state statute
forbidding use of contraceptives violated the right of marital privacy.
84. Id. at 251-52.
the first amendment, the choice of appearance may indicate a political or social statement deserving of first amendment protection.

While the Supreme Court has never held that citizens have a first amendment right to wear long hair, a contrary holding would violate the core meaning of the first amendment, which should protect against the coerced affirmation of another’s views. As Justice Brandeis described in his classic opinion in *Whitney v. California*: “Believing in the power of reason as applied through public discussions, [the Founders] eschewed silence coerced by law—the argument of force in its worst form.” Similarly, in *West Virginia State Board of Education v. Barnette*, prohibiting the states from ordering citizens to salute the flag, the Court emphasized: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” (emphasis added).

Recently, in *Wooley v. Maynard*, the Court emphasized the constitutional fatality of coerced affirmations. Striking down a New Hampshire statute which required citizens to display the state motto “Live Free or Die,” upon their license plates, the Court stated:

“We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. *See West Virginia State Board of Education v. Barnette.* A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”

Justice Douglas, in his dissent from the denial of certiorari in one of the early decisions denying the constitutional right to wear long hair, forcefully...

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See also, *Braxton v. Board of Pub. Instr. of Duval County*, 303 F. Supp. 958 (M.D. Fla. 1969), in which a black teacher argued that his goatee was symbolic speech, communicating black identity and pride.

86. See also 84 *Harv. L. Rev.* 1702-09 (1971), surveying cases in which arguments alleging plaintiffs’ constitutional rights to wear long hair are considered, and Comment, *Constitutional Validity of Employer Dress and Grooming Codes*, 9 *U. San Fran. L. Rev.* 515 (1974), surveying various constitutional arguments regarding public employees’ rights to determine their personal appearance.

See also *Crews v. Close*, 432 F.2d 1259 (7th Cir. 1971), holding that hair restrictions applied to male students in a public school violated the boys’ right to equal protection.

87. 274 U.S. 357, 375-76 (1926).

88. 319 U.S. 624, 642 (1943).

89. 97 S. Ct. 1428 (1977).

90. Id. at 1435.

ly argued that serious first amendment interests were threatened: "I had supposed that those guarantees permitted idiosyncracies to flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow men."92

The Kelley Court did not address the serious first amendment considerations implicit in the plaintiff's challenge to the Suffolk County Police Department's hair regulations. Instead, the Court upheld the regulations, despite the tenuous relationship between the prescribed appearance and the employment involved. Justice Rehnquist's treatment of Kelley thus leaves it unclear whether the opinion reflects a reduction in the constitutional status of public employees, the special reduced status of policemen, the Court's feeling that personal appearance is not an interest worthy of constitutional protection, or the Court's feeling that fourteenth amendment liberty interests do not merit serious constitutional analysis. Since the rationale for the restrictions of the plaintiff's constitutional rights was so unclear, Kelley may provide a basis for the restriction of the civil rights of the citizenry at large based on the lower constitutional standard applied to police officers.93

II
PRINCIPLED CONSTITUTIONAL ANALYSIS:
AN ALTERNATIVE APPROACH TO THE CONSTITUTIONAL RIGHTS
OF PUBLIC EMPLOYEES

In marked contrast to the decision in Kelley, in a trilogy of cases involving the right of free association, the Court succeeded in distinguishing between the roles of public employee as citizen and as government employee and in making the appropriate determination of the constitutional rights of each. The dispute in Elrod v. Burns,94 decided at the end of the 1975 Term by a vote of five to three,95 arose when the office of Sheriff of Cook County, Illinois changed from Republican to Democratic hands in 1970. Consistent with past practice, the Democratic administration began immediately to replace Republican employees in the non-civil-service jobs controlled by the sheriff's office. At the time this suit was filed, each of the plaintiffs with one exception96 had been discharged from his office because of failure to obtain Democratic "sponsorship" for continued employment. Defendant's requirement of such active affiliation with the Democratic Party was overt and

92. 393 U.S. at 856.
93. See, e.g., Jacobs v. Kunes, 541 F.2d 222 (9th Cir. 1976), (regulation requiring male employees of county assessor's office to wear their hair cut above the collar held not so irrational as to constitute deprivation of liberty). cf. Pence v. Rosenquist, No. 77-2132 (7th Cir., Feb. 2, 1978) (discharge of male school bus driver reversed as violation of due process clause).
95. Justice Stevens did not participate because, while sitting on the Court of Appeals for the Seventh Circuit he had written the opinion in Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972) which was one of a trilogy of cases, including Elrod, concerning the patronage system.
96. The remaining employee had been threatened. 427 U.S. at 351.
undisputed. The discharged employees sued; the district court dismissed, and the Court of Appeals for the Seventh Circuit reversed, ruling that the Sheriff could not condition government employment, even non-civil-service employment, upon affiliation with the Democratic Party. The Supreme Court granted certiorari and affirmed.\textsuperscript{97}

\textit{Elrod v. Burns} provided the Court with a classic companion to its recent decision in \textit{Letter Carriers}.\textsuperscript{98} Where \textit{Letter Carriers} raised the question of whether public employees could be restricted in the exercise of their first amendment rights to protect government interests in a merit civil service system, \textit{Elrod} considered whether public employees could be restricted in their rights to free political association to advance government interests in the nonmerit “patronage system.” In two opinions, a plurality of five Justices found that the government’s interest in maintaining the political patronage system could not support the discharge of plaintiffs on the grounds of their failure to obtain proper partisan sponsorship. Mr. Justice Powell, joined by Justices Burger and Rehnquist\textsuperscript{99} dissented, reasoning that the patronage system advanced sufficiently important state interests to justify restrictions on public employees’ acknowledged first amendment rights.\textsuperscript{100}

The \textit{Elrod} plurality opinion by Justice Brennan, Justices Marshall and White concurring, illustrates the successful operation of a principled framework for evaluating the constitutional claims of public employees. Justice Brennan first observed that the patronage practices at issue in \textit{Elrod} restrained the associational freedoms of the employees, both by compelling association with the Democratic Party and by denying association with the employees’ preferred party. The secondary effect of these practices, the Court noted, was to restrict the free functioning of the political process for all.\textsuperscript{101}

Having established the first amendment status of the rights involved, the plurality turned to the question of whether any interest could justify the restraint. In considering this question, the plurality emphasized that it was

\textsuperscript{97} Cf. the Second Circuit in conflict with \textit{Elrod}: Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971). This was substantially overruled in Calo v. Paine, 521 F.2d 411 (2d Cir. 1975).


\textsuperscript{99} The three dissenting justices in \textit{Elrod} had all concurred in the majority opinion in \textit{Letter Carriers}.

\textsuperscript{100} 427 U.S. at 376. In the first of the patronage cases arising in the Northern District of Illinois, the Court of Appeals for the Seventh Circuit had ruled that nonincumbent candidates and supporters of nonincumbents had standing to challenge the patronage system because of injury to their right of political association.

\textsuperscript{101} Shakman v. Democratic Org. of Cook County, 435 F.2d 267 (7th Cir. 1970), cert. denied, 402 U.S. 909 (1971).

\textsuperscript{102} 427 U.S. at 366. Cf. Wieman v. Updegraff, 344 U.S. 183 (1952) (requirement that state employees take loyalty oath, creating conclusive presumption of disloyalty upon those who had not taken the oath, held violative of the first amendment).
applying the traditional strict scrutiny test for consideration of first amendment interests:

Before examining those justifications, however, it is necessary to have in mind the standards according to which their sufficiency is to be measured. It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct..." Thus encroachment "cannot be justified by a mere showing of some legitimate governmental interest." The interest advanced must be paramount, one of vital importance, and the burden is on the Government to show the existence of such an interest. In the instant case, care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, and the Government must "employ means closely drawn to avoid unnecessary abridgement..."102

In marked contrast to the Court's opinions in Kelley and Letter Carriers, the plurality opinion thus reiterated that public employees, including law enforcement officers, are entitled to the highest level of scrutiny of their first amendment claims.

The Court then applied these principles to its consideration of the arguments asserted in defense of the patronage system. The plurality easily dismissed the government's argument that employees belonging to minority political parties would not have the incentive to work efficiently for their governmental employers. The Court first relied on numerous decisions which had rejected similar "efficiency" arguments when public employees' affiliations with the Communist Party had been challenged.103 More significantly, the Elrod Court declined to accept the Government's justification at face value, but looked to the record to determine the validity of the efficiency claims and found:

It does not appear that efficiency and effective government were the concerns of elected officials in this case. Employees originally dismissed were reinstated after obtaining sponsorship letters, a practice hardly promotive of efficiency if the employee's work had been less than par or if the employee had previously behaved in an insubordinate manner. Complaints by one supervisor that too many people were being discharged too fast without adequately trained replace-

102. 427 U.S. at 362 (citations omitted).
ments were met with the response that the number of dismissals was to be maintained because the job openings were needed for partisan appointments. One Republican employee of the Sheriff’s office was told that his dismissal had nothing to do with the quality of his work, but that his position was needed for a Democratic replacement.\footnote{104}{427 U.S. at 364 n.18.}

As a second justification for the first amendment restrictions at issue in Elrod, the Government argued that patronage systems ensure political accountability, thereby increasing the effectiveness of government. The plurality quickly dismissed this argument, asserting that the “less drastic means” of limiting patronage dismissals to policy-making officials would accomplish the same result.\footnote{105}{Id. at 372.} The Court explained, “The greater effectiveness of patronage over these less drastic means, if any, is at best marginal, a gain outweighed by the absence of intrusion on protected interests under the alternatives.”\footnote{106}{Id. at 366.}

The Court rejected the Sheriff’s final argument—that patronage preserves the democratic process—with the observation that patronage may, in fact, undermine the process. Significantly, the Court relied on the earlier decision in Letter Carriers, construing that case to uphold the Hatch Act restrictions only because they were essential to preserve the political process from the evils of patronage:

To be sure, Letter Carriers . . . upheld Hatch Act restraints sacrificing political campaigning and management, activities themselves protected by the First Amendment. But in those cases it was the Court’s judgment that congressional subordination of these activities was permissible to safeguard the core interests of individual belief and association.\footnote{107}{Id. at 370-71.}

Justice Brennan thus construed Letter Carriers as having exercised strict scrutiny over the government’s restrictions of the plaintiffs’ first amendment rights. In his view, the Letter Carriers Court applied the test, proposed earlier in this article,\footnote{108}{See text accompanying notes 55-56, supra.} of the balancing of competing constitutional claims. Justice Brennan emphasized that had the Court failed to find an overriding constitutional interest in Letter Carriers, the Hatch Act prohibitions could not have been sustained: “For if the First Amendment did not place individual belief and association [of citizens] above political campaigning and management [by employees], at least in the setting of public employment, the restraints on those latter activities could not have been judged permissible in Mitchell and Letter Carriers.”\footnote{109}{Elrod v. Burns, 427 U.S. at 371.} Justice Brennan’s understanding of Letter Carriers, therefore, differs markedly from the interpretation of that case in Kelley,\footnote{110}{425 U.S. 238 (1976).} in which the Court, without
scrutinizing the constitutional interests at issue, cited Letter Carriers as authority for the reduced constitutional status of public employees. 111

Thus, the plurality opinion in Elrod both advocated and exercised exacting scrutiny over governmental justifications for restrictions of public employees' first amendment rights. However, the impact of the opinion is reduced by the limited agreement of Justices Stewart and Blackmun, who concurred only in the result. The Justices reasoned: "The single substantive question involved in this case is whether a nonpolicy-making, nonconfidential government employee can be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the Court that he cannot." 112 The Justices further indicated that while they would vote with Justice Brennan on the record of political patronage involving nonpolicy-making employees in Elrod, they would not necessarily hold a system constitutionally invalid which confined the hiring of some governmental employees to those of a particular political party. 113 The concurring Justices' reservation of this question, coupled with their failure to propose the criteria to be applied to the resolution of the question, suggests that Justices Stewart and Blackmun were not in agreement with the exacting analysis prescribed by Justice Brennan for the scrutiny of restrictions on public employees' first amendment rights.

While the concurring opinion may have implied a willingness to relax judicial scrutiny over public employees' first amendment claims, Chief Justice Burger advocated complete judicial deference to the legislative determination which extended civil service protections to half of the Sheriff's employees and left the balance to be selected by the head of the department. The Chief Justice appeared to doubt whether Elrod involved serious first amendment issues, reasoning that the plurality opinion strained the boundary of the first amendment and trivialized constitutional adjudication. 114 He concluded:

The considerations leading to these legislative conclusions are—for me—not open to judicial scrutiny under the guise of a First Amendment claim, any more than is the right of a newly elected Representative or Senator, for example, to have a staff made up of persons who share his political philosophy and affiliation and are loyal to him. It seems to me that the Illinois Legislature's choice is entitled to no less deference. 115

Chief Justice Burger's brief dissenting opinion is misleading and dis-

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111. See text accompanying notes 28-64, supra.
112. Id. at 375. The result in Elrod is somewhat broader than the concurring opinion acknowledges, because the practices prohibited affected not only belief, but contributions and services. Presumably, a Republican who "believed" in the Republican Party could continue to work for the Democratic sheriff if he contributed money and time to his Democratic opponents.
113. Id. at 374.
114. Id. at 375.
115. Id. at 376.
honest. Selection of a few policy-making assistants to a legislator is in no way analogous to the discharge of masses of clerical employees at issue in *Elrod*. Not only did the opinion fail to acknowledge clear first amendment interests, but its deference to the legislature implied that plaintiffs were not entitled to judicial review of their first amendment claims. Chief Justice Burger’s willingness to defer to the legislature in *Elrod* foreshadows the Court’s abandonment of judicial review in the procedural due process area.\(^{116}\)

In contrast, the dissenting opinion by Justice Powell (joined by Chief Justice Burger and Justice Rehnquist, all of whom were in the majority in *Letter Carriers*) acknowledged that the traditional test of the constitutionality of first amendment restrictions was applicable:

> The question is whether it is consistent with the First and Fourteenth Amendments for a State to offer some employment conditioned, explicitly or implicitly, on partisan political affiliation and on the political fortunes of the incumbent officeholder. This is to be determined, as the plurality opinion agrees, by whether patronage hiring practices sufficiently advance important state interests to justify the consequent burdening of First Amendment interests.\(^ {117}\)

Applying this test, the dissenting Justices concluded that the patronage system served sufficient governmental interests to justify the restrictions in *Elrod*.\(^ {118}\) They reasoned that patronage hiring practices have stimulated political activity, helping to make government accountable.\(^ {119}\) The Justices also found that these practices have served strong governmental interests in encouraging stable political parties and avoiding fragmentation.\(^ {120}\) Finally, the dissenting Justices reasoned that finding that patronage hiring interfered with the free functioning of the political process for all, ran “counter to the judgments of the representatives of the people in state and local government... One would think that elected representatives of the people are better equipped than we to weigh the need for some continuation of patronage practices.”\(^ {121}\)

The dissenting Justices thus found that the protection of the patronage system in state and local government was of sufficient importance to support the restrictions in *Elrod*. Since the same Justices had ruled three years before, in *Letter Carriers*, that the abolition of such patronage practices was a sufficient state interest to justify similar restrictions, it is difficult to imagine what interests would not be found to be sufficient. Justice Powell’s willingness to defer to the legislative judgment of the need for patronage practices renders his opinion almost indistinguishable from Chief Justice

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116. See text accompanying notes 131-189, infra.
117. *Id.* at 381.
118. *Id.* at 387.
119. *Id.* at 382.
120. *Id.* at 383.
121. *Id.* at 386.
Burger’s abdication of judicial review. Moreover, the dissenting opinion is consistent with *Letter Carriers* only in its willingness to defer to legislative judgment on the question of the appropriateness of restrictions of the political associations of public employees. If judicial deference on questions involving public employees’ first amendment claims becomes standard, the concept of public employment as a privilege undeserving of constitutional protection will, in effect, be resurrected.

The plurality opinion in *Elrod* is likely to be of little precedential value for two reasons. First, as has been discussed, the members of the Court could not agree upon the proper analysis to be applied to the plaintiffs’ first amendment claims. Second, the Court in *Elrod* was presented with a unique record of abusive political practices which left the majority with little alternative to facing the first amendment implications of patronage hiring. Since it is highly unlikely that future cases will present such a clear record of governmental restrictions of public employees’ first amendment rights, the major value of *Elrod* is as an illustration of the application of principled first amendment analysis to the constitutional claims of public employees.

Such an analysis, striking a balance between the protection of constitutional interests of public employees and society’s interest in stable labor management, was graphically illustrated in the recent case of *Abood v. Detroit Board of Education*. In *Abood*, the plaintiffs challenged the validity of a Michigan statute which permitted agency shop arrangements to require all employees represented by unions to pay a service fee equal to union dues. The plaintiffs contended that such an arrangement violated their rights to freedom of association by compelling them to provide financial support to institutions with whose goals they did not agree. The Court relied on earlier decisions upholding a similar arrangement under the Railway Labor Act to rule that “important governmental interests presumptively support the impingement upon associational freedom created by the agency shop here at issue.” The Court held that the agency shop arrangement did not impermissibly violate the first amendment.

In his concurring opinion, Justice Rehnquist chastised those of his
brethren who had joined the majority opinion in *Elrod* for joining the majority in *Abood*. Justice Rehnquist reasoned that if the first amendment prohibits coerced political association in *Elrod*, it must also prohibit coerced support of a labor organization. However, he failed to perceive the crucial distinction between the cases. By applying the first amendment to prohibit the patronage practices in *Elrod*, and refraining from applying it to prohibit the payment of agency fees in *Abood*, the Court accurately distinguished between restrictions of the public employee in his commercial role as employee and in his role as a citizen exercising political rights within society at large. The *Abood* majority’s recognition of this distinction was demonstrated by its attempt to protect the employee against coerced support of union activities not related to his commercial identity. The Court found that the employee could obtain a rebate of any portion of his dues used for any purpose other than collective bargaining.

In *City of Madison v. Wisconsin Employment Relations Commission*, the Supreme Court again distinguished between the interests of public employees as employees and their interests as citizens. The case involved a Wisconsin law which prohibited public employers from seeking to bargain individually with employees once a collective bargaining representative had been selected. The plaintiff teachers in *Madison* were represented by a union. During the course of collective bargaining, the union asked the school board for an agency fee arrangement and for a provision establishing binding arbitration. A group of dissident teachers organized a protest against these requests by the collective bargaining representative and attempted to present their dissenting views of these issues to the school board at a public school board meeting. After the school board permitted the dissident teachers to address the meeting, the union filed a charge with the Wisconsin Employment Relations Commission, alleging that the school board had engaged in individual negotiations contrary to state law. The Commission found the board guilty of the prohibited labor practice, the Wisconsin state courts affirmed, and the United States Supreme Court reversed.

The Supreme Court held that the first amendment protected the teachers’ right to address an open meeting of the school board on an important decision of their government. This characterization is debatable. Significantly, however, the Court specifically reserved the question of whether dissident teachers could assert a similar right to participate in actual collective bargaining negotiations. Such a development would be incompatible with the functioning of orderly collective bargaining. The ruling in *Abood*, which follows the Court’s decision in *City of Madison* indicates

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127. *Id.* at 1803-04.
129. *Id.* at 426-27.
130. *Id.* at 426.
that Madison probably would not be extended to open collective bargaining negotiations to anyone wishing to dissent from his union's positions.

The three decisions in Elrod, City of Madison and Abood illustrate the operation of a proper analytic approach to the public employee question. Although none of the opinions actually engages in a detailed analysis of the factors comprising an acceptable employment-related restraint as opposed to an unacceptable political restraint, the facts of the cases themselves are illustrative. As was discussed above, the requirements of partisan support in Elrod actually undermined the effective functioning of the Sheriff's office and were undertaken solely for the purpose of using public employment to tip the political balance in favor of the "ins." In contrast, well-established nonpolitical labor principles underlie the selection and support of a single collective bargaining representative which was at issue in Abood and Madison. Thus, the essential dichotomy between the public employee as employee and the public employee as citizen may, correctly used, form the basis for a proper analysis of questions involving public employees' first amendment rights.

III

THE ERODED BULWARK OF PROCEDURAL DUE PROCESS

In a series of decisions on the due process rights of public employees, the Supreme Court again moved toward depriving public employees of meaningful judicial review of their employers' actions. The withdrawal of constitutional protections in the procedural sphere was an even more radical departure from the developments of the recent past than were the decisions on speech and associated substantive rights. The right to strict procedural protections when dealing with the government has long been recognized as a core element of constitutional due process, and the Court had recently announced the revised status of due process rights in disputes involving government employment in Board of Regents v. Roth and Perry v. Sindermann. Nonetheless, in 1976 the Court gave every indication that it intended a wholesale withdrawal from judicial review of the procedural safeguards affecting public employees.

In Bishop v. Wood, a majority of the Court sustained discharge procedures established by a local legislature, although they fell short of the due process protections generally required by the fourteenth amendment. The plaintiff policeman had been discharged from his employment without any hearing, allegedly for failure to follow orders, poor attendance and conduct unbecoming a police officer. Justice Stevens, writing for himself

133. 408 U.S. 593 (1972).
and Justices Burger, Stewart, Powell and Rehnquist, affirmed the decision of the lower court that the policeman was not entitled to due process before being discharged, on the grounds that the employee did not have a property interest in his employment entitling him to protection under the due process clause.

To reach this result, Justice Stevens relied upon the 1972 decision in *Board of Regents v. Roth*, that public employees are only entitled to due process protections if they have an enforceable interest in continued employment constituting a property interest. Justice Stevens reasoned that the question of whether a property interest has arisen is to be decided by reference to state law, and that under North Carolina law a reasonable expectation of continued public employment would only arise if the employer, by statute or contract, had actually granted some kind of guarantee of tenure. Justice Stevens then examined the statute governing the employment relation to determine whether such a guarantee was conferred. Relying on the district court's finding that the state statute in issue did not create a legitimate expectancy of continued employment, but merely specified procedures for termination, Justice Stevens held that the plaintiff in *Bishop* was not entitled to due process protections.

The Court's analysis in *Bishop* was problematical for two reasons. First, the lower court's interpretation of the statute governing the employment relation at issue was highly questionable, and deference to the lower court's interpretation of state law was unnecessary. The lower court opinion construing the statute, delivered before the 1974 Supreme Court decision in *Arnett v. Kennedy*, was based on reasoning which was subsequently expressly rejected by six of the nine Justices in *Arnett*. Second, even if the construction of state law were correct, *Roth* and *Perry*, the seminal cases defining property interests cognizable under the due process clause, do not compel the conclusion that the plaintiff in *Bishop* did not have a "property interest" in continued employment sufficient to merit due process protections.

The statute at issue in *Bishop* provided:

*Dismissal.* A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is

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136. The *Roth* Court defined property for purposes of the due process clause as follows: To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
138. *Id.* at 345-47.
deficient and what he must do if his work is to be satisfactory. If a
personal 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 notice.\footnote{140}

At the outset, Justice Stevens noted that on its face the ordinance might
fairly be read as conferring a guarantee of continued employment except for
the causes shown.\footnote{141} Despite the apparent clarity of the statutory language,
the Court ultimately accepted the contrary interpretation that: "the ordi-
nance may also be construed as granting no right to continued employment
but merely conditioning an employee’s removal on compliance with certain
specified procedures."\footnote{142} Justice Stevens’ attempt to distinguish between
the provision of continued employment and the limitations on removal is
extremely questionable. What is the expectancy of continued employment,
if not a limitation on removal? Second, even assuming that some narrow
procedural limitations on dismissal might not create an expectancy amount-
ing to tenure, Bishop is not such an instance. In Bishop, the statute not only
limited the permissible procedures for dismissal but spoke of “permanent
employment” and listed the causes supporting dismissal. As Justice White
persuasively argued in his dissenting opinion, in order to find that the city
ordinance in question did not condition termination on cause, the Court had
to construe the ordinance as “permitting, but not limiting, discharges to
those based on the causes specified in the ordinance. In this view, dis-
charges for other reasons, or for no reason at all, could be made.”\footnote{143} If this
were the correct reading of the ordinance, and if the city management
consequently had an unreviewable discretion to terminate employment, then
the statutory enumeration of causes for dismissal in the statute would be
meaningless. As Justice White concluded, such a reading of the city ordi-
nance would be clearly erroneous.\footnote{144}

\footnote{140. Bishop v. Wood, 426 U.S. at 344 n.5.}
\footnote{141. Id. at 345.}
\footnote{142. Id.}
\footnote{143. Id. at 356 n.1.}
\footnote{144. Id. As the dissenting justices in Bishop pointed out, the lower court to which Justice Stevens deferred on the issue of state law did not in fact construe the ordinance at issue to determine that the plaintiff held his position at will. Rather, the lower court relied on Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971), a state supreme court decision involving facts and a statute distinguishable from those in Bishop, for the proposition that "nothing else appearing," an employment contract containing no provision for the duration of employment is terminable at the will of either party. Bishop v. Wood, 377 F. Supp. 501, 504 (W.D.N.C. 1973). As Justice Blackmun commented in his dissenting opinion, 426 U.S. at 361-62, Still did not dispose of the state law issue presented in Bishop. In Still, the plaintiff’s employment was governed by a statute which permitted employment to be terminated at the end of a school year without a showing of good cause. The court held that the statute, in conjunction with the plaintiff’s employment contract, which specified no termination date, did not create an enforceable interest in continued employment. The Still court contrasted this statute with the one
Moreover, the lower court decision to which the Supreme Court deferred, was questionable in its interpretation of federal law, since it was based on a proposition rejected in Arnett v. Kennedy.\textsuperscript{145} The lower Court in Bishop had reasoned:

It is clear from Article II, Section 6, of the City's Personnel Ordinance that the dismissal of an employee does not require notice or a hearing. Upon request of the discharged employee, he shall be given written notice of his discharge setting forth the effective date and the reasons for the discharge. It thus appears that both the city ordinance and the state law have been complied with.\textsuperscript{146}

Thus, the lower court decision on which Justice Stevens relied actually held that the statute created no property interest cognizable under the due process clause, because, although containing some limits on procedures for removal, it contained no statutory procedures for hearing before termination. By adopting this interpretation to determine that the property right is thus limited and then concluding that, absent a locally cognizable property interest, the federal due process protections do not apply, Justice Stevens came very close to adopting the position of Justice Rehnquist in the plurality opinion of the Court's badly divided 1974 decision in Arnett.

In Arnett, a plurality of the Court held that the statute creating a property interest also defines the limits of the procedures required by the due process clause. The plaintiff had been a permanent employee of the federal government. Accordingly, his job tenure was surrounded by the statutory protections of the federal civil service system, which did not include the right to an adversary hearing before discharge.\textsuperscript{147} When Arnett was discharged for alleged slander of his superior, he sued to enjoin the discharge on the grounds that the due process clause entitled him to a full blown trial hearing before separation from his property as a permanent government employee. Writing for a plurality of himself, Chief Justice Burger and Justice Stewart, Justice Rehnquist reasoned that if the statute establishing

which governed dismissals during the school year requiring a showing of cause and providing for notice and a hearing, Id. at 259-60, 182 S.E.2d at 407.

As Justice Blackmun argued in his dissent, the statute at issue in Bishop required a showing of cause for the termination of employment and was therefore distinguishable from the statute construed in Still, 426 U.S. at 361-62. The Bishop ordinance was similar to the other statute described in Still which governed terminations during the school year and which the Still court implied did not subject employees to termination at the will and pleasure of the school board. Thus, under the Still reasoning, Justice Stevens could have found an implied contract conferring an expectation of continued employment so long as the plaintiff performed his job satisfactorily. The lower court's finding that under state law the Bishop plaintiff had no enforceable expectation of continued employment was defective both in its failure to scrutinize the ordinance in question and in its cavalier application of North Carolina state law to the Bishop facts.

\textsuperscript{145} 416 U.S. 134 (1974).
\textsuperscript{147} Under the federal civil service rules in effect in Arnett, the employee was entitled to notice of the reasons for discharge and an opportunity to rebut the accusations in writing before the discharge, but not to a trial-type hearing until after discharge. 416 U.S. at 140.
the property right in government employment prescribed procedures for discharge, those statutory procedures also defined the extent of the due process required by the Constitution before the employee could be discharged. In Justice Rehnquist's circular formulation, since the due process clause of the Constitution protects only cognizable "property," the protected interest extends only to a property right not to be discharged without the procedures prescribed by statute.

A majority of six members of the Court disagreed with this formulation. Concurring in the holding that the plaintiff was not entitled to a predetermination hearing, Justices Powell and Blackmun specifically rejected the Rehnquist formulation that due process provided by the Constitution could be limited by the legislature.148 The Justices reasoned:

While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.149

The two Justices concurred in the Rehnquist holding only because they found that the provision in the Arnett statute for a post-dismissal hearing was sufficient to fulfill the plaintiff's constitutional right to due process.150 Similarly, Justice White, concurring and dissenting in Arnett, disagreed with the Rehnquist formulation that the property interest which the plaintiff had in his employment was conditioned by the procedural limitations set forth in the statute.151 Finally, Justices Douglas, Brennan and Marshall dissented completely, concluding that the plaintiff had a property interest in continued employment which required the full procedural protection of a predetermination hearing.152

However, the Rehnquist formulation—that the statute providing the property expectancy may simultaneously limit the procedures available for its protection—has a superficial consistency that has never completely been laid to rest.153 The Bishop decision, which deferred to the local interpretation that the absence of statutory hearing procedures before discharge means

148. Under the plurality opinion in Arnett, the due process clause cannot require procedures more protective than the legislature has selected.
149. 416 U.S. at 167.
150. Id. at 171.
151. Id. at 177.
152. Id. at 203-31.
153. In Goss v. Lopez, 419 U.S. 565 (1975), a due process case, the Court had ruled five to four that a student is entitled as a matter of constitutional rights to due process notice and hearing before suspension from school. There, the protected "property" right was established by statute according all school age children a public education. Although, as in Arnett, another section of the statute creating the right authorized the summary suspension procedure struck down by the Court, the shift in Justice Stewart's vote created a majority from the dissenters in Arnett. Interestingly, even in dissent in Goss, Justice Powell did not assert the Rehnquist formulation that the statute limited the student's relief.
that the due process clause does not require such procedures, comes very close to establishing the Rehnquist position as law. Justice White dissented in Bishop on this very point:

I dissent because the decision of the majority rests upon a proposition which was squarely addressed and in my view correctly rejected by six Members of this Court in Arnett v. Kennedy.

... The majority’s holding that petitioner had no property interest in his job in spite of the unequivocal language in the city ordinance that he may be dismissed only for certain kinds of cause rests, then, on the fact that state law provides no procedures for assuring that the City Manager dismiss him only for cause. The right to his job apparently given by the first two sentences of the ordinance is thus redefined, according to the majority, by the procedures provided for in the third sentence and as redefined is infringed only if the procedures are not followed.

This is precisely the reasoning which was embraced by only three and expressly rejected by six Members of this Court in Arnett v. Kennedy.154

Justice White concluded:

The ordinance plainly grants petitioner a right to his job unless there is cause to fire him. Having granted him such a right it is the Federal Constitution, not state law, which determines the process to be applied in connection with any state decision to deprive him of it.155

The significance of Bishop is somewhat obscured by its procedural history. Since Bishop was an appeal from the decision of a federal district court as affirmed by the court of appeals, the Supreme Court was reviewing a federal district court’s interpretation of the state law. Under these circumstances, the Supreme Court of course has complete latitude to find that the district court was in error. The Supreme Court could have overruled the district court opinion, either as an erroneous interpretation of state law or as an incorrect disposition of the federal questions resting on a theory expressly rejected by a majority of the Court in Arnett.

Moreover, even if the Supreme Court had accepted the district court’s interpretation that under state law the plaintiff held his employment at will, resolution of the state issue need not have been determinative of the federal constitutional question of whether a property interest had arisen. The Supreme Court in Roth had not stated, as Justice Stevens implied, that “the sufficiency of the claim of entitlement must be decided by reference to state law.”156 Rather the Roth Court had posited that property interests “are created and their dimensions are defined by existing rules or understandings

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155. Id. at 360-61.
156. Id. at 344.
that stem from an independent source such as state law.\textsuperscript{157} While this language indicates that state law is certainly relevant to the possession of a property interest, state law is only one "independent source" from which such understandings can arise.

In Roth's companion case of Perry v. Sindermann,\textsuperscript{158} the Court had emphasized that property interests subject to procedural protections are not limited by a few technical forms.\textsuperscript{159} The Court observed that while a written contract with explicit tenure provisions is clear evidence of a public employee's property interest, the absence of such a provision need not foreclose the possibility that an implied contract granting tenure has arisen. The Perry Court held that the plaintiff employee should, as a matter of federal law, have been given the opportunity to prove the legitimacy of his claim to tenure "in light of the policies and practices of the institution," despite his lack of possession of an explicit contractual tenure provision.\textsuperscript{160} Applying this reasoning to the Bishop case, the plaintiff in Bishop should have been given an opportunity to prove the legitimacy of his claim as a matter of federal law, in the light of the policies, expectations and practices in the city police department.

Justice Brennan dissented in Bishop on this point.

I would only add that the strained reading of the local ordinance, which the Court deems to be "tenable"... cannot be dispositive of the existence vel non of petitioner's "property" interest. There is certainly a federal dimension to the definition of "property" in the Federal Constitution... But certainly, at least before a state law is definitely construed as not securing a "property" interest, the relevant inquiry is whether it was objectively reasonable for the employee to believe that he could rely on continued employment.\textsuperscript{161}

Justice Stevens declined to employ any of the possible avenues of review in Bishop, choosing to treat the district court judge like a state court judge whose determination of state law was definitive and ignoring all opportunities to overturn the lower court finding either as an incorrect interpretation of federal law or as an attempt to evade the requirements of the due process clause.

As a practical matter, even before the explicit abandonment of meaningful judicial review in Bishop, the Court had refused all term to impose any independent standard of due process on units of government, repeatedly declaring itself satisfied with whatever procedures were followed.\textsuperscript{162} For example, in Hortonville Joint School District v. Hortonville Educational

\begin{itemize}
\item \textsuperscript{157} Board of Regents v. Roth, 408 U.S. 564, 567 (1972) (emphasis added).
\item \textsuperscript{158} 408 U.S. 593 (1972).
\item \textsuperscript{159} Id. at 601.
\item \textsuperscript{160} Id. at 603.
\item \textsuperscript{161} Bishop v. Wood, 426 U.S. 341, 353 (1976).
\item \textsuperscript{162} Compare Muscare v. Quinn, 520 F.2d 1212 (7th Cir. 1975), cert. dismissed as improvidently granted, 425 U.S. 560 (1976) with Matthews v. Eldridge, 424 U.S. 319 (1976). Matthews
the Supreme Court found no violation of the plaintiff teachers' due process rights in mass firings by the school board during an unlawful strike. The teachers challenged the firing in state court on the grounds that the discharge deprived them of their property interest in their employment without due process of law because the school board was not an impartial tribunal. The teachers alleged that the board was impermissibly biased because the strike originated in a breakdown in collective bargaining, and the board was the bargaining agent. The trial court denied the teachers' claim, but on appeal the Wisconsin Supreme Court reversed, holding that since the board had many options besides discharge, entrusting all discretion to the board, which was itself involved, did not satisfy the requirements of due process. Accordingly, the Wisconsin court ordered that the board's decision should be reviewable in trial de novo in the local county court.

The Supreme Court reversed. In a short opinion by Chief Justice Burger, the Court considered the allegations of bias arising from the board's involvement in the negotiations and concluded that the due process clause did not warrant the restriction of the board's discretion to do anything it saw fit to further the interests of the school system. Although the Court unenthusiastically adopted the state court's holding that the teachers had a cognizable property interest in their pending contracts and in the offers of renewal for the coming year, the decision rested on a refusal to tamper with the allocation of authority over the teachers set forth under local statutes. Thus, the effect of Bishop was only to formalize the Court's prior de facto abdication of review of public employee due process.

The Rehnquist position in Arnett, which was implicitly adopted by the majority of the Supreme Court in Bishop, only formalizes this abdication of judicial review. The abdication results from the misuse of the Roth property concept. As was discussed above, the Roth Court clearly understood that property relationships, which are ordinarily a matter of state or common law, exist for reasons other than the creation of procedural protections. Property constitutes a whole series of relationships; and the majority in Roth apparently thought it could use such independent, pre-existing relationships to determine whether the due process clause could be invoked. However,

v. Eldridge, although not involving a public employee, was a particularly shocking example of the procedures that the Court found within the bounds of acceptability. Matthews was brought by a claimant under Social Security Aid to the Disabled, who had thrice been denied his disability benefits without a prior hearing. The actions of the Social Security Administration had led to his utter impoverishment before the decision would be reversed (as it was) under the statutory hearing procedures which followed the deprivation. Nonetheless, the Court ruled that the burden on the claimant of such a deprivation did not tip the balance in favor of a prior hearing because the claimant could apply for aid to the needy under state programs.

163. 426 U.S. 482 (1976).
164. 66 Wis. 2d 469, 225 N.W.2d 658 (1975).
165. 426 U.S. at 488 n.2.
166. Id. at 496.
167. See text accompanying notes 156-161.
once the Court indicated in *Arnett* that by failing to provide a procedural protection in the statute, the state could use the *Roth* concept to evade the due process clause, state courts became able to construe public employees' property interests to exclude due process.

The *Roth* decision should eventually be reexamined. Since government at all levels is an expanding source of employment, welfare, contracts and licenses, one's reasonable expectation of fair treatment from a democratic government should be a sufficient interest to invoke the protections of the due process clause. As Justice Frankfurter explained in his classic concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, every citizen is entitled to the expectation that government will act fairly. The expectation that government will act fairly is essential to the rule of law and thus to the government's claim to legitimacy. As Justice Marshall explained, in his dissenting opinion in *Roth*, "[I]t 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 or contractual controls, a government employer is different. The government may only act fairly and reasonably." In 1977, the Supreme Court ruled, in *Codd v. Velger*, that a probationary policeman has no action for reinstatement and damages resulting from the denial of a hearing, even though his liberty interest in future employment may have been substantially impaired by derogatory material placed in his file at the time of discharge. The Court held that he must plead and prove that the material was false. Requiring a refutation of the substance of charges before a plaintiff can state a violation of his constitutional rights misses entirely the significance of the due process clause. As Justice Stevens pointed out, dissenting from the per curiam opinion, "even when it is perfectly clear that the charge is true, the Constitution requires the procedural safeguard be observed." Ultimately, the question for the courts must be not whether, but how much, process is due. The courts have proven themselves capable of prescribing procedural protections in a variety of cases which reflect both legitimate state interests in summary procedures and the varying importance

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173. *Id.* at 123 (1951).
174. *Id.* at 170 (Frankfurter, J., concurring).
176. 408 U.S. at 588.
178. 97 S.Ct. at 887.
to the individual of those substantive interests which the procedures are meant to protect.\(^7\)

In the context of public employment, every citizen who applies for an existing government job should be entitled to it unless the government can establish some reason for denying employment. As Justice Marshall convincingly argued in response to contentions that such a system would be burdensome: "[I]t is not burdensome to give reasons where reasons exist."\(^1\) Moreover, as Justice Marshall observed, "[W]here there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired, but, where the demand for reasons is exceptionally great, summary procedures can be defined which would provide fair and adequate information to all persons."\(^2\)

After the employee is hired, the government employer might be entitled to a probationary period permitting the employer substantial latitude to "try out" new employees without a long-term obligation. Fairness might demand that, upon hiring, the public employer inform its employees how long the probationary period will last and what sort of behavior will warrant discharge during that period. The public employer might only be obliged to give some rational explanation for a discharge during a previously announced probationary period.

Once an expectation of ongoing employment attaches, the employee should receive some procedural protection against discharge beyond a mere statement of reasons. As the Court noted in *Perry*, informal practices often contribute to an expectation which should not be taken away without appropriate protections. If the practice has been to retain substantial numbers of employees even before formal statutory provisions for tenure apply, then such a protected expectation would arise. During the semi-conditional early years, the employee might have an expectation of notice of the reasons for his discharge or demotion and an opportunity to answer them in a summary fashion. Thereafter, discharge might be treated like the capital punishment of the employment sphere, accompanied by the highest level of protection, with differing levels of process to be applied for lesser penalties such as demotion or a cut in pay.

The Court's summary action, vacating the opinion of the Court of Appeals for the Seventh Circuit in *Confederation of Police v. Chicago (C.O.P.)*,\(^3\) illustrates the contrast between this approach and the approach of the Supreme Court in *Bishop*. Shortly before the decision in *Bishop*, the court of appeals had held in *C.O.P.* that disciplinary actions against tenured

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179. 408 U.S. at 591.
180. Id. at 591.
181. 529 F.2d 89 (7th Cir. 1975), *vacated and remanded*, 427 U.S. 902 (1976) (mem.).
police officers, such as suspension, transfer or demotion, constituted deprivations of property which must be accompanied by elementary procedural protections.\textsuperscript{182} The Court assumed that the plaintiff police officers had a cognizable relationship with the government which entitled them to the fairest procedures practical. At the same time, the Court recognized the unique features of employment as a police officer and attempted to allow maximum flexibility to the lower courts and department administrators. Taking into account the legitimate interests of both the government and the officers, the Court attempted to provide the lower court with guidance regarding the process which is "due":

In the context of the operations of a police department, we do not believe that grievance procedures require a stay of ordered and orderly transfers and demotions. The police department must be capable of immediate response to emergency situations. This capability would be substantially impaired if, for example, patrolmen were permitted to refuse to honor transfers pending exhaustion of grievance procedures. This concern for the effective performance of the police department is no justification for a complete denial of all procedural rights but transfers, demotions and the like should be presumed valid until successfully challenged through the grievance procedures.

The district could and should give special attention to the forms that the adverse job action may take. Several such actions have been mentioned here; among the most obvious is the demotion which can cost the policeman up to $1,000 per year. At oral argument, counsel for appellants alluded to other more subtle, non-obvious adverse actions. Each such action should be analyzed, and the district court must determine whether the rights of the patrolmen encompass freedom from arbitrary imposition of such actions and, if so, how those rights are to be protected.

The grievance procedures to be afforded the patrolmen need not mirror in all respects those afforded other civil servants. The quasi-military quality of the police force does not justify complete denial of all grievance procedures. It does, however, justify use of a different grievance procedure within the police department.\textsuperscript{183}

After the decision in \textit{Bishop}, the Supreme Court summarily vacated the order of the court of appeals, citing \textit{Bishop} and two recent cases involving the due process claims of prisoners, \textit{Montayne v. Haymes}\textsuperscript{184} and \textit{Meachum v. Fano}.\textsuperscript{185} The effect of the Court's decision was to eliminate procedural protections for the plaintiffs' interest in continued employment. \textit{Bishop}, however, did not justify this result. Unlike the plaintiff in \textit{Bishop},

\textsuperscript{182} Id. After probation, Chicago police may only be discharged for cause and after notice and a hearing, I.L.L. REV. STAT. ch. 24 § 10-1-18.1 (1973 & Supp. 1974).
\textsuperscript{183} 529 F.2d at 92.
\textsuperscript{184} 427 U.S. 236 (1976).
\textsuperscript{185} 427 U.S. 215 (1976).
the plaintiffs in *C.O.P.* were tenured employees who had expectations of continued employment analogous to the property interest described in *Roth*. Not surprisingly, the court of appeals had grounded its opinion on this continuing property interest.\(^{186}\) Thus, insofar as *Bishop* rested on the absence of a property interest under the local statute, its application to *C.O.P.* is misplaced.

Alternatively, the *C.O.P.* Court may have reasoned that the statute which created the plaintiffs' property interest in their continued employment prescribed procedures prerequisite to discharge or long suspension, but was silent regarding procedures for the lesser disciplinary actions at issue in *C.O.P.* If this interpretation of the Court's summary action is correct, the *C.O.P.* Court was willing to measure the federal due process rights of the plaintiffs by the procedural protections guaranteed by state law. Under this interpretation, the reference to *Bishop* in *C.O.P.* can only mean, as the dissenters in *Bishop* had argued,\(^{187}\) that the due process clause is to be limited to particular interests specifically protected by state law, and that the Rehnquist position in *Arnett* has been accepted by default.

This interpretation of the application of *Bishop* to *C.O.P.* is reinforced by the *C.O.P.* Court's reliance on *Montayne*\(^{188}\) and *Meachum*.\(^{189}\) In those cases, the plaintiffs argued that the transfer of prisoners within a prison system without due process hearings violated the prisoners' liberty interests under the fourteenth amendment. The Court rejected these claims, reasoning that the plaintiffs, who were properly deprived of their liberty of movement by incarceration, had no affirmative right under state law to the choice of prison.\(^{190}\) The Court concluded that no liberty interests cognizable under the fourteenth amendment were infringed by the denial of hearings before the plaintiffs were transferred to less desirable prisons.\(^{191}\) The police in *C.O.P.*, however, clearly possessed statutory rights to tenure in their employment, although their interests in maintenance of salary and rank were not specifically protected by the statute. Since the rights at issue in *Montayne* and *Meachum* were not analogous to the rights claimed in *C.O.P.*, in applying *Montayne* and *Meachum* to reverse *C.O.P.*, the Supreme Court must have construed those cases and *Bishop* to hold that the due process clause protects no interests beyond those explicitly protected by local law.

**IV**

**CONCLUSION**

When the Supreme Court acknowledged in *Roth* and *Perry* that government employees are not excluded from due process protections, the

\(^{186}\) 529 F.2d at 92.


\(^{188}\) 427 U.S. 236 (1976).

\(^{189}\) 427 U.S. 215 (1976).

\(^{190}\) 427 U.S. at 224, 242.

\(^{191}\) Id. at 225, 242-43.
application of protective standards to the employment context raised serious questions. The examination of a series of cases decided in the last two Terms demonstrates that principled constitutional analysis could be applied to the employment relationship without unduly damaging the operations of government. The Court's failure to enforce substantive constitutional protections in cases such as *Kelley*\(^1\) exposes the numerous citizens employed by government to deprivations that should be entirely unacceptable in other spheres. Similarly, the refusal to enforce standards of fundamental fairness under the due process clause is dangerous to the political process and is necessitated by no considerations unique to employment. Like many of the Court's recent actions, the Supreme Court's rejection of the constitutional claims of public employees in the last two Terms had its roots in the Court's concept of its own restricted role in constitutional adjudication rather than in any insurmountable obstacle to the protection of public employees' rights within the traditional constitutional framework.

\(^{1}\) 425 U.S. 238 (1976).