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The Part-Time Teacher and Tenure in California

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THE PART-TIME TEACHER AND TENURE IN CALIFORNIA

In 1967, the California Legislature amended the state's Education Code to provide a classification of part-time temporary teachers[1] which substantially limited the tenure system in community colleges. This comment examines the relation of the part-time classification to the statutory tenure system as it has been construed by the state courts in a series of cases leading up to the decision in *Peralta Federation of Teachers v. Peralta Community College District.*[2] The California Supreme Court, in *Peralta,* held that the statute allowed classification of part-time teachers as temporary employees for a continuing and indefinite period of time.[3] The holding was based on a ruling that part-time teachers did not serve the complete school-year which the court required for reclassification from temporary status.[4]

This comment critically analyzes *Peralta,* demonstrating that the ruling is an undeclared departure from precedent, resting on a weak analytical foundation. The *Peralta* ruling is repugnant to the rationale of the state tenure system as expressed in *Balen v. Peralta Community College District.*[5] The perpetual temporary classification contradicts the *Balen* principle that continuity of service establishes statutory due process rights to notice and hearing before dismissal from employment.[6] It will be argued that the perpetual temporary classification construed by *Peralta* violates fourteenth amendment equal protection. The state's four articulated rationales for the permanent temporary

1. CAL. EDUC. CODE § 13337.5 (West 1975) (recodified at CAL. EDUC. CODE § 87482 (West (1978)). See note 40 *infra* for the language of the section.

2. 24 Cal. 3d 369, 595 P.2d 113, 155 Cal. Rptr. 679, *cert. denied,* 100 S. Ct. 455 (1979).

3. *Id.* at 383-85, 595 P.2d at 121-22, 155 Cal. Rptr. at 687-89. *See* note 122 *infra* and accompanying text.

4. 24 Cal. 3d at 383-85, 595 P.2d at 121-22, 155 Cal. Rptr. at 687-89.

5. 11 Cal. 3d 821, 523 P.2d 629, 114 Cal. Rptr. 589 (1974).

6. *Id.* at 832, 523 P.2d at 631-32, 114 Cal. Rptr. at 591-92.

classification of part-time faculty[7] arguably fail to meet a minimum scrutiny test: (1) the permanent temporary classification contradicts the purpose of the tenure system; (2) the employment of long-term part-time faculty does not further administrative flexibility; (3) the purpose of achieving budgetary savings is constitutionally inadequate to support an otherwise invidious classification; (4) the complete school-year tests construed by *Peralta* as barring reclassification to probationary status have no rational relation to continuity of service.[8]

Strict scrutiny analysis of the teacher classification scheme was suggested by the United States Supreme Court decisions in *Perry v. Sinderman*[9] and *Board of Regents v. Roth*.[10] Due process liberty rights may be infringed because the temporary classification imposes a disability foreclosing the teachers' employment opportunities.[11] Due process property rights may be infringed because the teachers' continuity of service can establish a de facto tenure.[12] An intermediate level of scrutiny may be applied to this classification in the future because of the close nexus between the claim to tenure protection and first amendment free speech interests.[13] The constitutional questions raised by the *Peralta* decision demand further adjudication.

I. BACKGROUND

Over half the faculty in California's community colleges are part-time teachers.[14] Since 1970, the full-time faculty has maintained roughly constant numbers,[15] while the number of part-time teachers has increased dramatically—150 percent between 1973 and 1977.[16] While the use of part-time staff is attractive to

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7. The articulated rationales are cited in notes 144-49 *infra*.

8. *Id.*

9. 408 U.S. 593 (1972).

10. 408 U.S. 564 (1972).

11. *Id.* at 574-75. *See* notes 170, 176 *infra* and accompanying text.

12. 408 U.S. at 603-04. *See* notes 187-192 *infra* and accompanying text.

13. *See* notes 201-207 *infra* and accompanying text.

14. D. Sewell, C. Brydon & W. Plosser, Report on a Statewide Survey About Part-time Faculty in California Community Colleges at 5 (Jan. 1976) (available from California Community and Junior College Association, 2017 "O" Street, Sacramento, CA. 95814). (In 1974-75, the authors noted 20,027 part-time and 14,273 full-time teachers).

15. *See* T. Phair, Staffing Patterns in California Community Colleges, A 1966-67 Overview (published yearly) (Field Service Center, School of Education, University of California, Berkeley).

16. Los Rios Community College Dist., Cal. Educ. Employment Relations Bd.,

colleges for various reasons,[17] the over-riding factor is the substantial savings realized by the colleges.[18] Such cost savings and other incentives result from the treatment accorded part-time teachers by the statutory scheme controlling employment in the state's public institutions. Two consequences flow from the present statutory scheme when the teaching assignment is less than full-time. First, part-time teachers are classified as temporary employees. Though rehired continuously from semester to semester, they remain temporary, accumulating neither seniority nor tenured status. Accorded no procedural protections against arbitrary action, they may be dismissed at any time without notice or hearing.[19] Second, these part-time teachers are excluded from many of the benefits accorded full-time or tenured teachers and, on a pro rata basis, are paid a lower salary for the same workload.[20] Since these disabilities are contingent on the temporary classification, litigation involving part-time faculty has focused on their potential access to the statutory tenure system.

A. The Statutory Scheme Controlling Employment of Public School Teachers

Employment tenure for college teachers is an established principle in American public education. The majority of states have some form of tenure legislation.[21] Tenured teachers are accorded permanent employment status and are subject to dismissal or discipline only for specified cause established through some form of procedural due process.[22] The over-riding purpose

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EERB Dec. No. 18 at 48 (June 9, 1977) (dissent).

17. Part-time teachers are used to meet the shifting specialized or short-term teaching needs of the community. *See generally* Bd. of Governors of Cal. Community Colleges, Part-time Employment 4-5, 12 (April 4, 1975).

18. *Id.* at 2 app. The report notes with approval the budgetary and fiscal advantages of employing part-time faculty.

19. *Id.* at 4, for a discussion of the statewide employment conditions of part-time faculty.

20. *See* D. Sewell, C. Brydon & W. Plosser, *supra* note 14, at 9 (the survey indicated that the part-time teachers received, on average, half the salary per course that full-time received); EERB Dec. No. 18 at 7; Hartnell Community College Dist., PERB Dec. No. 81 at 2-4 (January 2, 1979). For a clear discussion of the part-time temporary in relation to other categories of teachers (including part-time tenured) *see generally* Los Rios Community College Dist., EERB Dec. No. 18 at 3-7 (June 9, 1977).

21. *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1086 n.6 (1968) (citing a National Education Association (NEA) listing of 33 states with statewide tenure systems and an additional nine with restricted tenure systems).

22. For a general discussion of statutory tenure systems, see Annot., 66 A.L.R. 3d 1018 (1975).

of tenure is to protect academic freedom by preventing arbitrary or repressive dismissal.[23] In essence, tenure provides a statutory analogue to federal protection of first, fifth, and fourteenth amendment rights.[24]

The tenure system in California has developed through the intertwining of successive codifications[25] and court decisions.[26] Prior to 1967, the Code had established four broad classifications of employee: probationary, permanent (tenured), substitute, and temporary.[27] Tenure was achieved upon reappointment to a teaching position after satisfactory probationary employment for "three complete consecutive school years."[28] A proba-

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23. *Id.* at 1022 ("statutory or contractual systems have been recognized as the principal arrangement" protecting academic freedom); *Developments in the Law, supra* note 21, at 1048-49 (tenure is the "principal device" protecting academic freedom. "Tenure promotes academic freedom by protecting the individual professor against dismissal for undisclosed or disguised ideologically repressive motives"). *See* 68 AM. JUR. 2d *Schools* § 151 (the purpose of tenure laws "is to promote good order and the welfare of the state and school system by preventing the removal of capable and experienced teachers by political or personal whims"). *See also* Zimmerman v. Bd. of Educ., 38 N.J. 65, 183 A.2d 25, (1962), *cert. denied,* 371 U.S. 956 (1963) (purpose of tenure is to protect teachers "against removal for unfounded, flimsy, or political reasons"); Million v. Bd. of Educ., 181 Kan. 230 310 P.2d 917 (1957) (purpose of tenure is to protect "against unjust dismissal of any kind—political, religious or personal—and to secure for them teaching conditions . . . unharried by constant pressure and fear") and Balen v. Peralta Community College Dist., 11 Cal.3d 821, 523 P.2d 629, 114 Cal. Rptr. 589 (1974) (purpose of tenure is to prevent 'arbitrary dismissal").

24. Joughin, *Academic Due Process,* in ACADEMIC FREEDOM AND TENURE, A HANDBOOK OF THE A.A.U.P. 270 (L. JOUGHIN, ED. 1967). (Joughin in discussing the fourth amendment due process analogue stresses that the analogy is merely that and should not be regarded as an identity between the academic due process of tenure and legal due process.) *See* R. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History, id.* at 243 (academic freedom rests on "freedoms guaranteed by the Bill of Rights of the Federal Constitution.").

25. *See generally* Kunzi, The California Education Code 101 (1969) for a discussion of the historical development of the Code.

26. *See generally* Peralta Fed'n of Teachers v. Peralta Community College Dist., 24 Cal. 3d 369, 595 P.2d 113, 155 Cal. Rptr. 679 (1979); Balen v. Peralta Jr. College Dist., 11 Cal. 3d 821, 523 P.2d 629, 114 Cal. Rptr. 589 (1974); Beseman v. Remy, 160 Cal. App. 2d 437, 325 P.2d 578 (1958); Holbrook v. Bd. of Educ., 37 Cal. 2d 316, 231 P.2d 853 (1951); Ham v. Los Angeles City High School Dist., 74 Cal. App. 2d 773, 169 P.2d 646 (1946); and Crawford v. Bd. of Educ., 20 Cal. App. 2d 391, 67 P.2d 348 (1937).

27. CAL. EDUC. CODE §§ 13334, 13337 (probationary), 13304 (permanent), 13336 (substitute), 13337 (temporary) (West 1975) (recodified at CAL. EDUC. CODE §§ 87476, 87478, & 44882 (West 1978)).

28. CAL. EDUC. CODE § 13304 (West 1975) (as amended by 1961 Cal. Stats., ch. 1778 § 2, recodified in CAL. EDUC. CODE § 44882 (West 1978)) (initially limited to districts with average daily attendance in excess of 850, amended to include districts with average daily attendance in excess of 250). *See also id.* § 13307 regarding districts with less than

tionary employee was one who was employed for a full year,[29] or for a period in excess of the first three school months,[30] and who was neither a permanent nor a substitute employee.[31] Substitute employees were those hired "to fill positions of regularly employed persons absent from service."[32] Temporary teachers were defined as those "other than substitute[s] . . . who are employed to serve from day to day during the first three school months of any school term" or were employed "to instruct in special day and evening classes for adults or in schools of migratory population for not more than four school months of any school term."[33] A temporary employee who served in excess of the three and four month limits of section 13337 became a probationary employee, and a temporary who was re-employed after teaching a complete school year became a second year probationary employee.[34] By contract, permanent instructors can be dismissed only for specified cause after notice and hearing.[35] Initially, probationary instructors could be terminated at the end of the school year by service of notice, but after 1961, they could only be dismissed after notice of cause and a hearing.[36] Substitute

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250 average daily attendance (repealed as to community colleges by 1971 Cal. Stats. ch. 1654). *Id.* § 13328 (West 1975) (recodified in CAL. EDUC. CODE § 87468 (West 1978)) defined a complete school year as service for "at least seventy-five percent of the number of days the regular schools . . . are maintained . . .", or "seventy-five percent of the . . . days the evening schools . . . are in session . . ."

29. *Id.* § 13334 (West 1975) (recodified in CAL. EDUC. CODE § 87476 (West 1978)).

30. *Id.* § 13337 (West 1975) (recodified in CAL. EDUC. CODE § 87480 (West 1978)); *id.* § 13346 (West 1975) (recodified in CAL. EDUC. CODE § 87604 (West 1978)).

31. *Id.* § 13334 (West 1975) (recodified in CAL. EDUC. CODE § 87476 (West 1978)).

32. *Id.* § 13336 (West 1975) (recodified in Cal. Educ. Code § 87478 (West 1978)).

33. *Id.* § 13337 (West 1975) (recodified in CAL. EDUC. CODE § 87480 (West 1978)) (repealed as to community colleges by 1971 Cal. Stats. ch. 1654). Section 13309, added in 1959, authorized tenure for teachers of classes for adults who had served the requisite probationary period. The tenure was to an assignment equivalent to the average number of hours per week served during the probationary period. Amended by 1963 Cal. Stats. ch. 1113, § 1¶2611, to exclude teachers assigned to less than 11 hours per week in districts having an average daily attendance in excess of 400,000. Section 13309 is recodified in CAL. EDUC. CODE § 87449 (West 1978).

34. *Id.* §§ 13336, 13337 (West 1975) (recodified in CAL. EDUC. CODE §§ 87478, 87480 (West 1978)).

35. *Id.* §§ 13403-13414 (West 1975) (recodified at CAL. EDUC. CODE §§ 87732-87739 (West 1978)) ("cause" was defined in terms of fitness to teach or associate with students). *Id.* 13447 (West 1975) (recodified at CAL. EDUC. CODE § 87743 (West 1978) (cause was defined as a necessary reduction in staff resulting from a change in program, or drop in enrollment). *See id.* § 13448 for reappointment rights of terminated permanent employees (recodified in CAL. EDUC. CODE §§ 87, 87 (West 1978)).

36. *Id.* § 13443 (West 1975) (as originally enacted by 1959 Cal. Stats., ch. 2; amended by 1961 Cal. Stats., ch. 2063, § 1 to require hearing and dismissal for cause

and temporary teachers could be dismissed "at any time at the pleasure of the board."[37]

With the growth of the community college system came specific legislation governing the colleges. From 1921, when legislation established the state community colleges,[38] until 1963, when a junior college legislative division was enacted,[39] the employment of teachers in colleges was governed by the general scheme set out above. In 1967, section 13337.5,[40] extending the tempo-

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with the board's determination as to the sufficiency of the cause final). (Repealed as to community college instructors and superceded by Rodda Act, 1971 Cal. Stats., ch. 1654, §§ 13345-13346.30, 13480-13484, recodified in CAL. EDUC. CODE §§ 87600-87610, 87660-87684 (West 1978)).

37. *Id.* § 13445 (West 1975) (repealed 1977); *id.* § 13446 (West 1975) (repealed 1977). A new section governing community college dismissal of temporary instructors is codified at *id.* § 87742 (West 1978).

38. 1921 Cal. Stats., ch. 495, p. 756.

39. 1963 Cal. Stats., ch. 100, p. 735 (drawing together extant code sections solely applicable to the colleges.

40. CAL. EDUC. CODE § 13337.5 (West 1975) (recodified in CAL. EDUC. CODE § 87482 (West 1978)).

> Notwithstanding the provisions of Section 13337, the governing board of a school district maintaining a community college may employ a teacher in grade 13 or grade 14, for a complete school year but not less than a complete semester or quarter during a school year, any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees for grades 13 and 14 during a particular semester or quarter because of the higher enrollment of students in those grades during that semester or quarter as compared to the other semester or quarter in the academic year, or because a certificated employee has been granted leave for a semester, quarter, or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.
>
> Such employment may be pursuant to contract fixing a salary for the entire semester or quarter.
>
> No person shall be so employed by any one district for more than two semesters or quarters within any period of three consecutive years.
>
> Notwithstanding any other provision to the contrary, any person who is employed to teach adult or community colleges classes for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties shall be classified as a temporary employee, and shall not become a probationary employee under the provisions of Section 13446.

Id. (section 13446 had set the three and four month limits on temporary classification).

rary classification, was added to the Code. This section authorized temporary employment for a school year of instructors hired to replace regular faculty on leave or to teach classes scheduled to meet temporary enrollment increases. Such classification of any teacher was restricted to periods of one school year in every three consecutive years. Part-time instructors teaching less than sixty percent of the classroom hours of a comparable full-time position were designated as temporary employees.[41]

Extensive changes in the tenure system governing the employment of college faculty were enacted in 1971. Beginning September 1, 1972, colleges were to classify all teachers as "contract" (probationary), "regular" (permanent), or temporary.[42] Contract teachers were no longer required to serve "complete school years" to achieve regular status. Contract employees "working under [their] first contract" could be dismissed at the end of the school year by the board or given "a contract for a second academic year."[43] At the end of the second year, the board could either "employ the contract employee as a regular employee for all subsequent academic years," or "not employ the contract employee as a regular employee."[44] The board was required to give notice but not a hearing to dismiss a first-year contract teacher.[45] However, the board had to give both notice and a hearing to dismiss a second-year contract teacher[46] and to provide a specified cause relating "solely to the welfare of the schools."[47] Failure by the board to give the prescribed notice to a first-year contract employee effected an automatic reappointment for the following year.[48] Lack of proper notice in the case of a second-year contract employee effected automatic reem-

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Another section added that year defined a complete school year of probationary service in the community colleges as "more than 75 percent of the number of hours considered as a full-time assignment for permanent employees having similar duties." *Id.* § 13328.5 (West 1975) (recodified in CAL. EDUC. CODE § 87469 (West 1978)).

41. *See* note 40, *supra.*

42. *Id.* § 13346 (West 1975) (recodified in CAL. EDUC. CODE § 87604 (West 1978)).

43. *Id.* § 13346.20 (West 1975) (recodified in CAL. EDUC. CODE § 87608 (West 1978)).

44. *Id.* § 13346.25 (West 1975) (recodified in CAL. EDUC. CODE § 87609 (West 1978)).

45. *Id.* § 13346.30 (West 1975) (recodified in CAL. EDUC. CODE § 87610 (West 1978)).

46. *Id.* § 13346.32 (West 1975) (recodified in CAL. EDUC. CODE § 87611 (West 1978)).

47. *Id.* § 13443(d) (West 1975) (recodified in CAL. EDUC. CODE § 44949(d) (West 1978)). Good cause includes reduction in staff occasioned by a decreased student enrollment. *Id.* § 13447 (West 1975) (recodified in CAL. EDUC. CODE § 44955 (West 1978)).

48. *Id.* § 13346.30 (West 1975) (recodified in CAL. EDUC. CODE § 87610 (West 1978)).

ployment as a regular instructor.[49] Another new section classified substitute and short-term employees as temporary.[50] Yet another created a temporary classification for a complete school-year for teachers employed as replacements of regular faculty on leave and mandated reclassification as a second-year probationary of "any person employed for one complete year as a temporary" who was reemployed the following year.[51]

B. Early Case Law

Permanent part-time employment was recognized as early as 1937, in *Crawford v. Board of Education.*[52] The plaintiff in *Crawford* served three consecutive years as a probationary employee, was reappointed to a fourth year under a contract designating him a permanent employee for one-half time services only, and was hired for a fifth year as a permanent employee for one-fourth time services only. He was given notice of dismissal at the end of his fifth year.[53] Relying on the fact of part-time service, the community college denied that the plaintiff had been "re-elected for the . . . school year," as required by the statute governing advancement to permanent status.[54] However, the court held that execution of the contract designating permanent status was sufficient to constitute a re-election to permanent status for one-fourth time service.[55] In dicta, the court expressed disapproval of this attempt "to discharge permanent teachers by reducing . . . employment to such brief periods as would be equivalent to dismissal."[56] But the court did not reach the issue of the board's method of discharging permanent teachers "since plaintiff is relying on the doctrine of estoppel and has agreed to a contract for one-fourth time services."[57]

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49. *Id.*

50. *Id.* § 25490.25 (West 1975) (recodified in Cal. Educ. Code § 87625 (West 1978)).

51. *Id.* § 13337.3 (West 1975) (amended by 1975 Cal. Stats., ch. 885, § 1¶1964 to restrict the reclassification to probationary only where the teacher is reemployed for a second year in a "vacant position"—excluding positions temporarily vacant because a regular teacher is on leave; recodified in Cal. Educ. Code § 87481 (West 1978)).

52. Crawford v. Bd. of Educ., 20 Cal. App. 2d 391, 67 P.2d 348 (1937).

53. *Id.* at 392-3, 67 P.2d at 349.

54. Section 13304 is discussed in note 28 *supra* and accompanying text (the section is currently codified in Cal. Educ. Code § 44885 (West 1978)).

55. Crawford v. Bd. of Educ., 20 Cal. App. 2d at 397, 67 P.2d at 351.

56. *Id.*

57. *Id.*

The teacher in *Crawford* achieved his part-time permanent status after completing the necessary three year's service of full-time probationary employment. But the recognition of permanent, part-time employment raised the question of whether that status could be achieved by part-time, probationary service. *Holbrook v. Board of Education*[58] involved an employee assigned full-time as both principal and business manager of an evening high school. His combined assignment made up a full-time workload, but as a business manager he was not eligible for tenure.[59] For the first three years, his employment contract did not distinguish between the two jobs in terms of relative workload, but his fourth and succeeding contracts specified the service as principal to be one-fourth time. Since the school board conceded that plaintiff had achieved tenure in the one-fourth time position as principal, the court assumed "that part-time employment in a position requiring certification qualifications during the period of probation will result in the right to permanent employment on a part-time basis only."[60] The necessary implication of this assumption is that the one-fourth time position involved daily duties and thus constituted employment for "complete" years for the purpose of obtaining tenure.[61]

Crawford and *Holbrook* established the principle that part-time teachers stood on an equal footing with full-time teachers in the attainment of probationary and permanent status.[62] But the principle was eroded by the different teaching schedules in the schools and colleges. Because classes in the schools meet daily, all faculty, whether full- or part-time, teach five days a week. Since section 13328[63] defined the complete school year of

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58. Holbrook v. Bd. of Educ., 37 Cal. 2d 316, 231 P.2d 853 (1951).

59. The tenure statutes are phrased in terms of "position[s] requiring certification qualifications," which include school principals, librarians, counselors and others, all of whom are eligible for tenure along with teachers. CAL. EDUC. CODE §§ 13290, 13315 (West 1975) (recodified in CAL. EDUC. CODE §§ 87436, 87458 (West 1978)).

60. 37 Cal. 2d at 331, 231 P.2d at 861. The court footnoted this proposition with citation to CAL. EDUC. CODE § 13525, which prescribes salaries to be paid "less than full-time" positions, and defines full-time as "not less than the minimum school day for each day the schools . . . are maintained" CAL. EDUC. CODE § 45053 (West 1978).

61. 37 Cal. 2d at 323, 231 P.2d at 856.

62. 43 CAL. JUR. 2D *Schools*, § 470 (1966).

63. CAL. EDUC. CODE § 13328 (West 1975) (recodified at CAL. EDUC. CODE § 87468 (West 1978) providing in pertinent part: "[a] probationary employee who, in any one school year, has served for at least 75 percent of the number of days the regular schools . . . are maintained shall be deemed to have served a complete school year.").

probationary employment necessary for advancing to tenured status as "service" for seventy-five percent of the days in the school year, the school part-time teacher stands on the same footing as full-time in fulfilling the days requirement. In colleges, however, the teaching work load has no relation to the number of days in the school year. Full-time college teachers can be assigned class schedules meeting less than seventy-five percent of the school year days. Would they, then, fail to acquire the complete school year of service necessary to attain tenure? This question was presented in *Vittal v. Long Beach Unified School District.*[64] The plaintiff in *Vittal* argued that the language of section 13328 required that a teacher merely "serve" the requisite days, not hold classes for that number. A teacher conducting classes regularly throughout the year "serves" the entire year, regardless of the number of days the classes meet.[65] The court, however, phrased "the determinative question" as whether the days test should be narrowly construed to deny permanent status to teachers who have taught more than seventy-five percent of the hours but not seventy-five percent of the days of the school year.[66] The court reasoned that as the days test resulted from the legislature's looking to the prevailing teaching schedules in the schools, its intent did not foreclose permanent status "where an equivalent" percentage of hours has been served.[67] This is borne out by the apparent intent of the new seventy-five percent of the hours test in section 13328.5—to clarify rather than change the tenure statute and thus to have retroactive effect.[68] The court held that Vittal had served com-

64. Vittal v. Long Beach Unified School District, 8 Cal. App. 3d 112, 87 Cal. Rptr. 319 (1970). Vittal held a full-time assignment for twelve years, conducting classes on average three days a week. The college viewed her "service" as constituting less than seventy-five percent of the school-year days and employed her under "hourly-rate contracts," an apparent temporary classification. *Id.* at 118, 87 Cal. Rptr. at 321 (though this classification was nowhere authorized by the Code, no mention was made of this anomoly). In her twelfth year, section 13328.5 was enacted, defining the "complete" school year in the colleges to be "more than 75 percent of the . . . hours considered as a full-time assignment." CAL. EDUC. CODE 13328.5 (West 1975) (recodified in CAL. EDUC. CODE § 87469 (West 1978)).

65. 8 Cal. App. 3d at 119, 87 Cal. Rptr. at 323.

66. *Id.* at 120, 87 Cal. Rptr. at 323 (by its terms, the question indicates that the court had decided to give the new "hours" statute retroactive effect).

67. *Id.* at 120-21, 87 Cal. Rptr. at 323-4.

68. *Id.* at 121, 87 Cal. Rptr. at 324. In ascertaining retroactive intent, the court noted that a statute should be construed "so as to produce a result that is reasonable; the courts must look to its context . . . its apparent purpose will not be sacrificed to a literal construction." *Id.* at 120, 87 Cal. Rptr. at 323.

plete school years.[69]

While the result in *Vittal* is reasonable, the court's analysis is illogical. The seventy-five percent of the hours test is not the equivalent of the seventy-five percent of the days test. The former measures proportion of work load, while the latter measures continuity of employment. Under the "days" test as construed by the *Crawford* and *Holbrook* rulings, a teacher assigned a sixty percent work load could attain tenure; under the "hours" test as construed by *Vittal*, the same teacher would not achieve tenure for failure to work the complete school year. While appearing to accept the contention that "service" is not limited to the time spent in class, the court in fact equated "service" with class-time.[70] The decision in *Vittal*, while purporting to harmonize the new hours section with the general tenure scheme, construed it as creating two classes of part-time teacher where only one had existed before.[71] Even though such a construction did not affect the ultimate ruling in *Vittal*,[72] it generated confusion.

A third part-time classification was created by section 13337.5,[73] enacted in the same year as section 13328.5,[74] which classified as temporary employees those part-timers assigned "no more than 60 percent of the hours per week considered a full-time assignment." The effect of this section on the part-time faculty was first addressed in *Balen v. Peralta Junior College District*.[75] Balen had been employed at a forty percent workload in the evening program for four and one-half years as an "hourly instructor" when he was terminated without notice of cause or a hearing. He had been initially hired in 1965 before section

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69. *Id.*, 87 Cal. Rptr. at 323-24. Since the apparent intent of the tenure statutes was to give permanent status to "teachers who have faithfully served the indicated portion of the school year for three consecutive years . . . [t]he petitioner falls within the class of teachers intended to be benefited by the statute." *Id.*

70. *Id.*

71. The court never specifically addressed the complete-year issue as it related to part-time teachers, since Vittal was a full-time teacher. But the implication of the court's equivalency of tests ruling divided part-time teachers at the 75% work-load line. Those above are eligible for tenure, those below, not.

72. 8 Cal. App. 3d at 121, 87 Cal. Rptr. at 323-24.

73. CAL. EDUC. CODE § 13337.5 (West 1975) (recodified in CAL. EDUC. CODE § 87482 (West 1978) the section is set out in note 40 *supra*).

74. See note 64 *supra*.

75. Balen v. Peralta Jr. College Dist., 11 Cal. 3d 821, 523 P.2d 629, 114 Cal. Rptr. 589 (1974).

13337.5 came into effect in 1967. In an action for reinstatement, the superior court found him to be a temporary employee.[76]

The California Supreme Court viewed the case as raising the issues of Balen's part-time status prior to the passage of section 13337.5 and the effect of the section on that status.[77] The court began its analysis with a statement of the purpose and general scheme of the tenure system:

> The essence of the statutory classification system is that continuity of service restricts the power to terminate employment which the institution's governing body would normally possess. Thus, the Legislature has prevented the arbitrary dismissal of employees with positions of a settled and continuing nature, i.e., permanent and probationary teachers, by requiring notice and hearing before termination. (§§ 13404, 13443). Substitute and temporary teachers, on the other hand, fill the short-range needs of the school district, and may be summarily released absent an infringement of constitutional or contractual rights. (§§ 13445, 13446). Because the substitute and temporary classifications are not guaranteed procedural due process by statute, they are narrowly defined by the Legislature, and should be strictly interpreted.[78]

The court reasoned that Balen's length of continuous employment in the regular instructional program indicated that he held a permanent position within the protection of the tenure system.[79]

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76. *Id.* at 826, 523 P.2d at 631, 114 Cal. Rptr. at 591.

77. *Id.* at 828, 523 P.2d at 632, 114 Cal. Rptr. at 592-93.

78. *Id.* at 826, 523 P.2d at 631-32, 114 Cal. Rptr. at 591-92 (citations omitted). *Compare* 43 CAL. JUR. 2D *Schools*, § 454 (1966) (purpose of tenure to insure an efficient and permanent staff not dependent on caprice for their positions), *with* cases cited at notes 22, 23 *supra* (for other jurisdictions' views regarding the purpose of tenure).

79. 11 Cal. 3d at 827, 523 P.2d at 632, 114 Cal. Rptr. at 592. Citing the "accepted importance" of the "traditional" course that Balen taught, the court noted that he had been continuously rehired, that college officials had "ample opportunity" to evaluate him and had not expressed any complaint with his performance. "In short, plaintiff's continuity of service would seem to create the necessary expectation of employment which the Legislature has sought to protect from arbitrary dismissal by its classification scheme." *Id. see also* Perry v. Sindermann, 408 U.S. 593, 601-2 (1972). The court cited *Sindermann* later in its analysis to the same point: that the "form-letter dismissal with virtually automatic rehiring creates an expectancy of reemployment," which negates the

As an alternative ground for finding that Balen had achieved probationary status, the court cited sections 13334, 13337, and 13446,[80] the probationary statutes in effect at Balen's time of hire, as determinative of his status as a probationary employee.[81] In addition, the court noted that part-time status, per se, does not exclude a teacher from the tenure system.[82] Moreover, both substantial precedent and the code support this conclusion by recognizing the achievement of tenured status through teaching in evening, adult, off-campus classes, "or by hourly employment."[83]

The court found that section 13337.5 neither applied retroactively nor operated prospectively to divest a probationary teacher of that status.[84] Noting that statutes are not to be given retroactive effect unless the legislative intent cannot be otherwise satisfied, the court saw nothing in the section to indicate a retroactive intent. Moreover, it could not be regarded as a retroactive clarification of the existing law because it created new designated program and workload demarcations for the temporary classification.[85] The terms of the new section would force an

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form of the temporary assignment. 11 Cal. 3d at 831, 523 P.2d at 635, 114 Cal. Rptr. at 595. *Contra* Pryles v. State, 86 Misc. 2d 205, 380 N.Y.S. 2d 429 (1975) *aff'd*, 51 A.D. 827, 380 N.Y.S. 2d 628 (1976), Commonwealth *ex rel.* Hetrick v. Sunbury School Dist., 335 Pa. 6, 6 A.2d 279 (1939).

80. *See* notes 29, 30 *supra*, and accompanying text.

81. 11 Cal. 3d at 828, 523 P.2d at 633, 114 Cal. Rptr. at 593. "Because Balen worked for more than three months [sections 13337, 13446] his first year, was hired thereafter for a full year [12223], and was not considered a permanent or substitute teacher, he meets the statutory prerequisites for probationary employment." *Id.* The analysis suffers here from the ambiguity of what "full year" Balen actually worked. The court did not discuss the question whether Balen ever served the "complete school year." It stated that he was hired under "annual contracts," *Id.* at 827, 523 P.2d at 632, 114 Cal. Rptr. at 592. But the record, arising from a summary judgment, is based on plaintiff's affidavits, *id.* at 826, 523 P.2d at 631, 114 Cal. Rptr. at 591. *See generally* Vittal v. Long Beach Unified School Dist., 8 Cal. App. 3d at 118, 87 Cal. Rptr. at 322 (1970) ("tentative assignment" for one semester); Peralta Fed'n of Teachers v. Peralta Community College Dist., 24 Cal. 3d at 376, 595 P.2d at 117, 155 Cal. Rptr. at 683 (1979) ("potential assignment" from "semester to semester").

82. 11 Cal. 3d at 829, 523 P.2d at 634, 114 Cal. Rptr. at 594. "A part-time instructor, unlike the day-to-day substitute, generally serves under conditions comparable to those of his full-time counterpart; thus there is no reason for differentiating between their statuses for the purpose of attaining probationary classification, nor has the Legislature directed us to do so." *Id.; accord,* Sherrod v. Lawrenceburg School, 213 Ind. 392, 12 N.E.2d 944 (1938).

83. 11 Cal. 3d at 829, 523 P.2d at 634, 114 Cal. Rptr. at 594.

84. *Id.* at 829, 830, 523 P.2d at 633, 634, 114 Cal. Rptr. at 593, 594.

85. The section "substantially changes the classification system by expanding the

anomolous result if given a retroactive construction: the section created a long-term temporary classification limited to a period of not more than two semesters within three consecutive years. Section 13337.5's fourth paragraph workload definition of temporary status is subject to the general two semester limitation.[86] The court held that the section did not operate prospectively on Balen because his probationary status remained in force unaffected by the new classification.[87] Application of a statute to destroy a previously-acquired status is generally disfavored and the court implied that to construe the section as allowing a reclassification of Balen would be to declare the section retroactive. Neither could the district claim to have dismissed Balen and subsequently rehired him under section 13337.5. The policy of continuous dismissal and rehiring of part-time teachers constitutes a circumvention of proper classification and creates a protected expectancy of reemployment.[88] Alternatively, Balen's periodic dismissals failed to comply with the statutory notice and hearing requirements controlling termination of probationary instructors.[89] Finally, although Balen achieved and retained probationary status, he did not necessarily become a permanent employee. Tenured status was achieved at that time in conformity with the complete school year requirements of sections 13304, 13328, and 13328.5.[90] Since the record did not disclose whether Balen met the tests, the court held that he was at minimum a probationary teacher, dismissable only for cause, after notice and hearing.[91]

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temporary designation to include not only designated yearly employees, but other instructors who do not meet *the new* minimum work load requirement for attaining probationary status." *Id.* at 829 n.8, 523 P.2d at 633 n.8, 114 Cal. Rptr. at 593 n.8 (emphasis added).

86. *Id.* at 829, 523 P.2d at 634, 114 Cal. Rptr. at 594. "Because Balen held his position for over four years, he could not be classified under section 13337.5 for more than two of those years, a circumstance which would leave him unclassified the remainder of the time." *Id.*

87. *Id.* at 831-32, 523 P.2d at 635, 114 Cal. Rptr. at 594-95.

88. *Id.* at 830-31, 523 P.2d at 635, 114 Cal. Rptr. at 594-95. In citing Perry v. Sindermann, 408 U.S. at 601-2, the court clearly suggests that a constitutional property interest attaches at some point to the "temporary" employment. Since *Sindermann* held such an interest to require procedural due process in dismissal, the state is foreclosed from creating a perpetual "temporary" classification. *Id.*

89. *Id.*

90. The section citations and discussions may be found at notes 28, 64 *supra* and accompanying text.

91. 11 Cal. 3d at 832-33, 523 P.2d at 636, 114 Cal. Rptr. at 595-96.

The narrow holding in *Balen* reached an equitable result at the cost of some inconsistent reasoning. The implication of the court's holding is that the seventy-five percent tests apply to the attainment of part-time tenure. Though the court never construed the "complete" school year as it appears in various sections,[92] the court suggested that it had adopted the *Vittal* analysis equating the days test of section 13328 with the hours test of section 13328.5, and viewing both as counting "service" in terms of classroom time.[93] Thus, if Balen failed to meet either test he would be a perpetual probationary employee. But the *Balen* court declared the purpose of the probationary plan as allowing time for the teacher to gain expertise and for the district to evaluate the teacher's performance.[94] A perpetual probationary status is no more recognized by the tenure scheme, as characterized by the court, than is perpetual temporary status.[95] The same inconsistent reasoning underlies the court's construction of the prospective effect of section 13337.5 on part-time teachers initially employed under its mandate. The court read the section to expand the old three month temporary classification to include two general groups of instructors: "designated yearly employees"[96] and "other instructors" who do not meet the new sixty percent workload requirement for probationary status.[97] Both groups are in a single long-term temporary status limited in duration to two semesters within any three years. Thus, a part-time teacher initially employed under section 13337.5 who was appointed to a third semester within that period would no longer be subject to the provisions of that section and would become a probationary employee under sections 13334, 13337, and 13446.[98] In this respect the *Balen* decision modified *Vittal*'s two

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92. For discussion of the ambiguity resulting from the court's omission of any construction of the complete school year tests, *see* note 81 *supra*.

93. 11 Cal. 3d at 831-32, 523 P.2d at 636, 114 Cal. Rptr. at 595-96.

94. 11 Cal. 3d at 829, 523 P.2d at 634, 114 Cal. Rptr. at 594.

95. This particular problem was mooted by the statutory redefinition of the probationary-permanent statuses in the 1972 "Rodda Act" additions to the code establishing a separate classification process for the community colleges. (*See* notes 42-48 *supra* and accompanying text). The new system has been construed as nullifying the 75 percent tests for advancement from probationary to tenured status in Peralta Fed'n of Teachers v. Peralta Community College Dist., 24 Cal. 3d 369, 378, 595 P.2d at 118, 155 Cal. Rptr. at 684 (1979).

96. *See* note 85 *supra* (substitutes and those hired to meet a temporary enrollment increase).

97. *Id.*

98. *Id.; see also* Ferner v. Harris, 45 Cal. App. 3d 363, 373, 119 Cal. Rptr. 385, 390

categories of part-time teachers.[99] Under *Balen,* the first category consists of those employed at a workload under sixty percent of full-time who could attain probationary status upon appointment to a third semester of teaching within three years, but who could not obtain permanent status. The second category consists of those teachers with part-time assignments between sixty percent and seventy-five percent of a workload, who would obtain probationary status upon continuation in employment exceeding the three and four month limits in the class assignments specified in section 13337,[100] but who could not obtain permanent status.[101]

II. THE CURRENT CASE LAW

Peralta Federation of Teachers v. Peralta Community College District[102] presented a fact situation identical to that in *Balen,* with the exception that the 1972 revision of the probationary-permanent system for community colleges[103] came into effect during the course of the teacher's employment. The *Peralta* plaintiffs all taught less than sixty percent of full-time, were classified as temporary employees under section 13337.5. They were hired from semester to semester, uniformly dismissed at the end of each year, and rehired the next.

(1975) disapproved in Peralta Fed'n of Teachers v. Peralta Community College Dist., 24 Cal. 3d at 381, 595 P.2d at 120, 155 Cal. Rptr. at 686. *See also* Coffey v. Governing Bd. of the San Francisco Community College Dist., 66 Cal. App. 3d 279, 293-94, 135 Cal. Rptr. 881, 889 (1977) disapproved in Peralta Fed'n of Teachers v. Peralta Community College Dist., 24 Cal. 3d at 381, 595 P.2d at 120, 155 Cal. Rptr. at 686 (1979).

99. For discussion of the *Vittal* categories, *see* notes 64-69 *supra* and accompanying text.

100. For discussion of these temporary classifications, *see* note 33 *supra* and accompanying text.

101. Teachers carrying a part-time work load greater than seventy-five percent are classified by statute as full-time and obtain both probationary status, either initially or upon continuation of classes specified in section 13337, and tenured status upon reappointment after three "complete" school years. Another potential part-time category consists of those assigned to less than sixty percent of a work load but meeting classes for more than seventy-five percent of the days, who would be in some interstitial limbo of the Education Code. This category is only mentioned in Peralta Fed'n of Teachers v. Peralta Community College Dist., 24 Cal.3d at 383, n. 5, 595 P.2d at 121 n.5, 155 Cal. Rptr. at 687 n.5 (1979). However, this category was at issue in a recent case. *See* Appellant's Second Supplemental Brief at 4-5, Warner v. North Orange County Community College Dist., No. 4/Civ. 17211, (Fourth App. Dist., Div. Two, Cal., filed June 21, 1979) (teacher employed four days a week at a work load less than 60 percent full-time).

102. 24 Cal. 3d 369, 595 P.2d 113, 155 Cal. Rptr. 679 (1979).

103. The 1972 revisions are set out in notes 36, 42-51 *supra* and accompanying text.

The court found it necessary to divide the plaintiffs into two groups categorized by their initial employment date either before or after the 1967 enactment of section 13337.5.[104] As to teachers hired before 1967, the court, applying *Balen,* held that they became probationary employees prior to the enactment of section 13337.5 and could not be divested of their status.[105] Presumably, they remained probationary for successive years thereafter. After enactment of the 1972 revisions they became first year contract employees under the provisions of section 25490.20(b), providing for the reclassification from the prior "probationary" status to the new "contract" status of those probationary teachers who had not "been employed for, and served on, at least 75 percent of the days during which the colleges . . . maintained classes."[106] Thereafter, since the 1972 tenure ("regular") provisions of section 13346.20 did not require service of three "complete" consecutive school years, but merely reappointment after employment under a "second consecutive contract," they became tenured "regular" employees on appointment to a third contract.[107] A different analysis was required for the post-1967 part-time teachers as they were initially employed subject to section 13337.5.[108] The court posited two questions

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104. 24 Cal. 3d at 376, 595 P.2d at 117, 155 Cal. Rptr. at 683. It is ironic that the very district involved in *Balen* apparently chose to regard that decision as limited to the facts of that case and continued to classify pre-1967 part-time as temporary employees.

105. *Id.* at 377, 595 P.2d at 118, 155 Cal. Rptr. at 684. The court characterized the *Balen* holding here as based on § 13334, omitting mention of *Balen*'s analysis of §§ 13337 and 13346 which provided authority for the reclassification from temporary to probationary on continuation in employment past the three-month temporary limit. (The court's analysis of the pre-1967 teachers was adopted from the Appellate Court decision. *Id.* at 375, 595 P.2d at 117, 155 Cal. Rptr. at 683).

106. *Id.* at 378, 595 P.2d at 118, 155 Cal. Rptr. at 684. The court omitted discussing the anomolous provision that requires the "days" test when the "hours" test of § 13328.5 presumably controls in the community colleges. The court by implication read "days" as "hours," continuing without comment the *Vittal* reading of the two tests as "equivalent" and as defining "service" in terms of classroom hours or days. The wording of § 25490.20(b)—"employed for *and served on*" 75 percent of the days (emphasis added)—could be characterized as a clarification of the "has served for" 75 percent of old § 13328, the "served on" implying a measurement in terms of classroom hours or days. But this construction begs the question. "Employment" and "service" are equally ambiguous terms. These terms neither semantically nor logically require a restricted definition in terms of classroom hours.

107. *Id.* "It is concluded that the 75 percent requirement of 13328.5 does not apply to these pre-1967 employees; that the provisions of the later section 13346.25 take precedence . . . [A]lthough section 13328.5 remains on the books, it has been rendered meaningless, at least insofar as the acquisition of tenure is concerned." (Citation omitted).

108. CAL. EDUC. CODE § 13337.5 is set out in note 40 *supra.*

determinative of their status: (1) whether the section's fourth paragraph, which classified the sixty percent part-timer as temporary, operated independently of its other provisions;[109] and (2) whether any other section provided for a reclassification of part-timers initially employed as temporary under the sixty percent limit.[110]

The court, in *Peralta,* determined that the language of section 13337.5 "support[s] the contention" that the fourth paragraph operates independently of the first three; it operates "notwithstanding any other provision to the contrary," extends to teachers other than those in community colleges, applies only to part-time teachers, and makes the temporary classification mandatory rather then permissive.[111] The court declared that the fourth paragraph was enacted as a compromise between the proposal to classify all newly-hired college faculty as temporary and the initial bill's attempt to limit the temporary classification to specific instructors for a determinate period.[112] The court found that countervailing evidence of legislative intent was outweighed by the bill's language and the legislative counsel's digest that portrayed the fourth paragraph as independently operative.[113] Finally, the court declared that the *Balen* decision does not prevent a finding that the fourth paragraph allows an indefinite temporary classification of part-time teachers.[114]

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109. 24 Cal. 3d at 381, 595 P.2d at 120, 155 Cal. Rptr. at 686. The specific question was whether the 60 percent classification operated independently of the temporal limit set in the third paragraph. *Id.*

110. *Id.* at 382-83, 595 P.2d at 121, 155 Cal. Rptr. at 687.

111. *Id.* at 379, 595 P.2d 119, 155 Cal. Rptr. 685. "In contrast to the fourth paragraph's expressions of self-containment and command the words of the first three are permissive. They impose no conditions on the fourth . . . The section's first sentence simply permits temporary employment . . . and each succeeding sentence of the first three paragraphs . . . limit its operation to the *previously described* employment." *Id.*

112. *Id.* at 379-80, 595 P.2d at 119, 155 Cal. Rptr. at 685-86.

113. Outweighed was a co-author's letter to the Governor representing the section's fourth paragraph as subject to the third paragraph's two-semester limit. *Id.*

114. *Balen* held that Section 13337.5 could not be applied retroactively to divest [pre-1967 part-timers] of previously acquired status. The holding of nonretroactivity would not have been necessary if the section by its terms did not import to impose temporary status on a teacher in Balen's position [four and a half years at forty percent workload]. Thus, his employment went beyond the two-semester limitation of the third paragraph and could not be rendered temporary by the section, unless—as we now hold—the fourth paragraph is applicable independently of the first three. Our present holding therefore

On the question of whether any other section provides for reclassification from temporary status under 13337.5, the court construed the language of the fourth paragraph as imposing two restrictions on part-time employment. The teacher with no more than sixty percent workload "shall be classified as a temporary employee" and "shall not become a probationary employee under the provisions of section 13446."[115] The court reasoned that "the second restriction would be superfluous if the first were not construed to apply only to *initial* classification and not to preclude an otherwise authorized *subsequent* change from temporary status."[116] However, although the specific prohibition of reclassification to probationary status under section 13446 implies authorization of reclassification under another section,[117] the court found no extant statute so authorizing subsequent reclassification. The court noted that section 13334[118] applies only to initial classification not reclassification. Section 13336[119] requires a "complete school year" of temporary service before reclassification to probationary status, and section 13337[120] applies only to specified short-term classes. Section 13337.3[121] applies only to certain employment conditions and requires service of one "complete school year" to qualify for probationary status. Since the complete school year of employment required for reclassification to probationary status is defined as seventy-five percent of the days in the year or hours per week of full-time workload, the court held that part-time teachers employed at the sixty percent workload under section 13337.5 fail to accumulate the complete school year necessary for reclassification.[122]

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was implicit in *Balen's* reaching the issue of nonretroactivity.

Id. at 381, 595 P.2d at 120, 155 Cal. Rptr. at 686 (citations omitted).

115. *Id.*

116. *Id.* at 381, 595 P.2d at 120, 155 Cal. Rptr. at 686. The majority, citing *Balen,* noted that this construction of the fourth paragraph "accords with the policy of strictly construing the temporary classification." *Id.*

117. *Id.* at 383, 595 P.2d at 121, 155 Cal. Rptr. at 687. The court is here applying the maxim of statutory construction: *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another).

118. Section 13334 is discussed in the text accompanying note 29 *supra.*

119. Section 13336 may be found in text accompanying notes 32, 34 *supra.*

120. Discussion of § 13337 is at notes 30, 33, 34 *supra* and accompanying text.

121. Section 13337.3 is cited and discussed in note 51 *supra* and accompanying text.

122. 24 Cal. 3d at 382-84, 595 P.2d at 122, 155 Cal. Rptr. at 687-89. In construing the complete school year tests, the court implied that the "hours" test prevails over the "days" test. The hours test "codified for community colleges a standard of 75 percent of full-time hours." "[T]o allow section 13328 to be satisfied regardless of minimum hours (e.g., by four one-hour days per . . . week) could lead to anomolies we do not believe

This "perpetual" temporary classification is a far cry from *Balen's* injunction that continuity of employment restricts the power to terminate and that the temporary classification is narrowly defined and strictly interpreted. The *Balen* court did not find it necessary to hold section 13337.5 non-retroactive because it imposed temporary status on Balen, as stated by the *Peralta* court, but rather because the defendant in *Balen* claimed that the section operated retroactively.[123] The *Balen* court stated that the plaintiff could not be classified under the fourth paragraph for more than two of his four years of employment[124]—a conclusion necessarily based on construction of the third paragraph's limitation of "not more than two semesters . . . in three consecutive years" as governing the fourth paragraph. Thus, the *Peralta* court rewrote the *Balen* analysis of section 13337.5 because it rejected *Balen's* rationale that continuity of employment restricts the power to terminate.

While the *Peralta* court found no occasion to discuss principles of statutory construction or to analyze the legislative intent, the court's analysis is inconsistent with the purpose of the classification scheme as stated in *Balen* and the rules of construction noted in *Vittal.*[125] Given the established rule that particular code sections are to be construed in light of the purpose of the statutory system as a whole,[126] the *Peralta* analysis is problematic. Initially, the holding that section 13337.5's fourth paragraph operates independently rests on the court's interpretation of *Balen.* It was only after the court found "implicit" in *Balen* that the paragraph operated independently that it held the paragraph to be independent.[127] Moreover, the legislative history is ambiguous. In the absence of a clear declaration of legislative intent, the section should not be construed to produce a classifi-

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were intended." *Id.* at 383 n.5, 595 P.2d at 121 n.5, 155 Cal. Rptr. at 687 n.5. For discussion of the problem raised by the dual tests, *see* notes 64, 69-72, 101, 107 *supra* and accompanying text.

123. Balen v. Peralta Junior College Dist., 11 Cal. 3d at 829, 523 P.2d at 633, 114 Cal. Rptr. at 593.

124. *Id.* at 829, 523 P.2d at 634, 114 Cal. Rptr. at 594. For review of the *Balen* construction of the section *see* note 87 and accompanying text, *supra.*

125. The *Vittal* court restated the judicial principle that statutes ar to be construed in their context, that their apparent purpose is not to be sacrificed to a literal construction, and that where uncertainty exists, the court must look to the consequences of a particular interpretation. 8 Cal. App. 3d at 121, 87 Cal. Rptr. at 323.

126. *See* note 68 *supra.*

127. 24 Cal. 3d at 381, 595 P.2d at 121, 155 Cal. Rptr. at 686.

cation not only unique to the Code, but at variance to its overall purpose in protecting continuity of employment.[128] The court's literal construction of the statute omitted what it recognized as the effect of the fourth paragraph—that the specific prohibition against attaining probationary status under section 13446 implies provision for attaining subsequent probationary status under other sections. As noted by the court, the reference to section 13446 would be superfluous if the legislature intended an absolute mandate for temporary classification. Since section 13446 limits temporary status to a duration of three months, the language of the paragraph should be viewed *in pari materia* with the provisions of the section in which it appears, extending the old three-month limit of the temporary classification to the two-semester limit in the third paragraph of section 13337.5. This construction would not make the fourth paragraph superfluous, because the first three paragraphs apply to employment to teach in specified classes while the fourth applies to employment in any class. Thus, the paragraph allows a limit of duration, but not of purpose, on the new temporary classification.[129] Moreover, construction of the fourth paragraph as subject to the two-semester limit would render meaningless *Peralta*'s distinction between initial and subsequent classification. Since the court found no authority for a subsequent classification, the "initial" temporary classification became perpetual by default.

The *Peralta* decision ultimately rests on its statement that the seventy-five percent tests applied to the reclassification of temporaries to probationary status. The court stated that it was consistent to apply the seventy-five percent tests to temporary employees but not to probationary employees.[130] But the attainment of tenured status should not be subject to less stringent

128. No other temporary classification allows perpetual employment. Each is subject to provisions governing advancement to probationary status. For discussion of the various temporary classifications *see* 24 Cal. 3d at 389-90, 595 P.2d at 125, 155 Cal. Rptr. at 691-92 (concurring and dissenting). Ironically, the dissent recognized the majority's construction of the fourth paragraph as creating "a unique temporary assignment," one whose limitation is based on hours worked per week. The dissent viewed this uniqueness as grounds for holding the temporary classification mandated continually "from year to year so long as the 60 percent limitation is not exceeded" (footnote omitted). *Id.* at 390, 595 P.2d at 126, 155 Cal. Rptr. at 692.

129. This reading of the section comports with the majority's characterization of the fourth paragraph as a legislative "compromise" (discussed at text accompanying note 112 *supra*).

130. 24 Cal. 3d at 383, n.6, 595 P.2d at 122 n.6, 155 Cal. Rptr. at 687 n.6.

conditions than the attainment of probationary status. The inconsistency in *Peralta* is highlighted by the fact that the 1972 recodification of the community college employment scheme dropped all reference to a requirement of the seventy-five percent tests for probationary teachers.[131] The practical effect of *Peralta* casts doubts on its validity. Where over fifty percent of teachers are employed in an "initial" yet perpetually temporary classification, tenured teachers become an exception to the scheme.[132] Under *Peralta,* their numbers could shrink to an insignificant minority of the total faculty.[133] Courts have stated that practices designed to circumvent the tenure law are not to be tolerated.[134] However, in *Peralta* the court authorized what is no more than a judicially recognized circumvention of the tenure law.

III. CONSTITUTIONAL QUESTIONS: EQUAL PROTECTION, DUE PROCESS, AND FREE SPEECH

The *Balen,* assertion that an expectancy of reemployment creates a property interest of constitutional magnitude,[135] suggests a constitutional analysis. Plaintiffs in both *Balen* and *Peralta* raised fourteenth amendment arguments, claiming that their classification as perpetual temporary employees constituted invidious discrimination.[136] But neither case addressed the issue. In both *Balen* and *Peralta,* the court rested its holding on statutory grounds.

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131. *See* notes 42-49 *supra* and accompanying text.

132. *See* notes 14-17 *supra* and accompanying text.

133. *Id.*

134. 43 CAL. JUR. 2d, *Schools,* § 458. *See* Beseman v. Remy, 160 Cal. App. 2d 437, 325 P.2d 578 (1958)(school district gave fourth-year teacher consecutive three-month temporary contracts, claiming the temporary classification prevented application of the tenure statutes. The court held that "If the appellants were correct . . . school districts by the simple method of giving fourth-year teachers only short-term contracts could effectively defeat the purposes of the teacher tenure law." *Id.* at 441, 325 P.2d at 581.

135. The *Balen* discussion may be found at note 88 *supra* accompanying text.

136. Plaintiffs in *Peralta* raised and briefed the constitutional issues at trial and on initial appeal, but did not do so before the California Supreme Court. Though plaintiffs made no express disavowal of the claims and argued in the petition for rehearing to preserve them in accord with state law, the court presumably held that the issue had not been preserved. The court rested its decision on statutory grounds and denied without comment the subsequent petition for rehearing. Plaintiffs' argument that the issue had been preserved may be found in the Petition of Plaintiffs and Appellants for Rehearing at 2-3, Peralta Fed'n of Teachers v. Peralta Community College Dist., 24 Cal. 3d 369, 595 P.2d 113, 155 Cal. Rptr. 679 (1979).

The courts will ultimately face the constitutional issues. It is well settled that state regulation of public employment must not violate the fourteenth amendment.[137] Under the fourteenth amendment, states may discriminate in legislative classifications, so long as the classification is not arbitrary, invidious, or irrational.[138] The United States Supreme Court employs two standards for judicial review of legislative classifications. In general areas of social and economic legislation, the classification is presumed valid, and the Court follows a rational basis standard, testing whether the classification bears a rational relationship to a legitimate state purpose.[139] Classifications which impinge on fundamental rights or involve a suspect class require strict judicial scrutiny, testing whether the classification is necessary to a compelling state interest.[140] California courts, under the state constitutional prohibitions against special legislation, employ identical tests.[141]

A. The Rational Basis Standard of Equal Protection.

The United States Supreme Court has recently declared that the rational basis standard is appropriate for review of state employment legislation.[142] However, in several recent cases presenting equal protection challenges to broad areas of economic legislation, the Court has refined its test and described

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137. Weiman v. Updegraff, 344 U.S. 183 (1952). "[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192 (overturning statute requiring summary discharge of public employee having membership in proscribed organizations); Berenguer v. Dunlavey, 352 F. Supp. 444 (D.C. Del. 1972) "while a state has discretion in the selection of the privileges and rights it will confer on different classes of employees, the classification chosen must be reasonable." *Id.* at 447 (overturning statute suspending merit system benefits as to probation and parole department employees); Purdy v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969) a state may not "create arbitrary classifications for purposes of hiring and firing public employees." *Id.* at 578, 456 P.2d at 653, 79 Cal. Rptr. at 85.

138. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 30 (1968).

139. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); *accord*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); Dandridge v. Williams, 397 U.S. 471, 485-87 (1970).

140. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967).

141. O'Kane v. Catuira, 212 Cal. App. 2d 131, 137, 27 Cal. Rptr. 818, 822 (1963) (citing County of Los Angeles v. Southern Cal. Telephone, 32 Cal. 2d 378, 389, 196 P.2d 773, 781 (1948)]. *See In re* Gary W., 5 Cal. 3d 296, 303 486 P.2d 1201, 1207, 96 Cal. Rptr. 1, 7 (1971); for the state provisions, *see* Cal. Const. art. I, § 11, § 21.

142. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (upholding on a rational basis test a statute requiring mandatory retirement at age 50 of state police officers).

the rational basis standard as requiring that the classification be related to an *expressed* purpose claimed by the state rather than to a merely hypothetical purpose.[143]

The State's Articulated Rationales

The state has presented four articulated rationales for the teacher classification scheme.[144] First, the classification must be tested against the purpose of the statutory scheme of which it is a part.[145] The general purpose of the statutory scheme is to prevent "arbitrary dismissal of [teachers] with positions of a settled and continuing nature" by providing procedural due process guarantees, while allowing summary dismissal of substitute and temporary teachers who "fill the short-range needs of a school district."[146] Second, part-time teachers may be classified as perpetual temporary employees because they do not "serve" for the complete school years that would establish continuity of service.[147] Third, administrative flexibility requires temporary status for part-time teachers because they are drawn from their normal occupation to perform a restricted range of teaching services and are hired to fill a temporary need for specialized courses of vocational instruction.[148] And finally, the part-time temporary status is necessary to enable the colleges to meet long-term budgetary constraints.[149]

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143. *Id.* at 314 (describing the test as requiring that the classification "rationally furthers the purpose identified by the state"), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (rejecting hypothesized purposes and looking to the purpose "articulated" in the statutory scheme and legislative history); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (describing the test as requiring the classification to rationally further "some legitimate articulated state purpose." *Id.* at 17). For a review of cases emphasizing "articulated" purposes, *see* Schlesinger v. Ballard, 419 U.S. 498, 519-20 (1975) (Brennan, J., joined by Douglas, J., and Marshall, J., dissenting); and Cooper v. Bray, 21 Cal. 3d 841, 848, 582 P.2d 604, 148 Cal. Rptr. 148 (1978) (under the rational basis test the court conducts "a serious and genuine judicial inquiry into the correspondence between the classification and legislative goals").

144. *See* 24 Cal. 3d at 390 n.6, 595 P.2d at 126 n.6, 155 Cal. Rptr. at 692 n.6 (flexibility rationale); 11 Cal. 3d at 827, 523 P.2d at 631-32, 114 Cal. Rptr. at 591-92 (purpose of tenure rationale). See notes 145-49 *infra*.

145. Characterization of the overall statutory scheme as an articulated purpose is drawn from Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

146. 11 Cal. 3d at 826, 523 P.2d at 631-32, 114 Cal. Rptr. at 591-2.

147. 24 Cal. 3d at 382-84, 595 P.2d at 122, 155 Cal. Rptr. at 687-89.

148. *Id.* at 390 n.6, 595 P.2d at 126 n.6, 155 Cal. Rptr. at 692 n.6 (concurring and dissenting).

149. *Id.* For the district's presentation of these last two rationales, *see* Clerk's Transcript (hereinafter C.T.) 318, 380, Reporter's Transcript (hereinafter R.T.) 7, 120, 152-5; 158; Peralta Fed'n of Teachers v. Peralta Community College Dist., 24 Cal. 3d 369, 595

The Purpose of the Tenure System

A permanent temporary classification defeats rather than furthers the purpose of the tenure system. Continuity of service is the touchstone of the system. The alternative grounds for the *Balen* holding recognized that continuing serial reemployment under short-term contracts must at some point be recognized as creating a "position of a settled and continuing nature."[150] Furthermore, the distinction between full-time and part-time bears little relationship to the purpose of the tenure system. Part-time teachers are not substitutes or true temporary employees since they teach regular and complete courses throughout the year. The sole workload distinction between part-time and full-time faculty is the number of courses they teach.[151]

The Complete School Year Tests of Continuity of Service

The purpose of requiring service for "complete" school years is not met by the seventy-five percent tests as construed.[152] Both tests fail to measure continuity of service. The seventy-five percent of the hours test cannot measure regularity of employment because it is a measure of proportion of workload, not of time. The fact that part-time teachers are assigned fewer courses per day or week does not negate the fact that they teach throughout the full length of the year. Thus, the hours test bears no relation to continuity of service. This is borne out by the fact that a teacher who fails to meet the hours test may still meet the days test and presumably achieve tenure.[153] Moreover, the irrel-

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P.2d 113, 155 Cal. Rptr. 679 (1979).

150. 11 Cal. 3d at 827, 523 P.2d at 631-2, 114 Cal. Rptr. at 592.

151. *Id.* at 829, 523 P.2d at 634, 114 Cal. Rptr. at 594. "A part-time instructor, unlike the day-to-day substitute, generally serves under conditions comparable to those of his full-time counterparts; thus there is no reason for differentiating between their statuses for the purpose of obtaining probationary classification." *Id., accord,* Sherrod v. Lawrenceburg, 213 Ind. 392, 12 N.E.2d 944 (1938) (holding teacher with 12-days per month assignment for six years to be tenured). *See* note 160 *infra,* for relation of this "comparable conditions" rationale to the "continuity of service" rationale of the complete school year tests.

152. For prior discussion of the tests, see notes 64-68, 101, 106, 122, 130 *supra* and accompanying text.

153. The previous discussion of the conflict between the two tests may be found at notes 68-72, 94, 95, 107, *supra* and accompanying text. For the *Peralta* court's summary disposal of the conflict, see note 122 *supra.* The *Peralta* decision implied that the 75 percent of the hours test superceded the old days test, but did not explain why both tests were carried over into the community college chapter of the current code. *See* CAL. EDUC. CODE §§ 87468, 87469 (West 1978).

evance of the hours test to continuity of service is demonstrated by the fact that the hours test is not applied to other "temporary" teachers employed under the provisions of section 13337, such as those teaching special classes for adults or in migratory schools.[154]

The days test also fails to measure continuity of employment because it has been construed as defining "service" solely in terms of teacher time in the classroom.[155] It allows an anomaly of similarly situated teachers being treated differently by the test.[156] If the purpose of the test is to exclude part-time teachers from tenure, the test is under-inclusive as to part-timers with classes meeting four days a week and over-inclusive as to full-time teachers with classes meeting three days per week. If the purpose of the days test is to exclude casual or truly temporary teachers, then it is under-inclusive as to teachers hired under section 13337, who achieve probationary status after three months. In addition, it is over-inclusive as to part-timers teaching continuously year after year and as to full-timers teaching three days per week.[157]

A definition of service limited to class time has yet to be explicitly set forth by the courts, but was implied by *Vittal*.[158] However, this implied definition cannot withstand serious scrutiny. A teacher's duties are not limited to classroom hours, but include lesson preparation, counseling of students, grading, and bookkeeping, among other professional duties.[159] It cannot be assumed that all these duties are performed on the same days that

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154. *See* notes 33, 34, 120 *supra* and accompanying text.

155. For discussion of the 75 percent tests of a complete school year requirement, *see* notes 64-68 *supra* and accompanying text (*Vittal*), notes 91-98 *supra* and accompanying text (*Balen*), notes 106, 107, 119-22, 130-31, *supra* and accompanying text (*Peralta*).

156. For example, teacher A may be assigned three courses (constituting sixty percent of full-time work load), each meeting one hour a day for four days per week. Teacher B can be assigned to the same three courses, but each of these meeting two hours a day for two days per week. Under the days test, teacher A "serves" a complete school year and subsequently achieves probationary status, but teacher B does not "serve" a "complete" year and remains a permanent "temporary" employee.

157. For discussion of under and over-inclusive equal protection analysis, *see generally* Tussman & tenBroeck, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

158. *See* note 67-71, 92-93 *supra*, and accompanying text, for discussion of the complete year of service tests in *Vittal* and *Balen*.

159. 68 AM. JUR. 2d *Schools* § 135 (1973).

the teacher's class meets. In fact, whether a teacher's classes meet daily or only weekly, the teacher is employed and "serves" the entire school year.[160]

Administrative Flexibility

The third purpose of the tenure scheme is the need for administrative flexibility to serve the fluctuating needs of short-time vocational programs by temporarily employing lay specialists unhampered by the dismissal procedures attendant on pro-

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160. *Cf.* McSherry v. St. Paul, 202 Minn. 102, 277 N.W. 541 (1938) (holding that a teacher employed intermittently throughout the school year and classified as "casual substitute" served three years of consecutive employment required by the state tenure act and thus attained tenured status). The defendants in *McSherry* argued that the state Tenure Act required appointment to a "regular" position, defined as continuous employment measured in terms of classroom time. Rejecting the argument, the court reasoned that "literal continuity of work or service is not the real test hare applicable." Rather, reasoning by analogy to compensation cases, the court distinguished "casual" from "regular" employment:

> The question whether an employment is casual must be determined with principle reference to the scope and purpose of the hiring, rather than with sole regard to the duration and regularity of the service. *** When there is a continuing engagement to serve the employer . . . at such times as the particular and essential services may be needed, the employment is not "casual" . . . .
>
> Plaintiff's *employment* was as *regular* as that of any of the *regular* teachers, but *rendering the service,* as to time and place, was not.
>
> . . . The lack of consecutive employment . . . is something that inhered in the nature of the plaintiff's employment. She was, as we have seen, an employee at all times here involved and her employment was that of a teacher, nothing else. To say that a day's layoff or even several, could break her service insofar as continuity is concerned is to nullify the very existence of any probationary period.

Id. at 105, 277 N.W. at 545. *Accord,* Ryan v. Superintend of Schools, 363 Mass. 731, 297 N.E. 2d 37 (1973). The plaintiff in *Ryan* had taught two days a week for eleven years. The court held the teacher attained tenure under a statute requiring service for three consecutive school years. The court based its decision on Frye v. School Committee of Leicester, 300 Mass. 537, 16 N.E. 2d 41 (1938) (holding that a part-time teacher employed to teach three classes daily (a 40 percent work load) served for consecutive school years and attained tenure). The court noted that the teacher in Ryan *had* taught

> a specific portion of every week of each of eleven consecutive school years. Having held in the *Frye* case that regular and continuous part-time teaching can constitute the basis for attaining tenure, there is no difference, for that purpose, between teaching a part of every school day and teaching at least the same or a greater part of the total time but concentrated in several days of each week for the entire school year.

Id. at 740, 297 N.E.2d at 42.

bationary or tenured status.[161] However, there is nothing inherently "temporary" about a sixty percent work load, as indicated by the lengthy employment record of the plaintiffs in *Peralta*. Their continuing employment, in some cases amounting to over a decade, negates the claim that short-term program fluctuation necessitated their temporary classification. Moreover, the classification merely focuses on the percentage of workload taught, allowing colleges to make part-time assignments in any teaching program for any length of time.[162] The need for "flexibility" is inapplicable since the majority of part-time teachers are not employed to fill the fluctuating short-range needs of the colleges.[163] Therefore, the line drawn between full- and part-time teachers bears no relation to the line between constant and fluctuating demand for courses.

The *Balen* decision addressed and disapproved the flexibility rationale. Noting the suggestion that judicial intervention in the teacher classification system "tends to unduly restrict a school district's necessary flexibility in assignment practices," the court recognized the necessity of "wide discretion and latitude" in administrative decisions.[164] "This accepted concept, however, cannot be adopted as a shield for arbitrary dismissal practices. The vice inherent in such practices emerges in this case."[165]

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161. *See* notes 148-49 *supra*.

162. For example, plaintiffs in *Peralta* presented uncontroverted evidence at trial as to their identity with tenured teachers in terms of professional education, teaching certificates, performance of extra-classroom services, career identity as teachers and of teaching assignments in regular, permanent program, and degree credit courses of liberal arts instruction. *See* R.T. *supra* note 149, at 177-78, 197, 216, 222, 224, 235, 239, 250; C.T. *supra* note 149, at 47-50, 53-56 (professional education); R.T. 10, 18, 171, 197, 239, 246; *see* C.T. 85; *see generally* R.T. 17, 20-22, 182, 185 (certificates); R.T. 20, 54, 83, 89, 199, 217-18, 221, 226, 231, 241, 248, 251 (office hours): R.T. 52, 85, 89, 221, 226, 247, 232, 89 (curriculum development); R.T. 28, 52-53, 85, 145, 218, 221, 226, 251 (committee work); R.T. 205, 209-10; *see* R.T. 181-2 (class preparation); R.T. 84, 199, 221, 237, 247, 232, 242 (other professional activities); C.T. 375 (findings of fact No. 8); R.T. 25, 187, 208; *see also* CCC of CFT Amicus, 6, 8, 11, Los Rios Community College Dist., EERB Dec. No. 18, (permanent liberal arts program). Moreover, the college district did not dispute evidence that over sixty percent of the part-time staff were assigned to regular liberal arts and business courses, a statistic belying the asserted purpose. *Id.* Plaintiffs Exhibit No. 2, at 25-27.

163. *Id.*

164. 11 Cal. 3d at 832, 523 P.2d at 636, 114 Cal. Rptr. at 596.

165. *Id. See also* Department of Mental Hygiene v. McGilvery, 50 Cal.2d 742, 754-55, 329 P.2d 689, 695 (1958) (striking down a welfare statute on the grounds that administrative convenience or minimization of costs cannot afford a rational basis for a legisla-

Economy of Operation

Budgetary economy is the only purpose actually served by the classification, and it provides the motive for asserting the flexibility and "temporary" rationales.[166] However, a state may not achieve fiscal economy through classifications which are arbitrary or irrational in contravention of the fourteenth amendment.[167] The distinction the state draws here is two-fold: first, between those part-time teachers hired before 1967 and those hired after;[168] second, between full- and part-time teachers.[169] Neither distinction is related to the services performed by the various classifications of teachers, which are essentially identical. Such dissimilar treatment of similarly situated people should be held to constitute arbitrary and invidious discrimination.

B. Strict Scrutiny

The doctrine of due process suggests the possibility of framing the issue of part-time classification in terms of fundamental rights. Due process protection for teachers evolved tentatively through a series of cases involving dismissal or nonrenewal of employment, often in circumstances raising first amendment questions.[170] In the companion cases of *Board of Regents v. Roth*[171] and *Perry v. Sindermann,*[172] the Court held that fourteenth amendment due process rights governed dismissal of

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tive classification).

166. *See* notes 18 and 20 *supra.*

167. Memorial Hospital v. Maricopa Country, 415 U.S. 250, 263 (1974) ("a state may not protect the public fisc by drawing an invidious distinction between classes of its citizens."). *Accord,* Shapiro v. Thompson, 394 U.S. 618, 633 (1969) ("although a state has a legitimate interest in preserving the fiscal integrity of its programs, . . . it may not accomplish such a purpose by invidious distinctions between classes of citizens.").

168. *See* notes 40, 104-07, 109, 122 *supra* and accompanying text.

169. *See* notes 28, 96, 97-101 (part-time), 28-37 (full-time) *supra* and accompanying text.

170. *See, e.g.,* Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Slochower v. Bd. of Educ., 350 U.S. 551 (1956); Weiman v. Updegraff, 344 U.S. 183 (1952); and Adler v. Bd. of Educ., 342 U.S. 485 (1952). For discussion of the ambiguous nature of the due process rights these early cases established, see *Developments in the Law, supra* note 21, at 1065-76 (rights other than due process), 1077-84 (due process).

171. 408 U.S. 564, 579 (1972) (holding that the fourteenth amendment does not require procedure due process to non-renewal of nontenured teacher unless he can show deprivation of "liberty" or "property" interest).

172. 408 U.S. 593, 600-03 (1972) (holding that non-tenured teacher may invoke due process property rights if the teacher can show that, under rules and understandings promulgated by college, he held a de facto tenure).

public school teachers. In *Roth,* the Court delineated some broad parameters of due process protection for public employees.[173] Noting that procedural due process applies "only to the deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property,"[174] the majority declared that such interests are not determined by a balancing of their relative "weight," but by evaluation of the "nature" of the interest at stake to test whether it is within "liberty" or "property."[175] The Court has rejected the "wooden distinction between 'rights' and 'privileges' " and neither liberty nor property is to be narrowly construed.[176]

Fundamental Liberty Interests

Surveying applicable precedent, the *Roth* Court discussed two sets of circumstances involving state action which, coupled with a refusal to reemploy, infringe liberty interests. Liberty is implicated where the state damages the employee's reputation and community associations or where the state action forecloses employment opportunity.[177] The part-time permanent-tempo-

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173. The teacher in *Roth* had been employed under an initial one-year contract when he was given notice of non-renewal, without a statement of cause, for the succeeding year. The state tenure statute required four continuous years of employment to acquire tenured status, and university rules did not specify any standard for retention, and allowed non-retention of probationary teachers without a statement of cause. Roth claimed that the non-renewal without notice and hearing violated procedural due process. The Court held that while "there might be cases in which a state refused to reemploy a person under such circumstances that interests in liberty would be implicated, [t]his is not such a case." 408 U.S. at 573. Roth also asserted a violation of his first amendment rights in that the non-renewal was in retaliation for his criticism of the university administration. The decision did not involve this issue, which in fact was not procedurally before the Court. But, responding to the district court's reasoning below that opportunity for notice and hearing were required "as a *prophylactic* against nonretention decisions improperly motivated by exercise of protected rights," the Court distinguished between a direct and indirect impingement of first amendment rights.

> In the respondent's case, however, the State has not directly impinged on interests in free speech . . . in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.

Id. at 576, n. 14. For discussion of the Court's first amendment analysis in *Sindermann,* which also raised both first and fourteenth amendment questions, *see* 408 U.S. 597-98.

174. 408 U.S. at 569.

175. *Id.* at 571.

176. *Id.* at 571-72.

177. 408 U.S. at 573. The Court noted that "liberty" would be impaired where the state action is accompanied by a "charge . . ., that might seriously damage [the em-

rary classification can be characterized as an infringement of liberty in that it is a disability foreclosing employment opportunities. It should be noted that fixed within specific liberty interests are the right to work for a living in the common occupations of the community,[178] the right to follow a chosen profession free from unreasonable governmental interference,[179] and the right of a public employee not to be excluded from further employment pursuant to an arbitrary or discriminatory statute.[180] The *Roth* language proscribing employment "disability" may be extended to the part-time classification.[181] While the classification allows summary non-renewal of employment, the administrative practices attendant on the part-time temporary designation create a caste system. Although part-time teachers are not dismissed, their employment is restricted to the part-time temporary status. The classification functions as a disability foreclosing not only their future but also their present employment under any other teacher classification. Moreover, *the teachers are foreclosed from appointment even under temporary status to available additional classes.*[182] Such action appears to fall within the proscribed disabilities upon liberty cited in *Roth.* Nor can the state wash its hands by declaring that the part-time teachers are free to go elsewhere. The state is virtually the sole employer of community college faculty. Part-time teachers who seek employ-

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ployee's] standing and associations in his community . . . [putting at stake his] good name, reputation, honor, or integrity," or where the action "impose[s] on [the employee] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." *Id.* In distinction to these circumstances indicative of impairment of liberty, "it stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Id.* at 575.

178. *In re* Griffiths, 413 U.S. 717 (1973); Truax v. Raich, 239.S. 33 (1915).

179. Greene v. McElroy, 360 U.S. 474 (1959); United States v. Robel, 389 U.S. 258 (1967).

180. Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952).

181. *See* note 176 *supra.*

182. This disability may be demonstrated by evidence presented at trial in *Peralta* to the effect that the colleges manipulate these teachers' serial appointments, not to meet short-term program needs or enrollment fluctuations, but to keep the teachers within the part-time temporary classification. For enrollment and program data, see R.T. *supra,* note 149 at 312 (constant enrollment increase), R.T. 120,; C.T. *supra* note 149, at 318, 376, 380 (employment of part-time teachers constant in accord with long-range program and budget planning). For course load manipulation, see C.T. 195; R.T. 213, 216, 225 (reduced assignment); R.T. 238 (banned from teaching over six hours); R.T. 240 (class-days reduced to keep teacher under 75 percent of the days); C.T. 195 (class assigned to another teacher to keep plaintiff within the temporary classification) *supra* note 149.

ment elsewhere find themselves restricted to part-time temporary status at whatever districts they may teach in.[183]

Fundamental Property Interests

Part-time teachers may also establish a fourteenth amendment property interest in their continuing employment sufficient to trigger due process restrictions. Property rights, the *Roth* Court declared attach to "interests that a person has already acquired in specific benefits."[184] After reviewing cases establishing "property" interests in welfare benefits, in statutory tenure, in school employment contracts, and in teaching positions held "without tenure on a formal contract, but nonetheless with a clearly implied promise of continued employment," the Court noted that,

> Certain attributes of property interests . . . emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it . . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules of understandings that stem from an independent source such as state law.[185]

Thus, the Court held that Roth's interests in employment were "created and defined by the terms of his appointment," which specifically provided for termination without provision for renewal. In addition, Roth did not derive a legitimate claim to reemployment under any other university rule, policy, or statute which constituted a property interest.[186]

While Roth's interest was defined by the terms of his contract, the facts of *Sindermann* presented another situation. The college did not have a statutory or contractual tenure system, but the teacher claimed the college operated under a "de facto"

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183. *See* R.T. *supra* note 149, at 222, 230, 252; Plaintiff's Exhibit No. Two at 28, 36; Los Angeles Community College Dist. Amicus Brief at 19, Peralta Fed'n of Teachers v. Peralta Community College Dist., 24 Cal. 3d 369, 595 P.2d 113, 155 Cal. Rptr. 679 (1979).

184. 408 U.S. at 576.

185. *Id.* at 577.

186. *Id.* at 578.

tenure program, and that he legitimately relied on that program by reason of both a college policy statement and the guidelines of the state Higher Education Coordinating Board which provided some form of tenure to teachers employed in the system for seven years.[187] Citing *Roth* to the effect that "property" denotes a broad range of interests secured by "existing rules or understandings," the Court stated that an interest is "a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support [a] claim of entitlement to the benefit."[188] The fact that such understandings extend beyond formal contractual provisions is clearly established in contract law, which recognizes informal "agreements implied from the promisor's words and conduct in the light of surrounding circumstances."[189] Thus, the Court concluded, "a teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure."[190] The Court reasoned that there may be an analogy to civil common law providing tenure in a public college. Proof of entitlement to such a property interest "in light of the policies and practices of the institution," require due process notice and hearing before non-renewal of employment.[191] The *Roth-Sindermann* reasoning establishes a principle of de facto tenure based on what may be termed an

187. 408 U.S. at 595, 601. The college policy stated that while it had no tenure system, "the administration wishes the [teacher] to feel that he has permanent tenure . . . ." Id. at 600. The state board guidelines were apparently advisory in nature. Note that the guidelines restricted tenure status to full-time teachers. *Id.* at 600-01, n.6.

188. *Id.* at 601.

189. *Id.* at 602.

190. The teacher had been employed in the state college system for ten years, the last four at a community college under a series of one-year contracts, when he was informed, without statement of cause or opportunity for hearing, that his contract would not be renewed the following year. *Id.* at 594-95. *See* note 192, *infra.*

191. 408 U.S. at 603. The Court blurred the range of this holding by declaring in a footnote that "we do not now hold that the respondent has any such legitimate claim of entitlement to job tenure . . . If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the . . . claim would be defeated." *Id.* at 603, n.7. The meaning here is obscure; this statement could be construed as limiting legitimate reliance to a connection with explicit contractual or statutory grants, but it could as well merely imply that the state law of contract would control the issue of implied understandings. The wording in *Roth* that "property" derives from the "rules or understandings that stem from *an* independent source *such* as state law" is significant (emphasis added). 408 U.S. at 578. State law constitutes an example rather than the definition of the independent source of "property" understandings.

objective expectation of employment derived from "the policies and practices of the institution.[192] Just what specific policies and practices would overcome either the lack of contractual or statutory tenure or an explicit statutory or contractual bar to tenure is left unclear. But *Sindermann* emphasized that continuity of employment "for a number of years" would provide the objective circumstances to show institutional practices establishing a de facto tenure.[193]

Whether continuity of employment *in itself* would establish de facto tenure is also an open question. One circuit court of appeals has decided this question in the affirmative.[194] In addition, at least one commentator has approved this ruling, noting that continuity of service must at some point establish "more than a mere subjective expectation of employment."[195] This construction was used by the *Balen* court when it cited *Sindermann* for the proposition that the district policy and administrative practice of routine blanket dismissal with virtually automatic rehiring creates "an expectancy of employment."[196] Under this rationale part-time teachers with more than a minimum length of employment could claim an objective expectation establishing due process rights. Ironically, the California Unemployment Insurance Appeals Board has pierced the charade of the perpetual temporary classification, denying unemployment compensation to part-time teachers during the summers following their annual

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192. *Id.* at 602-03. *See* note 184 *supra* and accompanying text.

193. *Id.* at 602. *See* notes 188 *supra* and 192 *infra.*

194. Johnson v. Fraley, 470 F.2d 179, 181 (4th Cir. 1972) (*Roth* and *Sindermann* "avouch that continuous employment over a significant period of time . . . can amount to the equivalent of tenure." *Johnson* held that a teacher dismissed after continuous service of 29 years may predicate a fourteenth amendment due process cause of action on a showing of such employment). *Contra,* Scheelhaase v. Woodbury Cent. Community School Dist., 488 F.2d 237 (8th Cir. 1973); Skidmore v. Shamrock Ind. School Dist., 464 F.2d 605 (5th Cir. 1972) (holding a teacher dismissed after 22 years employment under one-year contracts failed to state a federal claim) *Skidmore* reasoned that the teacher did not allege "the existence of rules or understandings promulgated or fostered by state officials which would justify any legitimate claim of enticement of continued employment." *Id.* at 606. Lukac v. Acocks, 466 F.2d 577 (6th Cir. 1972). *But see* Haimowitz v. Univ. of Nevada, 579 F.2d 526, 528 (9th Cir. 1978) (holding that "the existence of a formal code governing the granting of tenure precludes a reasonable expectation of continued employment absent extraordinary circumstances.").

195. Seitz, *Due Process for Public School Teachers in Non-renewal and Discharge Situations,* 25 HAST. L. J. 881, 896 (1974). The only question left open, according to Seitz, is the length of service sufficient to establish de facto tenure.

196. Balen v. Peralta Community College Dist., 11 Cal.3d at 830-31, 523 P.2d at 635, 114 Cal. Rptr. at 595.

"termination."[197] The board based its denial on the ground that the teachers have a "reasonable assurance" of resuming teaching in the fall, having "repeatedly returned to teach in the fall following the summer recess in the past."[198]

C. Intermediate Scrutiny and Free Speech

Yet another standard of scrutiny may be appropriate to judicial review of the constitutional issues raised by the *Peralta* classification. Commentators and justices alike have voiced dissatisfaction with the rigid two-tier approach to judicial review of equal protection cases.[199] What may be termed an intermediate level of scrutiny has been urged by courts and commentators where the classification involves "important" personal or social interests which have a nexus with recognized "fundamental" constitutional rights.[200] In such circumstances, the appropriate

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197. Terrance Lamb, Napa Community College Dist. and Employment Dev. Dep't., Cal. Unemployment Ins. App. Bd., No. 78-7212 (1978).

198. *Id.* at 2.

199. *See generally* Vance v. Bradley, 99 S. Ct. 939, 951-55 (1979) (Marshall, J., dissenting); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 62-63 (1973) (Brennan, J., dissenting); *id.* at 98-99 (Marshall, J., dissenting, joined by Douglas, J.); Gunther, *The Supreme Court, 1971 Term, Forward in Search of Evolving Doctrine on a Changing Court: A Model for the Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

200. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. at 102-03 (1973) (Marshall, J., dissenting). The majority decision upheld the funding of state public schools via unequal per-pupil expenditures based on local school district property tax valuations. Justice Marshall argued for explicit recognition of the "spectrum of standards" applied by the Court. The appropriate standard depends on "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." Fundamental interests extend beyond established rights guaranteed in the text of the Constitution, including, for example, the rights to procreate, to vote in state elections, to appeal a criminal conviction. These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. In the determination of what interests are fundamental,

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly . . . [Some interests are accorded] special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees . . . Only if we closely protect the related interests from state discrimination do we ultimately

standard of scrutiny would be whether "the classification serves important governmental objectives and is substantially related to achievement of these objectives."[201] The part-time situation stands on a novel footing, arguably fitting neither minimum nor strict scrutiny analysis. The teacher classification scheme is far from a purely economic regulation subject to minimum scrutiny, and the perpetual temporary teacher is continually rehired from semester to semester—and is not, therefore, *directly* denied due process or freedom of speech. This unique position may persuade the courts to adopt an intermediate scrutiny test. Placed within such a conceptual frame, the issues involved in the part-time classification would demand a tighter fit between classification and legitimate state purpose than was evidenced by the record in the *Peralta* case.

Tenure for public teachers is the norm nationwide.[202] Its recognized purpose is to provide a statutory analogue to procedural due process in order to protect academic freedom. The claim to academic freedom is no more than the claim that first amendment freedoms of speech and association operate within a state's schools and colleges.[203] The Supreme Court has declared that

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not

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insure the integrity of the constitutional guarantee itself.

Id. at 102-03.

201. Vance v. Bradley, 99 S. Ct. at 952 (1979) (Marshall, J., dissenting); *see also* Craig v. Boren, 429 U.S. 190, 197 (1976) (striking down a gender-based classification on invocation of this intermediate standard). The Court should scrutinize the relative fit between means and ends, classifications and purposes, tolerating less over or under-inclusiveness to the legislative, classification than in minimal rational-basis analysis. In teacher cases, strict scrutiny has been applied to deprivation of due process or first amendment rights occasioned by dismissal or nonrenewal. *See* Califano v. Webster, 430 U.S. 313, 316-17 (1976); Craig v. Boren, 429 U.S. 190, 197 (1976) for cases striking down classifications on grounds of an insufficient fit between means and ends. *But see* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) for cases holding that in areas of social and economic classifications the state is to be allowed considerable latitude in fashioning classifcations, and that a strict fit, particularly as to under-inclusiveness, is not required.

202. *See* note 21 *supra*.

203. For discussion of the relation between tenure, academic freedom, and first and fourteenth amendment rights, *see* notes 21-24 *supra* and accompanying text.

> tolerate laws that cast a pall of orthodoxy over the classroom.[204]

It follows that the interests of the part-time teachers fall within the penumbras of the due process clause and the first amendment. These values occupy a preferred position to mere economic interests. The nexus between the teachers' interests and specific constitutional guarantees could not be closer. Moreover, the constitutional and societal importance of these interests so defined is uncontested by the Supreme Court, which has long recognized a special standing of employment in public education. The Court has repeatedly stated that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[205]

The dictum in *Roth* that the interest in holding a teaching job "simpliciter, is not itself a free speech interest,"[206] does not dismiss the part-time teachers' interest in free speech rights as being inapplicable to the instant situation. *Roth* involved a teacher dismissed after his first year of employment.[207] California has created a class of permanent teachers who, by virtue of the "temporary" label, are perpetually subject to summary dismissal without notice or hearing. These teachers' interests are not confined to having the job "simpliciter," but extend to having the job absent the threat of arbitrary dismissal. Moreover, the complete exposure of part-time teachers to arbitrary or repressive action has a chilling effect on their exercise of freedom of speech. "It is apparent that the threat of dismissal from pub-

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204. Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967) (overturning a statute requiring summary dismissal of teachers with "knowing membership" in proscribed organizations). The Court in *Keyishian* noted that "we emphasize once again that precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 603.

205. Tinker v. Des Moines Community School Dist., 393 U.S. 503, 512 (1969) *quoting* Keyishian v. Bd. of Regents, 385 U.S. at 603 (1967), *and* Shelton v. Tucker, 364 U.S. 479, 487 (1960).

206. *See* note 172 *supra.*

207. It has been argued that underlying the decision in *Roth* was a judgment that a state may balance its teachers' free speech interest against its legitimate interest in efficiency, and that where a state has established a tenure system which in due course provides procedural safeguards against arbitrary or biased removal, the state may meet its interest in freeing itself of burdensome hearing procedures by providing for a probationary period of employment, during which it may evaluate both the teacher's performance and its need for his services. Sietz, *Due Process for Public School Teachers in Nonrenewal and Discharge Situations, supra* note 193, at 886.

lic employment . . . is a potent means of inhibiting speech."[208] Further, as the Court has several times noted, "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions."[209]

Nor will it suffice to say that the part-time teachers may vindicate first amendment rights in court, despite their temporary status, upon their dismissal on forbidden grounds of repression of speech.[210] Part-time teachers may be denied renewal of employment absent cause. They would be hard pressed to establish that their dismissal or non-renewal was impermissibly based on their exercise of free speech where they lack even the right to have grounds stated for the non-renewal. Without the due process rights accorded by probationary and tenured status, these teachers quite simply have no effective first amendment protection. Without such protection, free speech may exist in principle, but not in fact.[211]

CONCLUSION

The interests of part-time teachers are focused on access to

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208. Pickering v. Bd. of Educ., 391 U.S. at 574 (1968).

209. Keyishian v. Bd. of Regents, 385 U.S. at 602; Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); NAACP v. Button, 371 U.S. 415, 433 (1963), *Cf.* Arnett v. Kennedy, 416 U.S. 134, 159 (1974) (the Court dealt with an analogous free speech attack on a federal statute authorizing dismissal of public employees "for cause.") In holding that the terms of dismissal established a constitutionally sufficient standard of behavior, the plurality opinion implicitly recognized that an overbroad dismissal standard may be attacked on first amendment grounds. *Id.*

210. Bd. of Regents v. Roth, 408 U.S. at 576, n.14, discussed at note 172 *supra*. The legal fiction here is that the college board of trustees hires and fires. In actual practice the boards meet infrequently, and, in essence, perfunctorily approve a number of "personnel actions" en masse in one motion to approve the administration's "recommendation." In the community colleges, a "personnel action" may include hundreds of part-time faculty. The actual decision to renew or not, to assign one or more classes each semester to a particular part-time teacher, may be made at any level of the administrative chain. The part-time teacher is exposed to the whim, envy or spite of tenured "full-time" teachers who may demand an "over-load" and "bump" the part-time teachers from their classes. They are exposed to the whims of department chairman, division chairmen, assistant deans, deans, presidents, and chancellors. Anybody may trigger the firing of a part-time teacher for no reason or any reason. The part-time teachers who survive a year or two learn circumspection. They are not encouraged by their "temporary" status to speak their mind. To claim that they possess, in any meaningful way, first amendment freedom of speech is to shut one's eyes to the truth.

211. *See* Tinker v. Des Moines, 393 U.S. at 513 ("under our Constitution free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact").

the statutory due process rights subsumed in the tenure system which their classification denies them; this interest is not merely to gain or maintain public employment per se, but to perform the duties of that employment under the tenure protection accorded at some point to every other classification of teacher. The interest in tenure is not a mere economic matter and carries more constitutional significance than the rights and interests affected by ordinary economic and social legislation.[212] The determinative point here is that the subject at issue is the status of teachers in public education.

The damage of the permanent temporary classification falls not only on part-time teachers, but also on their students, who filled a third of the total classes in *Peralta*.[213] The potential for teacher's "self-censorship" affects the whole public, and is hardly less damaging for being privately administered.[214] Given the strength and public importance of these interests, a statutory classification granting protection to some teachers, but not to others, should be subject to review more strict than deferential rational basis scrutiny, and to review more searching than statutory construction devoid of constitutional analysis.

*Jeffrey Kerwin**

212. This point distinguishes the part-time teachers from the street-vendors in New Orleans v. Dukes, 411 U.S. 297 (1976), where the Court upheld a grandfather clause classification in an ordinance prohibiting all but long-term vendors from operating in the French Quarter. *Dukes* declared that the rational basis minimum scrutiny standard was to be applied to equal protection challenges to statutory classifications unless the classification involves fundamental rights or suspect classes. *Id.* at 303. The argument will be made that *Dukes* controls the issue of the *Peralta* distinction between pre- and post-1967 part-time teachers. But the *Dukes* reasoning emphasized that the ordinance was "solely on economic regulation," and the minimum scrutiny test applies to "local economic regulation" to state "regulation of their local economies," to "the local economic sphere." *Id.* at 303-04.

213. Plaintiff's Exhibit No. One at 12, 17, Peralta Fed'n of Teachers v. Peralta Community College Dist., 24 Cal. 3d 392, 595 P.2d 113, 155 Cal. Rptr. 679 (1979).

214. Smith v. California, 361 U.S. 147, 154 (1959).

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