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I. Constitutional Law

FOURTH CIRCUIT REVIEW

CONSTITUTIONAL LAW

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees that no state government will deprive any person of life, liberty or property without due process of law. The Due Process Clause has both procedural and substantive components.[1] Substantive due process rights arise only from the Constitution itself.[2] Federal courts consistently have held that the substantive component of the due process right does not guarantee safe and sanitary housing.[3] In addition to substantive due process, the Fourteenth Amendment requires procedural due process upon a governmental deprivation of a life, liberty or property interest.[4] The United States Supreme Court has held that a liberty interest arises either from the Due Process Clause itself or from state law.[5] Every state statute or regulation, however, does not automatically create a liberty interest.[6] Until recently, courts had not considered whether state laws regulating housing create a liberty interest in safe and sanitary housing that would enjoy protection under the procedural component of the Fourteenth Amendment Due Process Clause.

The Fair Housing Act of 1968, 42 U.S.C. sections 3604 (a) and (b) (Title VIII), forbids discrimination in housing sales and rentals and in the provision of housing services on the basis of race, color, religion, sex, or national origin. Successful prosecution of a Title VIII claim requires that the plaintiff show that the defendant actually made housing unavailable to the plaintiff. The plaintiff also must show that a discriminatory intent triggered the defendant's denial of housing or housing services or that the

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1. *See* Regents of Univ.of Michigan v. Ewing, 474 U.S. 214, 229 (1985) (noting that Fourteenth Amendment Due Process Clause guarantees both substantive and procedural rights); *Youngberg v. Romeo*, 457 U.S. 307, 309 (1982) (recognizing that Fourteenth Amendment Due Process Clause guarantees certain substantive rights as well as minimal process upon deprivation of life, liberty or property).

2. *See Ewing*, 474 U.S. at 229 (stating that only Constitution creates substantive Due Process rights); *Youngberg*, 457 U.S. at 315 (recognizing that Fourteenth Amendment Due Process Clause itself creates substantive rights).

3. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972) (holding that Constitution holds no guarantee that housing will meet certain minimum standard); *see also* Perry v. Housing Auth., 486 F. Supp. 498, 503 (D.S.C.) (noting that substantive due process does not encompass right to adequate housing), *aff'd*, 664 F.2d 1210 (4th Cir. 1980).

4. *See* Board of Regents v. Roth, 408 U.S. 564, 569 (1972) (holding that procedural due process is necessary only when liberty or property interests are at stake); *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (same).

5. *See* Hewitt v. Helms, 459 U.S. 460, 466 (1983) (noting that sources of liberty interests include state law and Due Process Clause); *Mills v. Rogers*, 457 U.S. 291, 300 (1982) (recognizing rights of states to give liberty interests other than those guaranteed by Due Process Clause).

6. *See Hewitt*, 459 U.S. at 471 (holding that mere creation of guidelines for administrative segregation of prisoners does not automatically give rise to liberty interest in being in general prison population).

defendant's seemingly nondiscriminatory actions had a disparate impact on minorities.

In *Edwards v. Johnson County Health Dept.*, 885 F.2d 1215 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit considered whether a county health department's issuance of permits for substandard migrant farmworker housing violated Title VIII and the Fourteenth Amendment substantive and procedural due process rights of six black migrant farmworkers. Local farmers who employed the plaintiffs in *Edwards* required the plaintiff farmworkers to live in housing on their farms as a condition of the plaintiffs' employment. The plaintiffs, who lived in the facilities during the spring and summer of 1985, asserted that the housing provided by the farmers violated state health and safety standards for migrant farmworker housing. The Johnson County Health Department (JCHD) had issued permits for the housing despite the fact that the housing did not meet the state's health and safety standards. According to the plaintiffs, the JCHD also failed to train properly its inspectors and failed to ensure that the inspectors made required periodic inspections after issuing the permits. The plaintiffs alleged that by issuing the permits and failing to make the required inspections the JCHD violated the plaintiffs' substantive and procedural due process rights, as well as Title VIII, and, therefore, brought suit in the United States District Court for the Eastern District of North Carolina.

The district court dismissed the farmworkers' suit for failure to state a claim upon which relief could be granted. The district court reasoned that the Constitution created no substantive right to safe and sanitary housing and that the state law involved did not create a liberty interest in safe and sanitary housing. Furthermore, the district court found that the plaintiffs failed to allege a violation of Title VIII.

On appeal to the Fourth Circuit, the plaintiffs argued that adequate housing is a right guaranteed by the substantive component of the Due Process Clause. The plaintiffs also argued that the JCHD violated the plaintiffs' right to procedural due process because the state had created a liberty interest in adequate housing by establishing the state health and safety standards for housing and that the county had deprived them of that liberty interest without meeting minimum procedural due process standards. In addition to their constitutional claims, the plaintiffs alleged that the JCHD's issuance of unwarranted housing permits violated Title VIII because the issuance made safe and sanitary housing unavailable to the plaintiffs on the basis of their race and illegally discriminated against the plaintiffs in the provision of housing inspection services on the basis of race.

The Fourth Circuit first examined the plaintiffs' substantive due process claim. The Fourth Circuit followed the well-accepted rule that the substantive component of the Due Process clause does not guarantee safe and sanitary housing. The *Edwards* court noted that under *DeShaney v. Winnebago County Dept. of Social Services*, 109 S.Ct. 998 (1989), the Due Process clause does not impose upon a state a duty to protect its citizens from private actors' wrongdoing, but imposes obligations on the state only after

the state itself deprives a citizen of a liberty interest. Because the local government in *Edwards* never had the plaintiffs in its custody, the Fourth Circuit reasoned that the JCHD had no duty to provide adequate housing for the plaintiffs under substantive due process theory.

The Fourth Circuit next examined the plaintiffs' procedural due process claim. The Fourth Circuit determined that the plaintiffs had no liberty interest in safe and sanitary housing. Although the Fourth Circuit recognized that certain state statutes and regulations may create liberty interests for procedural due process purposes, the *Edwards* court distinguished those regulations from the regulations at issue because those regulations involved the liberty interest of prisoners in parole and other statutory entitlements. The Fourth Circuit reasoned that under *Milburn v. Anne Arundel County Dept. of Social Services*, 871 F.2d 474 (4th Cir. 1989), the state must have deprived a party of freedom before a liberty interest is implicated. Because the required inspections did not affect the plaintiffs' freedom in choosing where to live and work, the Fourth Circuit concluded that the inspections did not create a liberty interest that required procedural due process before denial.

Finally, the Fourth Circuit considered the plaintiffs' Title VIII claim. The Fourth Circuit recognized that to establish a violation of section 3604(a) of Title VIII, a plaintiff must assert first, that the defendants actually made housing unavailable to the plaintiffs, and second, that the plaintiffs' race, color, religion, sex or national origin motivated the defendants' actions. In applying this test in *Edwards*, the Fourth Circuit determined that the plaintiffs failed to meet either of the test's requirements. With regard to the first prong, the Fourth Circuit reasoned that the JCHD's issuance of the permits did not actually make housing unavailable to the plaintiffs. In fact, the court noted, the JCHD's issuance of the permits actually increased the amount of housing available, although that housing was substandard. The Fourth Circuit recognized that Congress intended that courts construe Title VIII broadly, but declined the plaintiffs' invitation to depart from the plain meaning of the term "housing" by interpreting that term to mean housing meeting certain safety and health standards.

The Fourth Circuit also found that the plaintiffs failed the second prong of the test under section 3604(a) of Title VIII by failing to allege that racial discrimination motivated the JCHD's actions. Although the plaintiffs conceded that the permit policy was facially neutral, they contended that it violated Title VIII because the policy had a disparate impact on blacks; most of the migrant farm worker population in Johnson County was black. The Fourth Circuit disagreed with the plaintiffs' argument and contended that the proper approach to the issue was to analyze whether the permit policy had a disproportionate impact on minorities within the migrant farmworker class. Because the plaintiffs failed to allege that the policy resulted in disparity of housing conditions between black and white migrant farmworkers, the Fourth Circuit held that the plaintiffs could not pass the second prong of the test under section 3604(a).

The Fourth Circuit briefly turned to the plaintiffs' contention that the defendants violated section 3604(b) of Title VIII by discriminating against

the plaintiffs in the provision of housing related services. The court refused to consider this contention because the defendants failed to raise the issue at the district court level. Furthermore, the court reiterated that the plaintiffs failed to show a disparate impact on blacks, as compared to whites, in the provision of housing services and that it would not consider the question whether the housing inspections actually were housing "services" within the meaning of that word in Title VIII.

The *Edwards* court determined that the plaintiffs failed to state violations of substantive or procedural due process rights under the Due Process clause of the Fourteenth Amendment to the Constitution or of Title VIII. Accordingly, the court affirmed the judgment of the district court to grant the defendants' motion to dismiss for failure to state a claim upon which relief can be granted. The Fourth Circuit's decision in *Edwards* is consistent with traditional substantive and procedural due process analysis. The United States Supreme Court has refused to recognize that housing is a substantive due process right guaranteed by the Fourteenth Amendment.[7] Furthermore, the Fourth Circuit's refusal to find that the plaintiffs had a protected liberty interest in safe and sanitary housing reflects courts' concern about creating liberty interests when the statute involved actually does not effect a person's physical freedom.[8] Past courts have held that the proper approach for determining disparate impact in Title VIII cases is to examine a measure's impact on the minorities within the total group to which the measure applied.[9] Thus, the Fourth Circuit's analysis of the disparate impact problem in *Edwards* also is consistent with past Title VIII analysis.[10]

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In 1971, pursuant to a mandate of the new Virginia Constitution adopted in that year, the Virginia General Assembly created the Judicial Inquiry and Review Commission. The Commission has the power "to investigate charges which would be the basis for retirement, censure, or removal of a judge."[11] The Virginia Constitution states that proceedings before the Commission must be confidential.[12] Virginia Code section 2.1-37.13 states in part:

> All papers filed with and proceedings before the Commission, . . . including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a

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7. *See Lindsey*, 405 U.S. at 74 (refusing to hold that substantive due process rights include safe and sanitary housing).

8. *See Hewitt*, 459 U.S. at 472 (holding that inmate's right to remain in general prison population rather than administrative segregation was state-created liberty interest curtailing further confinement without due process).

9. *See* Betsey v. Turtle Creek Assoc., 736 F.2d 983, 987 (4th Cir. 1974) (stating that with regard to disparate impact on minorities, important impact to examine is impact on minorities as part of the group to which policy applies).

10. *See id.* at 986-87 (holding that Title VIII violation may result from facially neutral policy that results in disparate impact on minorities, but that proper impact to examine is impact on minorities within the group to which policy applies generally).

11. VA. CONST. art. VI, § 10.

12. *Id.*

> reporter, shall be confidential and shall not be divulged, other than to the Commission, by any person who either files a complaint with the Commission, or receives such complaint in an official capacity, or investigates such complaint, is interviewed concerning such complaint by a member, employee or agent of the Commission, or participates in any proceeding of the Commission, or the official recording or transcription thereof except that the record of any proceeding filed with the Supreme Court shall lose its confidential character.

Section 2.1-37.13 declares that divulging information in violation of this section is a misdemeanor.

When a plaintiff challenges a statute on First Amendment grounds, arguing that the statute violates the plaintiff's constitutional right of free speech, and the government counters that the statute is a valid time, place or manner restriction, courts resolve the issue by using a two-step analysis of the statute.[13] Under this analysis, the court first determines whether the statute is content-neutral.[14] If the statute is content-neutral, the court then considers whether the statute is a valid time, place and manner restriction on speech.[15] If, however, the statute regulates speech on the basis of its content, the court applies an exacting scrutiny or compelling interest test in determining the constitutionality of the statute.[16]

The Supreme Court addressed the constitutionality of Virginia Code section 2.1-37.13, the predecessor to the present code section, in *Landmark*

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13. *See* 3 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.47, at 237 (1986) (discussing two-step form of analysis that courts use to review time, place or manner restrictions).

14. *See, e.g.*, Hudgens v. N.L.R.B., 424 U.S. 507 (1976) (asserting that standards of First Amendment require that expression not be restricted by government because of its message, its ideas, its subject matter, or its content); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) (stating that First Amendment means government has no power to restrict expression because of its message, its ideas, its subject matter, or its content); Grayned v. City of Rockford, 408 U.S. 104 (1972) (asserting that government has no power to restrict expressive activity because of its message).

15. *See* United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)) (stating that time, place and manner restrictions must be content-neutral); Regan v. Time, Inc., 468 U.S. 641 (1984) (stating that to be constitutional time, place and manner restriction, statute may not be based upon content of speech). In *Regan* the Court set out the three-part test for constitutionality: To be a constitutional time, place, and manner regulation, a statute may not be based upon either content or subject matter of speech, must serve a significant governmental interest, and must leave open ample alternative channels for communication of the information. *Id.*

16. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (quoting Boos v. Berry, 485 U.S. 312, 321 (1988)) (holding that speech regulated on basis of content must be tested against most exacting scrutiny); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that most exacting scrutiny is required in cases where state undertakes to regulate speech on basis of its content); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (holding that if governmental regulation is based on content of speech or message, action must be scrutinized very carefully).

Communications, Inc. v. Virginia, 435 U.S. 829 (1978). In *Landmark*, a newspaper publisher appealed conviction for divulging information in violation of section 2.1-37.13 of the Virginia Code. Under section 2.1-37.13, a person could not divulge any information about papers filed with and proceedings before the Commission, the identification of the judge under investigation, or any testimony or other evidence, and no person could disclose confidential information to anyone except the Commission. In *Landmark*, the defendant's publication had reported on a pending inquiry by the Commission and identified the judge whose conduct was being investigated. The Supreme Court reversed the publisher's conviction, reasoning that a major purpose of the First Amendment is to protect the free discussion of governmental affairs. Moreover, the Supreme Court declared that the state interests advanced in imposing criminal sanctions were insufficient to justify the resulting infringements upon freedom of speech and of the press. The Supreme Court observed that the First Amendment does not permit the criminal punishment of third persons who are strangers to proceedings before such a commission for divulging or publishing truthful information regarding confidential proceedings of the commission unless the state can prove that the disclosure constitutes a clear and present danger. The Court noted that out-of-court comments on pending cases or grand jury investigations did not constitute a clear and present danger to the administration of justice. Thereafter, the Virginia Assembly amended section 2.1-37.13 to limit the confidentiality restrictions to participants in the proceedings. The Assembly, however, has since made an exception for judges under investigation who must divulge information in investigating the allegations against the judge in preparation for Commission proceedings.

In *Baugh v. Judicial Inquiry and Review Commission (JIRC)*, 907 F.2d 440 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit reviewed the constitutionality of the new provision. The two plaintiffs in *Baugh*, an attorney and an individual who had been a party in a state court proceeding, filed complaints against state judges with the Commission, and thereafter received letters from the Commission warning that disclosure of any information concerning their complaints could result in criminal prosecution. Because neither record was filed with the Virginia Supreme Court, the confidentiality restrictions of section 2.1-37.13 applied to plaintiffs, requiring that the plaintiffs keep confidential the contents of the complaints as well as the fact that the complaints had been filed. The plaintiffs sought injunctive and declaratory relief, arguing that section 2.1-37.13 violated their First Amendment right to free speech and their right to petition the government under the First and Fourteenth Amendments to the United States Constitution.

The United States District Court for the Eastern District of Virginia considered the constitutionality of Virginia Code section 2.1-37.13 under the First and Fourteenth Amendments. Finding that the statute was content-neutral, the district court reasoned that the statute banned all speech relating to the Commission's proceedings. The district court reasoned further that,

to the extent that this speech was coupled with criticism of the Commission, the statute banned speech by both defenders and critics for the purpose of promoting the substantial government interest in encouraging complainants and witnesses to speak fully and truthfully. Additionally, the court determined that the Virginia statute left open alternative means of communication. Under the statute, a person who filed a complaint could not divulge that the person had filed a complaint or what action the Commission had taken. The person could disclose, however, the name of the judge and the events that led the person to file the complaint. Finally, the district court found that the incidental restriction on speech did not impermissibly burden the plaintiffs' right to petition the government. Accordingly, the district court upheld section 2.1-37.13 as constitutional.

The plaintiffs appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, arguing that the district court erred in holding that section 2.1-37.13 was a constitutionally valid time, place and manner restriction. The Commission argued that the statute was content-neutral because the statute did not bar criticism of judges and applied equally to a judge's supporters and critics. The Commission argued further that the statute was a valid time, place and manner restriction that served a purpose unrelated to the content of the speech and had only secondary effects on speech. Finally, the Commission asserted that the statute was justified as an effective method for identifying unfit or disabled judges and facilitating disciplinary action or the judge's removal from the bench.

To resolve the issue, the Fourth Circuit reexamined first the district court's finding that the statute was content-neutral. The *Baugh* court relied upon the standard for content-neutrality as set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). In *Ward*, the Supreme Court observed that government regulation of expressive activity is content-neutral only if it is justified without reference to the content of the regulated speech. The Supreme Court also noted that the controlling consideration is the government's purpose, and that a regulation that serves purposes unrelated to the content of expression is deemed neutral even if it has an incidental effect on some speakers or messages.

Applying the *Ward* test, the Fourth Circuit analyzed section 2.1-37.13, addressing the Commission's arguments for content-neutrality. The *Baugh* court dismissed the Commission's argument that the statute was content-neutral because it applied equally to a judge's supporters and critics, reasoning that equal application of a statute is relevant only to viewpoint-neutrality, which is concerned with limitations on speech on the basis of the viewpoint expressed. The court asserted that a content-neutral analysis should focus on the operation of the status of the speech, and not on the identity of the speaker.

In addressing the Commission's argument that the statute was unrelated to the content of speech and was a valid time, place and manner restriction, the Fourth Circuit observed that unlike the zoning ordinance and camping regulation that the Supreme Court upheld in the cases cited by the Com-

mission, section 2.1-37.13 was a direct regulation of speech. The court noted that a statute is content-neutral only if the justification for the statute is unrelated to the content of the speech. The *Baugh* court then found that the justification for the statute was very closely related to the content of the speech. The effectiveness of the statute in motivating disabled or unfit judges to resign voluntarily from the bench is reliant upon the judge's knowledge that, by resigning, the judge can avoid public criticism that might follow if complainants revealed that a complaint had been filed. Accordingly, the *Baugh* court determined that, because the statute silenced all speech related to the actual filing of a complaint with the Commission, the section was not a regulation that had only the "secondary" or "incidental" effect of restricting speech, but rather was a content-based restriction. The Fourth Circuit, therefore, held that the district court had erred in its finding that the statute was content-neutral.

The Fourth Circuit then re-evaluated the test for constitutionality that the district court had applied. In *Baugh*, the district court applied a substantial interest test to determine whether the statute was a reasonable time, place and manner restriction. To determine the appropriate test, the Fourth Circuit reviewed the Supreme Court decision in *Boos v. Barry*, 485 U.S. 312, 321 (1988). In *Boos*, the Supreme Court held that a court must subject a content based statute to the most exacting scrutiny; a standard requiring that a statute be upheld only in the face of a compelling state interest. Accordingly, the Fourth Circuit held that the district court incorrectly had applied the less stringent "substantial interest" test.

The Fourth Circuit also reversed the district court's dismissal of the plaintiffs' claim that the statute violated their right to petition the government. In so holding, the *Baugh* court observed that the district court's conclusion rested on its erroneous assumption that the statute was only an incidental restriction on speech in dismissing the plaintiffs' claim. Consequently, the outcome would not necessarily be the same if the district court had applied the compelling interest test and found that the statute was an unconstitutional abridgement of free speech. The Fourth Circuit, therefore, remanded the case for the district court to reconsider the statute's constitutionality under the guidelines of *Baugh*.

A number of cases decided in other district courts, where plaintiffs have challenged similar confidentiality provisions on First Amendment grounds, are consistent with the Fourth Circuit's holding that the Virginia confidentiality provision restricted speech on the basis of its content.[17] The

17. *See* Doe v. Florida Judicial Qualifications Comm'n, 748 F. Supp. 1520 (S.D. Fla. 1990) (holding that Florida constitutional prohibition on disclosure of fact that complaint had been filed with Judicial Qualifications Commission was not valid time, place and manner restriction on speech); Doe v. Supreme Court of Fla., 734 F. Supp. 981 (S.D. Fla. 1990) (holding that Florida Bar Rule prohibiting complainant from disclosing information regarding disciplinary proceedings was aimed directly at content of speech); Providence Journal Co. v. Newton, 723 F. Supp. 846 (D.R.I. 1989) (stating that confidentiality provisions of Rhode Island's government ethics law prohibiting public discussion of existence and content of

Baugh opinion indicates that the court may find that assertions of traditional justifications for confidentiality provisions, such as section 2.1-37.13, which are usually based upon the significant or substantial government interests allegedly advanced by this type of provision,[18] are merely smokescreens set up to obscure the real governmental concerns with speech content that underlie the provision. The *Baugh* opinion demonstrates that by offering such justifications, defendants may not successfully avoid the strict scrutiny that courts must apply to statutes that are not content-neutral. The practical effect of the Fourth Circuit's decision in *Baugh* may be that defenders of government-imposed confidentiality provisions who argue that the regulation is a valid time, place and manner restriction will have to focus more pointedly on the content-neutrality issue, because the Fourth Circuit's probing justification analysis will make content-neutrality a much more difficult hurdle for defendants to overcome.

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The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits states from establishing statutory schemes that give property owners more power than non owners in voting on local government issues.[19] The Fourth Circuit has held that once a state or local government establishes the right to vote on an issue of general importance, the Equal Protection Clause prohibits the government from creating a system that favors the votes of property owners over those who do not own property.[20] When the statute involved does not extend the right to vote on the issue, however, allowing a majority of landowners to authorize certain actions does not violate equal protection principles.[21] For example, a statute that allows for annexation upon the filing of a petition by seventy-five percent of landowners in the area to be annexed and a majority vote by the governing body of the annexing area does not violate the Equal Pro-

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complaint filed against public official are "prototypical content-based regulations of protected speech").

18. *See* Baugh v. Judicial Inquiry and Review Comm'n (JIRC), 907 F.2d 440, 445 (4th Cir. 1990) (discussing justification Commission advanced for § 2.1-37.13); Doe v. Florida Judicial Qualifications Comm'n, 748 F. Supp. at 1526 (discussing four principal interests asserted by JQC offered in justification for confidentiality provision, including prevention of damage to reputation of judges and judiciary, facilitation of effective investigations, and protection of judge's constitutional right to privacy).

19. *See* U.S. CONST. amend. XIV, § 1 (requiring states to provide equal protection of law); Hill v. Stone, 421 U.S. 289, 300 (1975) (striking down requirement that voters in bond referendum be registered property owners in locality concerned); Hayward v. Clay, 573 F.2d 187, 190 (4th Cir.) (invalidating statutory annexation process requiring favorable vote of majority of property owners as well as majority of voters in locality involved), *cert. denied*, 439 U.S. 959 (1978).

20. *See Hayward*, 573 F.2d at 190 (finding that government may not effectively disenfranchise citizens who do not own property in matters that affect all citizens in jurisdiction).

21. *See* Berry v. Bourne, 588 F.2d 422, 424 (4th Cir. 1978) (holding that statutory provision allowing annexation upon filing of petition by 75% of landowners in area to be annexed and majority vote of governing body of annexing area did not violate Equal Protection Clause).

tection Clause because the voters in the area to be annexed never had the right to vote on that issue.[22] Against this background, the Fourth Circuit, in *Muller v. Curran*, 889 F.2d 54 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 1121 (1990), considered whether a Maryland statute relating to incorporation of an unincorporated area met the requirements of the Equal Protection Clause.

The statute at issue in *Muller* set out three requirements for incorporation of an unincorporated area. First, interested citizens had to file a petition to the county council signed by at least twenty percent of the registered voters in the area to be incorporated. The statute also required that the owners of at least twenty-five percent of the assessed value of the real property in the area to be annexed sign the petition. Second, the city council, in its discretion, had to decide whether to submit the issue of incorporation to the voters in the area to be annexed. Third, the Maryland statute required that the locality involved hold a general election in which all registered voters could vote.

The plaintiff in *Muller*, a registered voter of the area in question and the village itself, filed suit in the United States District Court for the District of Maryland, seeking a declaratory judgment invalidating the statute. The district court denied declaratory relief. The plaintiff then appealed to the United States Court of Appeals for the Fourth Circuit, arguing that the statute was unconstitutional because it violated the Equal Protection Clause.

In examining the applicable law, the Fourth Circuit first noted that under *Hayward v. Clay*, 573 F.2d 187 (4th Cir.), *cert. denied*, 439 U.S. 959 (1978), once a locality extends the right to vote on an issue, restrictions on that right outside of age, citizenship and residence requirements are subject to strict scrutiny and that a locality could justify those restrictions only upon showing furtherance of a compelling interest. The Fourth Circuit also recognized, however, that when the citizens of a locality do not have the right to vote on an issue, allowing property owners as a group to request certain action does not violate the Equal Protection Clause. Applying those principles to *Muller*, the Fourth Circuit stressed that the Maryland statute's requirement that the owners of twenty-five percent of the assessed value of the real property in the area to be incorporated sign the petition allowed that group to block the county council from even considering whether to call for a general election. Thus, the Fourth Circuit determined that, because the statute allowed property owners to project their wishes on a possibly unwilling majority of voters, the state had to advance a compelling interest to justify the statute. Because the state failed to show a compelling interest, the *Muller* court invalidated the statute on the ground that the statute violated the Equal Protection Clause.

The Fourth Circuit then considered whether remaining portions of the statute were unseverable from the section requiring a petition signed by the owners of twenty-five percent of the assessed value of the real estate in the

22. *Id.*

area. The Fourth Circuit noted that state law governs the issue of severability of a state statute and that in Maryland legislative intent controls the issue of severability. Although under Maryland law a presumption in favor of severability exists, the *Muller* court found that, because the Maryland legislature rejected a version of the incorporation statute that contained no role for property owners, the legislature did not intend for the statutory process to survive without participation by property owners. Thus, the Fourth Circuit held that the other portions of the statute were unseverable and, therefore, struck down the entire Maryland statute.

The Fourth Circuit's analysis of the equal protection issues in *Muller* is consistent with past decisions on equal protection and property ownership requirements as a precondition to voting. The Fourth Circuit recognized that when a state or local government allows a general vote on an issue, it cannot dilute a majority vote or preclude such a vote on the basis of property ownership.[23] In *Muller*, the Fourth Circuit applied that same principle when it held the Maryland statute unconstitutional because the statute allowed the property owners in an area to preclude the general population from voting on an issue in.

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The First Amendment to the United States Constitution protects against the abridgement of free speech.[24] The First Amendment does not protect all forms of speech, but does protect commercial speech if the speech concerns lawful activity and is not misleading.[25] Even protected speech may be subjected to reasonable time, place and manner restrictions.[26] Governmental restrictions on speech must pass differing degrees of scrutiny based on an analysis of the openness of the property.[27] Courts generally consider military bases as closed or non-public property and, therefore, subject to more intrusive governmental restrictions.[28] With these considerations in mind, the Fourth Circuit addressed restrictions placed on the distribution

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23. *Id.*

24. U.S. CONST. amend. I.

25. *See* Central Hudson Gas and Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980) (describing four part test to determine protected commercial speech).

26. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (establishing degrees of judicial scrutiny associated with different categories of government property); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (invalidating ordinance banning "for sale" and "sold" signs for purpose of stemming "white flight" from racially integrated town); City of Madison Joint School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (invalidating restrictions on speech at public school board meeting).

27. *See Perry Educ. Ass'n*, 460 U.S. at 45-46 (establishing three categories of openness associated with government owner property and degrees of judicial scrutiny associated with each category of property).

28. *See, e.g.*, United States v. Albertini, 472 U.S. 675, 686 (1985) (holding that military base is not public forum); Greer v. Spock, 424 U.S. 828, 838 (1976) (same); United States v. McCoy, 866 F.2d 826, 833 (6th Cir. 1989) (same); M.N.C. of Hinesville, Inc. v. United States Dept. of Defense, 791 F.2d 1466, 1473 (11th Cir. 1986) (same); Persons for Free Speech at SAC v. United States Air Force, 675 F.2d 1010, 1015 (8th Cir. 1982) (en banc) (same); United States v. Mowat, 582 F.2d 1194, 1205 (9th Cir.), *cert. denied* 439 U.S. 967 (1978) (same).

of circulars by the commanding officer of a military base in *Shopco Distribution Co. v. Commanding General of Marine Corps, Camp Lejeune, N.C.*, 885 F.2d 167 (4th Cir. 1989). In *Shopco* the United States Court of Appeals for the Fourth Circuit considered whether the granting of preferential distribution rights to a government affiliated newspaper over similar civilian publications constituted a violation of the right to freedom of commercial speech guaranteed by the First Amendment. The defendant, Commanding General of Camp Lejeune Marine Corps base, gave preferential distribution rights to a Civilian Enterprise Newspaper (CEN) over the rights of other nonsubscription, nongovernmental publications. Typically, a CEN contracts with the military to produce a newspaper primarily for distribution to military personnel and their families at no cost to the government. The CEN covers the costs of publishing and makes a profit solely by selling advertisements. The base's public affairs staff controls the editorial content of the CEN.

Plaintiff, Shopco Distribution Co. (Shopco), published *The Globe* as a CEN for six years until Shopco lost the publishing contract following a competitive bid process. Shopco also publishes an advertising circular known as the *Shopper*. Shopco typically distributes the circular door-to-door in residential areas. Shopco distributed the *Shopper* door-to-door in Camp Lejeune's housing areas from the circular's inception in 1975. Shopco continued to distribute the *Shopper* in Camp Lejeune's housing areas after losing a competitive bid to produce *The Globe* in June 1987.

In July 1987, the Commanding General was informed that continued door-to-door distribution of the *Shopper* adversely would affect the advertising draw of *The Globe* and, therefore, adversely would affect the amount of editorial space available for base articles in *The Globe*. In response, the Commanding General issued a new Base Order which limited distribution of nonsubscription, civilian publications by volume and distribution location throughout the base. As a result of the new Base Order, Shopco began distributing the *Shopper* by mail at a significant increase in cost over hand delivery door-to-door.

Shopco contended that the Commanding General's new Base Order threatened the economic viability of the *Shopper*. Additionally, Shopco claimed that the base housing areas became public fora because of certain activities permitted in the housing areas. Lastly, Shopco claimed that the Commanding General created a public forum in the housing areas by allowing door-to-door distributions in the past. Therefore, Shopco claimed that the Commanding General's action violated Shopco's First Amendment right to freedom of commercial speech. The district court granted the Commanding General's motion for summary judgement and Shopco appealed.

On appeal, the Fourth Circuit used a two-part test to evaluate Shopco's First Amendment claim. First, the Fourth Circuit held that Shopco must prove that the commercial speech in the instant case was protected speech within the meaning of the First Amendment. According to the *Shopco* court, to pass this first part of the test, the commercial speech must concern

lawful activity and the speech must not be misleading. The Fourth Circuit did not rule on this first test because the defendant stipulated that Shopco's proposed speech met the criteria for protected commercial speech. According to the Fourth Circuit, the second part of the test is a determination of whether the governmental regulation of speech is justified. In answering this second part of the test, the Fourth Circuit weighed two factors; the type of forum where the speech took place and the nature of the government restriction.

The Fourth Circuit adopted the framework of *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), for evaluating the type of forum involved in *Shopco* and the level of scrutiny the court must apply to the challenged government restrictions on speech. The framework from *Perry* recognizes three categories of government property that provide a continuum of greater to lesser protection of speech. Under the *Perry* framework, First Amendment protection of speech is strongest in traditional public forums such as public parks and streets. Courts apply strict scrutiny to restrictions on speech in traditionally public areas and only uphold narrowly tailored restrictions that serve a compelling state interest. According to *Perry*, a middle ground for protecting speech exists in created public forums, such as university meeting facilities. The government does not have to allow speech in created public forums. If the government opens the forum to the public, then speech in these areas receives the same level of protection as in traditional public forums. Lastly, according to *Perry*, the First Amendment allows the heaviest regulation of speech in nonpublic government forums. In nonpublic government forums, restrictions on speech must only be reasonable and unbiased.

Applying the framework from *Perry* to the case at bar, the Fourth Circuit began by noting that courts generally consider a military base to be a nonpublic government forum. The Fourth Circuit then addressed and dismissed Shopco's claim that the base housing areas became public fora because the Commanding General currently allowed civilian-run businesses on the base, permitted pizza and laundry delivery in base housing, and previously had allowed door-to-door delivery of nongovernment publications. First, the court noted that the Commanding General maintained Camp Lejeune's housing areas as separate and distinct from civilian residential areas. The Commanding General limited access to all base housing areas, maintaining armed sentries in some areas. The court reasoned that the Commanding General's imposition and enforcement of access restrictions on base housing preserved the housing areas as a nonpublic forum. Next, the court compared each of the civilian activities allowed by the Commanding General to Shopco's proposed activity of delivering the *Shopper* door-to-door. The court distinguished pizza and laundry delivery because base residents solicit these deliveries. Then, the court reasoned that the *Shopper* enjoyed a degree of freedom similar to that of the civilian-run business because the Commanding General restricted both the businesses and the *Shopper* to the same areas on the base. Lastly, the Fourth Circuit addressed whether the Commanding General's past authorization of door-

to-door distributions of nongovernment publications opened the housing areas as public fora for Shopco's speech. Relying on the holding in *Perry*, the Fourth Circuit held that the Commanding General's past actions did not prevent him from closing the forum to the public. In *Perry*, the Supreme Court rejected a similar claim by an ousted teachers' union asserting that the union's use of school mailboxes before losing a representation election converted the mailboxes into a public forum.

After determining that the base housing areas were and continued to be a nonpublic form, the Fourth Circuit applied the reasonableness standard found in *Perry* for restrictions on speech in nonpublic forums. The Fourth Circuit explained that to pass a First Amendment standard of reasonableness, the restriction must be "viewpoint neutral" and "reasonable in light of the purpose served." The Fourth Circuit held that the Commanding General's circulation restriction met both these requirements. The Fourth Circuit reasoned that the Base Order was viewpoint neutral because the order restricted all nongovernment publications except the CEN, and because of the absence of evidence that the Commanding General agreed or disagreed with material in any of the publications involved. The court further reasoned that the special function the CEN served as a means for the Commanding General to communicate with the personnel on the base at large made preferential distribution for *The Globe* reasonable. Additionally, the court noted that the necessary economic incentives involved in the contractual arrangement between the government and *The Globe* made the Commanding General's Base Order reasonable.

Accordingly, the Fourth Circuit in *Shopco* held that Camp Lejeune's housing areas were nonpublic fora and that the Commanding General's Base Order, which gave preferential distribution to the CEN, was unbiased and reasonable in light of its purpose. Therefore, the Fourth Circuit affirmed the district court's order and granted summary judgement to the Commanding General. The decision in *Shopco* is in line with the great weight of decisions holding that military bases are not a public forum, and brings the Fourth Circuit in accord with a recent decision of the Eleventh Circuit.[29]

* * *

Subsection fourteen of the North Carolina Sales and Use Tax Act, N.C. Gen. Stat. section 105-164.13(14) (the Tax Exemption), exempts the sale and purchase of Holy Bibles from North Carolina's state retail sales and use tax. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the United States Supreme Court held unconstitutional two state statutes providing for state tax exemptions.[30] In those decisions, the Supreme Court first concluded that

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29. *See* M.N.C. of Hinesville, Inc. v. United States Dept. of Defense, 791 F.2d 1446 (11th Cir. 1986) (authorizing preferential treatment of CEN's on military bases).

30. *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227 (1987) (holding that Arkansas statute providing for exemption of newspapers and religious, professional, trade, and sports journals from sales tax violated First and Fourteenth Amendments); Texas Monthly, Inc. v. Bullock , 489 U.S. 1, 8 (1989) (holding that Texas statute exempting religious periodicals from state sales and use tax violated Establishment Clause of First Amendment).

non-exempt taxpayers have standing to challenge the constitutionality of state tax exemptions. The Supreme Court based its holding in *Arkansas Writers' Project* on two factors.[31] First, the Supreme Court commented that to deny standing to non-exempt taxpayers would result in a segregation of underinclusive statutes from constitutional challenge.[32] Second, the Supreme Court acknowledged that allowing standing in these actions was consistent with prior adjudication by the Court regarding similarly situated plaintiffs.[33] On the merits of these two cases, the Supreme Court found both state tax exemptions unconstitutional because the exemptions violated the establishment clause of the First Amendment and the free press clause to the United States Constitution.[34] Against this background, the United States Court of Appeals for the Fourth Circuit considered similar issues of standing and constitutionality in an action brought to enjoin the enforcement of the Tax Exemption in *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990).

In *Finlator* the Fourth Circuit first considered whether plaintiffs had standing to bring the suit and then dealt with plaintiffs' claims that the tax exemption statute was unconstitutional. Five of the plaintiffs in *Finlator* were book purchasers who separately bought non-sacred books and literature of the Jewish, Hindu, and Hare Krishna faiths. The other two plaintiffs were booksellers who collected the state's sales tax from the purchasers at the time of sale and subsequently remitted the tax to the Secretary of Revenue of the State of North Carolina (the Secretary).

The plaintiffs sued the Secretary, seeking to enjoin the enforcement of the Tax Exemption which exempts the Holy Bible from state sales and use taxation. The plaintiffs also challenged the constitutionality of the Tax Exemption, claiming that the exemption violated both the establishment clause and the free press clause of the First Amendment of the United States Constitution. The Secretary moved to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(6), contending that the plaintiffs failed to allege any injury and, therefore, lacked standing to pursue the claims of their complaint. The United States District Court for the Eastern District of North Carolina dismissed the suit on the ground that the plaintiffs lacked standing.

The plaintiffs appealed, arguing that the requisite standing as non-exempt parties, and alternatively as taxpayers, entitled the plaintiffs to maintain a proper cause of action. Noting that dismissals are reviewed de novo on appeal, the Fourth Circuit first considered whether plaintiffs had

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31. *Arkansas Writers' Project*, 481 U.S. at 221.

32. *Id.* at 227.

33. *Id.*

34. *See Arkansas Writers' Project*, 481 U.S. at 227 (holding that Arkansas statute providing for exemption of newspapers and religious, professional, trade, and sports journals from sale tax violated First and Fourteenth Amendments); *Texas Monthly*, 489 U.S. at 8 (holding that Texas statute exempting religious periodicals from state sales and use tax violated Establishment Clause of First Amendment).

suffered an actual injury and, therefore, had the requisite standing to maintain their claims against the Secretary. Reviewing the Supreme Court's decisions in *Arkansas Writers' Project* and *Texas Monthly*, the Fourth Circuit interpreted these decisions to hold that non-exempt taxpayers have standing to challenge the constitutionality of state tax exemptions. The Secretary challenged the Fourth Circuit's interpretation, arguing that tax-exempt taxpayers must take certain minimal steps to ensure their standing. According to the Secretary's argument, these steps include contesting the tax prior to payment, refusing to pay the tax, paying the tax under protest, paying the tax, and seeking a refund or taking some other action to permit the state to redress the taxpayer's injuries.

Despite acknowledging that the plaintiffs had taken none of these minimal steps, the Fourth Circuit rejected the Secretary's argument that non-exempt taxpayers must take certain minimal steps to ensure their standing. The Fourth Circuit stated that requiring non-exempt taxpayers to take these steps would not improve the quality of the parties' advocacy, enhance the posture of the case, clarify the legal issues, or contribute in any way to the Fourth Circuit's ability to resolve the questions presented by the parties. The Fourth Circuit noted that, if denied standing upon the Secretary's argument, plaintiffs merely would protest the payment and collection of the state tax and refile the suit.

Additionally, the Fourth Circuit found that the plaintiffs suffered actual injury because the Secretary had imposed additional burdens on the plaintiffs not placed on purchasers of Holy Bibles. Next, the Fourth Circuit concluded that denying standing to the plaintiffs would be a waste of judicial resources because of the blatant unconstitutionality of the Tax Exemption. The Fourth Circuit also held that even though plaintiffs had no explicit legal obligation to pay the sales tax to the State, the language of the statute contained an implicit legal obligation to pay the tax at the time of sale.

After holding that plaintiffs had the requisite standing, the Fourth Circuit next addressed the constitutionality of the Tax Exemption. The plaintiffs contended that the Tax Exemption, which exempted the Holy Bible from state taxation, violated the United States Constitution for two reasons. First, the plaintiffs argued that the Tax Exemption violated the establishment clause of the First Amendment, and second, the plaintiffs contended that the Tax Exemption violated the free press clause of the First Amendment.

In finding that the Tax Exemption violated the establishment clause of the First Amendment, the Fourth Circuit followed the Supreme Court's decision in *Texas Monthly*. The Supreme Court, in *Texas Monthly*, held unconstitutional a state tax exemption which applied to religious literature, but not to other types of literature. The Fourth Circuit reasoned that the tax exemption in the instant case presented a more untenable violation because the Tax Exemption applied to a religious text sacred only to members of Christian faiths.

Finally, the Fourth Circuit found that the Tax Exemption violated the free press clause of the First Amendment. The Fourth Circuit relied on the Supreme Court's decision in *Arkansas Writers' Project*, which held that a

state tax scheme exempting certain classes of magazines, including religious publications, violated the First Amendment guarantee of freedom of the press because of its content-based discrimination. Applying the *Arkansas Writers' Project* decision to the instant case, the Fourth Circuit found that the Tax Exemption differentiated between a Christian sacred text and other publications. The Fourth Circuit held that this distinction forced the State to discriminate on the basis of the content of a book, a basis intolerable under the First Amendment. Consequently, the Fourth Circuit ordered North Carolina to permanently enjoin the enforcement of the Tax Exemption.

The Fourth Circuit decision in *Finlator* brings the circuit into accord with the Supreme Court's decisions in both *Arkansas Writers' Project* and *Texas Monthly* on the separate issues of standing of nonexempt taxpayers and of the constitutionality of state tax exemptions of religious literature. The effect of the Fourth Circuit decision, however, eases the requirement for standing as compared with the cited Supreme Court precedent. Although the Fourth Circuit stated that the Supreme Court in neither *Arkansas Writers' Project* nor *Texas Monthly* specifically required minimal steps to establish standing, the plaintiffs in those cases took such steps to protest the respective tax exemptions.[35] Because the plaintiffs in *Finlator* did not take such steps, the Fourth Circuit recognized such minimal steps as unnecessary for a plaintiff to establish standing to bring a suit. While the response to the Fourth Circuit's holding may not bring a flood of litigation, the Fourth Circuit appears to have opened the doors to litigants who previously may not have had standing to bring similar suits.

* * *

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from depriving any person of his life, liberty, or property without due process of law.[36] In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the United States Supreme Court developed a three factor test to determine what process is due before the government may deprive a citizen of a property right: the effect of the government action on the private interest; the risk of erroneous deprivation of the private interest from the present process; and the effect on the government interest from the additional procedural requirements.[37] In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court held that when a state has created a property interest in public employment, the state must provide some type of hearing prior to taking away the property interest to comply with the due process requirements under the Fourteenth Amendment.[38]

The United States Supreme Court never has addressed the issue of whether a state violates the Due Process Clause when it fails to follow

35. *See Arkansas Writers Project*, 481 U.S. at 225 (explaining that plaintiffs protested by contesting tax exemption initially); *Texas Monthly*, 489 U.S. at 6 (explaining that plaintiffs protested by seeking refund of tax).

36. U.S. CONSTIT. amend XIV, §1.

37. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

38. Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 546 (1985).

state-created procedures that provide more process for the protection of a property right than the Constitution would require. Other courts that have considered the issue have determined that a state's violation of its own laws providing more process than the federal standard does not necessarily violate the Due Process Clause.[39] In *Riccio v. County of Fairfax*, 907 F.2d 1459 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit considered first, whether a county police force complied with federal due process standards when the police force discharged a county police officer and, second, whether the failure of the police force to comply with state-created procedures that exceeded the federal due process requirements constituted a violation of the police officer's Fourteenth Amendment rights.

In *Riccio* the plaintiff, Gary Riccio (Riccio), was a county police officer for Fairfax County, Virginia. A young female acquaintance of Riccio reported that Riccio had placed several obscene phone calls to her. The Fairfax County Police Department (the Department) immediately began an investigation through its Internal Affairs Section. In an interview with Sergeant Steven Hardgrove, Riccio denied making the calls and presented an alibi concerning the dates and times of the calls. The next day, Hardgrove suspended Riccio, with pay, during the investigation and told Riccio to refrain from discussing the investigation with anyone. Later that day Riccio received written notice that the Department was investigating him for violations of Department regulation 201.3 (obedience to laws and regulations). After a series of meetings with Riccio, Hardgrove discovered that Riccio had violated orders by discussing the investigation with other police personnel, and that Riccio had given conflicting stories to Hardgrove.

Hardgrove presented his final report (Hardgrove Report) to the Chief of Police recommending that Riccio be held in violation of regulation 201.3, as well as regulation 210.20 (governing truthfulness) because of Riccio's conflicting statements and regulation 205.1 (governing insubordination) because of Riccio's failure to refrain from discussing the investigation. While containing the Department's evidence against Riccio, the Hardgrove Report omitted any mention of Riccio's alibi defense. After a meeting in which the Department gave Riccio a chance to explain his side of the story to his supervisor and the Commander of the Patrol Bureau, the latter found Riccio to be in violation of the previously mentioned regulations and terminated his employment. Pursuant to section 305.4 of the Department's General Orders, Riccio appealed to a hearing panel. After a lengthy evidentiary hearing in which both the Department and Riccio presented numerous

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39. *See* Brandon v. District of Columbia Board of Parole, 823 F.2d 644, 648-49 (D.C. Cir. 1989) (refusing to determine process required under Fourteenth Amendment by state's definition of substantive property interest and, therefore, rejecting proposition that individuals have constitutional due process right to force states to comply with any procedural rules promulgated by state); Bills v. Henderson, 631 F.2d 1287, 1298 (6th Cir. 1980) (same); Slotnick v. Stavinsky, 560 F.2d 31, 34 (1st Cir. 1977) (same).

witnesses, the hearing panel sustained the charges. Riccio appealed again, this time to a Special Police Hearing Panel, which held a *de novo* investigation without the admission of the Hardgrove Report. Nonetheless, the Special Police Hearing Panel also sustained the charges.

Riccio then brought suit under 42 U.S.C. section 1983 alleging a violation of procedural due process rights under the Fourteenth Amendment and naming the County of Fairfax, the Chief of Police and various Fairfax County officials as defendants. After a hearing on the summary judgment motions of both parties, the United States District Court for the Eastern District of Virginia found for the defendants, reasoning that the Department had provided Riccio with sufficient federal due process and that any violations of state procedural laws did not rise to constitutional significance. Riccio appealed, alleging error in both the district court's finding of sufficient federal due process and its finding that the state due process violations did not rise to constitutional level.

To determine whether Riccio received satisfactory process under the federal standard, the Fourth Circuit relied on the principles the United States Supreme Court developed in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill* the Court held that, in an employee's pretermination hearing, the government must provide the employee oral or written notice of the pending charges, an explanation of the employer's evidence against the employee, and a chance to present the employee's side of the story. Before applying the *Loudermill* factors to the case at bar, the Fourth Circuit noted that the considerable amount of process the Department had provided Riccio prior to its decision to terminate him established a formidable presumption against the Due Process Clause violations that Riccio alleged. The court then addressed Riccio's specific due process allegations, noting that even though the Department could have treated Riccio more impartially, the Department's treatment did not violate the *Loudermill* test. Although Riccio received written notice of only one of the charges against him, the Fourth Circuit observed that Hardgrove effectively put Riccio on notice of all charges against him during a series of meetings between Hardgrove and Riccio. Although the Department did not furnish Riccio with a copy of the Hardgrove report, the Fourth Circuit found that no violation of *Loudermill* resulted from the Department's failure to give Riccio an internal employer document that Riccio did not request. Finally, although the Hardgrove report did not contain Riccio's alibi evidence, the Fourth Circuit determined that Riccio had sufficient opportunity to present his alibis and any other mitigating evidence at the hearing with his supervisor and the Commander of the Patrol Bureau. The Fourth Circuit dismissed other alleged Due Process violations, noting that the state was not required to give a government employee facing termination of employment all the protections afforded to a criminal defendant. The Fourth Circuit, therefore, concluded that the process the Department gave to Riccio satisfied the due process requirements under the Fourteenth Amendment.

Considering Riccio's second ground for appeal, the Fourth Circuit noted that the United States Supreme Court had failed to address the exact issue,

but that other circuits had held that a violation of state rules was not necessarily a violation of the Due Process Clause when those rules provided more process than the federal standard would require. The Fourth Circuit also noted that it had reached an apparent opposite conclusion when construing violations of the same statute at issue in the present case in *Kersey v. Shipley*, 673 F.2d 730 (4th Cir.), *cert. denied*, 459 U.S. 836 (1982). In *Kersey* the Fourth Circuit's dicta stated that Virginia policemen possessed due process rights to the extent of the state's procedural guarantees and that a due process violation occurred only if the employer violated these guarantees. Although the *Kersey* court found no due process violation because the employer had complied with the state's procedures, the *Riccio* court noted that *Kersey* could be read as binding the court to find a due process violation whenever an employer violated the state's procedures.

In rejecting any binding effect on the court from the dicta in *Kersey*, the Fourth Circuit first noted that the *Kersey* holding conflicted with the Supreme Court's principle in *Loudermill*. The *Loudermill* Court determined that, although a state was free to define a substantive property right, the state could not define what procedures were constitutionally adequate to deprive a person of such a right. Recognizing a definite division between substance and procedure, the *Loudermill* Court stated that once a state creates a right to due process, the Constitution determines what process is due. The Fourth Circuit determined that *Kersey*'s extension of constitutional due process to the level defined by state procedures would force the court to defer to the state on the ultimate issue of whether a constitutional violation existed. The Fourth Circuit conceded that *Kersey*'s dicta was typical of the approach rejected emphatically by the Supreme Court in *Loudermill*. The Fourth Circuit also noted that, by holding that a violation of state procedures resulted in a Due Process Clause violation, the court would be taking away the necessary flexibility of the due process doctrine.

The Fourth Circuit then concluded that the Department's violation of the state-created procedures exceeding federal due process requirements did not necessarily compel a finding that the state had violated Riccio's due process rights. The court suggested that a different conclusion might lie where the additional state procedures reduced the risk of an erroneous deprivation of a property interest. The Fourth Circuit, however, examined the facts of the case at bar and determined that the extra procedures only would have served to give Riccio additional notice of matters which he already had effective notice. Thus, the Fourth Circuit concluded that additional state procedures did not reduce the risk of an erroneous deprivation of Riccio's property interest and that the state's violation of these procedures did not violate the Fourteenth Amendment's Due Process Clause. The Fourth Circuit, therefore, rejected the implied holding in *Kersey* and held that a state's violations of state laws providing more process than the Constitution would require are not necessarily violations of the Due Process Clause. Consequently, the Fourth Circuit affirmed the decision of the district court.

By holding that the state was not free to define what procedures were constitutionally adequate to deprive a person of a state-created property

right, *Riccio* brings the Fourth Circuit in line with the United States Supreme Court's holding in *Loudermill*.[40] The Fourth Circuit's holding in *Riccio* is also in accord with several other circuits that have concluded that a state's failure to adhere to state-created procedural rules which exceed federal due process requirements does not violate the United States Constitution.[41]

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Section 1962 of the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), 18 U.S.C. section 1962 (1988), prohibits the operation of, or participation in, an enterprise engaged in a pattern of racketeering. This section encompasses direct or indirect participation in a pattern of racketeering as well as conspiracies to engage in a pattern of racketeering activities. Section 1961 of RICO, 18 U.S.C. section 1961 (1988), defines the predicate acts that may constitute a pattern of racketeering. Transportation of obscene material in interstate commerce for sale and distribution is a predicate act for the purposes of section 1961.[42] In addition to the criminal penalties of imprisonment and fines for a criminal conviction under RICO section 1962, section 1963 provides for the forfeiture of any interest that the violator acquired or maintained through racketeering activity and any interest that affords the violator the opportunity to engage in racketeering activity. *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), represents the first application of the RICO forfeiture provision, section 1963, in which obscenity violations were the predicate acts that constituted the pattern of racketeering activity.

In *Pryba* the United States Court of Appeals for the Fourth Circuit considered whether RICO's forfeiture provision violated the First Amendment when the predicate offenses are obscenity violations or whether the forfeiture provision constituted cruel and unusual punishment in violation of the Eighth Amendment. The Fourth Circuit also reviewed the district court's use of prior state court obscenity convictions to prove predicate acts of racketeering, and the district court's exclusion of surveys concerning the

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40. *See Loudermill*, 470 U.S. at 541 (holding that state-created substantive rights were separate from constitutionally adequate procedures).

41. *See Brandon*, 823 F.2d at 648-49 (rejecting proposal that individuals have constitutional due process right to force states to comply with state-created procedural rules that provide more process than Due Process Clause would require); Bills, 631 F.2d at 1298 (same); *Slotnick*, 560 F.2d at 34 (same). *See also* Woodard v. Los Fresnos Indep. School District, 732 F.2d 1243, 1245 (5th Cir. 1984) (holding that Fourteenth Amendment Due Process Clause requires no greater coherence with extra-constitutional protections when they are adopted by state agencies than Due Process Clause requires when such protections are adopted by federal agencies); Morris v. City of Danville, 744 F.2d 1041, 1048 n.9 (4th Cir. 1984) (noting that mere fact state agency violates its own procedures does not, *ipso facto*, mean that agency has violated federal due process requirements); South Central Terminal Co. v. United States Dept. of Energy, 728 F. Supp. 1083 (D. Del. 1990) (holding that state agency violation of own procedures does not automatically rise to level of constitutional violation); Tietjen v. United States Veteran's Admin., 692 F. Supp. 1106 (D. Ariz. 1988), *aff'd*, 884 F.2d 514 (9th Cir. 1989) (holding that agency's mere violation of own regulation does not rise to level of violation of Due Process Clause).

42. 18 U.S.C. § 1465 (1988).

community's opinion of sexually explicit materials. Additionally, the Fourth Circuit considered the defendants' challenges to several of the district court's jury instructions.

The defendants in *Pryba* included Educational Books, Inc., Dennis and Barbara Pryba, the owners of B & D Corporation and Educational Books, Inc., and Jennifer Williams, the president of B & D Corporation. Educational Books, Inc. and B & D Corporation operated nine video rental stores and three bookstores in Northern Virginia. The government acquired indictments against the defendants following an obscenity investigation during which investigators opened memberships with the video retail centers and rented or purchased sexually explicit video tapes and magazines. To prove the predicate offenses for the RICO violations, the government introduced the tapes and magazines alleged to be obscene. At the first phase of the defendants' bifurcated trial on the RICO violation action based on obscenity violations, the jury found six magazines and four video tapes that the investigators rented or purchased to be obscene. Accordingly, the United States District Court for the Eastern District of Virginia imposed fines upon the defendants and sentenced the individual defendants to varying terms of imprisonment, which the trial court suspended in favor of probation.

During the second phase of the trial, the jury heard an additional week of testimony on the issue of forfeiture under RICO section 1963(a)(1). Ultimately, the jury convicted the individuals and Educational Books, Inc. for participating in a pattern of racketeering activity in violation of RICO section 1962(a). The jury further found that the Pryba's and Educational Books Inc.'s president, Williams, were employed by a criminal enterprise engaged in racketeering activities in violation of RICO section 1962(c). Additionally, the jury convicted all defendants for conspiring to participate in a pattern of racketeering activity in violation of RICO section 1962(d). As predicate acts for the RICO convictions, the jury relied upon the individual defendant's and Educational Books, Inc.'s earlier federal obscenity convictions in the first phase of the trial and upon Educational Book, Inc.'s prior state court obscenity conviction. Finding that the defendants had certain interests in property which afforded them a source of influence over the enterprise, the jury directed the defendants to forfeit all shares of stock in the corporations, along with corporate assets, certain real estate, and motor vehicles pursuant to section 1963, RICO's forfeiture provision. To enforce the jury's verdict, the government padlocked the doors of the three bookstores and nine video rental shops.

On the defendants' pretrial motion to dismiss the RICO counts in the indictment, the district court first addressed the defendants' constitutional challenges to the potential application of RICO's criminal forfeiture provision to the alleged obscenity violations. In considering the defendants' constitutional challenges, the district court initially emphasized that *Roth v. United States*, 354 U.S. 476 (1957), made unmistakably clear that obscenity was not constitutionally protected speech. According to the district court, while *Miller v. California*, 413 U.S. 15 (1973), modified the *Roth* test for discerning obscenity, the Supreme Court remained committed to the task

of drawing a line between obscenity and constitutionally protected speech.

The district court specifically rejected the defendants' claim that the use of RICO in the obscenity context chills protected speech due to the breadth and vagueness of the underlying obscenity offense. Again citing *Roth*, the district court found that the predicate act of obscenity for a RICO violation gave adequate warning of the conduct proscribed, allowing courts to fairly administer the law. Responding to the defendants' assertion that RICO's forfeiture provision acts as an impermissible prior restraint, the district court characterized the forfeiture provision as subsequent punishment and noted that any resultant chilling effect was a legitimate attempt to deter proscribed, unprotected speech. Moreover, the district court concluded that the forfeiture provision did not impermissibly restrain further dissemination of speech, but rather simply requires those engaged in racketeering acts to relinquish illicit profits. Addressing the defendants' claim that RICO's forfeiture provision constituted excessive fines or cruel and unusual punishment in violation of the Eight Amendment, the district court noted that while defendants' claim may require a proportionality analysis, such analysis would have to wait until the matter was tried. Accordingly, the district court denied defendants' motion to dismiss.

On appeal to the Fourth Circuit following the jury's convictions on the obscenity and RICO offenses, the defendants again claimed that the RICO statute and its forfeiture provisions violated the First Amendment when the predicate offenses were obscenity violations. The defendants first argued that the post-trial forfeiture of property under RICO constituted a prior restraint of the defendants' protected right of expression under the First Amendment. The defendants asserted that the RICO forfeiture provision allows the government to restrain expressive material without first demonstrating its obscenity as required under *Freedman v. Maryland*, 380 U.S. 51 (1965). The Fourth Circuit distinguished *Freedman* as a censorship case and concluded that *Freedman* was irrelevant on the issue of criminal sanctions. The court further concluded that the evidence established a nexus between the defendants' profits from the racketeering activities and the protected materials that the court ordered the defendants to forfeit. According to the court, the First Amendment would not allow the defendants to protect profits from racketeering activities by investing such profits in newspapers, magazines, radio, and television stations. The defendants next argued that forfeiture of nonobscene material has a chilling effect on the defendants' right of expression. In response to this claim, the Fourth Circuit reasoned that a prison term and a large fine also would have a chilling effect on the right of expression, but such penalties are constitutional. Accordingly, the Fourth Circuit concluded that the subsequent punishment that RICO's forfeiture provision imposed was constitutional.

The defendants' also argued that RICO's forfeiture provision violated the Eighth Amendment's prohibition of cruel and unusual punishment or excessive fines. The Fourth Circuit declined to engage in a proportionality review of the relation of the forfeiture to the crime because the Fourth Circuit found that the forfeiture provision was not sufficiently severe to trigger proportionality review.

In addition to defendant's First and Eighth Amendment arguments, the defendants contended that the district court improperly admitted into evidence Educational Books, Inc.'s fifteen prior state court obscenity convictions as part of the pattern of racketeering proof. The defendants argued that the government must relitigate the acts underlying the state conviction in the federal RICO action. Finding this claim to be without merit, the Fourth Circuit cited *Myers v. United States*, 49 F.2d 230 (4th Cir. 1931), which held that a defendant's guilty plea in state court to possession of liquor was admissible in a federal court prosecution for the sale of liquor.

The defendants further challenged the district court's exclusion of a public opinion survey that a Duke University professor conducted. Through the survey, the defendants sought to demonstrate the community's attitude and standards regarding sexually explicit materials. Noting the difficulty of describing the visual impact of the magazines and video tapes, the Fourth Circuit approved the district court's exclusion of the survey as well as the district court's reasoning. In excluding the survey, the district court had reasoned that the communicative impact of a video may be patently offensive while a verbal description of the video may fail to adequately convey to the survey interviewee the true nature of the material in question. Furthermore, relying upon *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), the Fourth Circuit upheld the district court's determination that the jury did not need assistance from experts on the issue of obscenity once the allegedly obscene material was in evidence.

The defendants in *Pryba* also challenged the district court's jury instructions both in regard to the test for obscenity and to the RICO conspiracy count. While the defendants asserted that the test for obscenity is a community's toleration for sexually oriented material, i.e., what a community will put up with, permit or allow, the Fourth Circuit relied upon the Supreme Court's obscenity test as articulated in *Miller v. California*, 413 U.S. 15 (1973). Finding no error in the district court's instruction on obscenity, the Fourth Circuit cited *Miller* for the proposition that the jury must decide the issue of obscenity as would the average person applying contemporary community standards as a whole, not upon the standards of the most prudish or most tolerant.

The Fourth Circuit also rejected the defendants' claim that to prove a violation of the RICO conspiracy section, section 1962(d), the government must prove that a defendant personally agreed to commit two or more specified predicate crimes. Instead, the Fourth Circuit approved the district court's instruction that the government must prove either that the defendant personally agreed to commit or assist two or more predicate crimes or that each defendant agreed that another coconspirator would commit two or more acts of racketeering. According to the Fourth Circuit, to adopt defendants' position would add an element to RICO conspiracy that Congress did not direct.[43]

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43. *But see* United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.) (finding conspiracy