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Vi. Constitutional Law

In its decisions concerning discrimination by public officials, the Fourth Circuit has demonstrated the relevance of demographic data. The *Morton* case indicated that demographic changes will be considered as a factor, perhaps a decisive one, in determining whether a school board must justify its conduct involving the racial makeup of its schools' faculties. However, in *Wheeler*, the court decided that when the makeup of the student bodies of schools was involved, demographic changes would apply in the court's decisions to construct remedies only when the school system had earlier attained a completely desegregated state. Otherwise, the demographic changes would be considered of secondary importance to state-imposed segregation. Finally, the court in *Vollin* noted that it would presume that elected officials represented and were responsive to all voters within an at-large system[155] absent evidence to the contrary, such as racially discriminatory conduct or statements reflecting bigotry. Without solid proof that a group's voting power has been diluted by actions of state officials, the court will not entertain suits requesting changes in election systems.

VI. CONSTITUTIONAL LAW

A. Free Speech: Telephone Misuse and Disorderly Conduct Statutes

Any statute which proscribes certain conduct must be free of vagueness and uncertainty, both in meaning and in application.[1] Moreover, even if such a statute has clearly defined limits, those limits may not be so broad as to restrict constitutionally protected freedoms.[2] In addition, a statute which regulates the exercise of unprotected expression for the purpose of maintaining public order must not be susceptible of interpretation which may inhibit the exercise of protected expression.[3] The Fourth Circuit recently reaffirmed

791 (4th Cir.), *cert. denied*, 44 U.S.L.W. 3264 (U.S. November 4, 1975) (No. 75-5304).

[155] The demographic consideration of the racial makeup of a system's population would not by itself be sufficient to rebut this presumption.

[1] Baggett v. Bullitt, 377 U.S. 360, 367 (1964). *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972).

[2] *See, e.g.* Grayned v. City of Rockford, 408 U.S. 104 (1972).

[3] *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965).

these principles in *Squire v. Pace,*[4] holding Virginia's disorderly conduct statute unconstitutional.[5] The court, in a per curiam opinion, affirmed the decision of the district court[6] which had disallowed a conviction under the statute due to the statute's vagueness and overbreadth.[7] The principles of overbreadth were also applied by the Fourth Circuit in *Walker v. Dillard*[8] which held Virginia's telephone misuse statute[9] facially overbroad and, hence, unconstitutional. Both *Squire* and *Walker* demonstrate that although offensive speech is a legitimate concern for state control, careful delimiting of offensive and unprotected speech is required to prevent inhibition of the exercise of protected speech.[10]

Vagueness and overbreadth are two distinct doctrines despite some degree of conceptual interrelatedness. Vagueness considers due process deficiencies under the fourteenth amendment, and seeks to correct those defects in statutes which fail "to give fair notice and warning as to what conduct is proscribed."[11] To avoid a finding of

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[4] 516 F.2d 240 (4th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3202 (U.S. Oct. 6, 1975).

[5] The statute provides in part:

> If any person behaves in a riotous or disorderly manner in any street, highway, public building, or any other public place . . . or causes any unnecessary disturbance in or on any public conveyance, by running through it, climbing through windows or upon the seats, failing to move to another seat when lawfully requested to so move by the operator, or otherwise annoying passengers or employees therein, he shall be guilty of a misdemeanor.

VA. CODE ANN. § 18.1-253.2 (Supp. 1975).

[6] Squire v. Pace, 380 F. Supp. 269 (W.D. Va. 1974).

[7] The Fourth Circuit's per curiam opinion summarized the district court's conclusions concerning the statute thusly:

> (1) it did not inform a defendant what conduct is proscribed; (2) it allowed policemen, prosecutors, and courts to impose their own personal predilections in determining what should be permissible behavior; and (3) it could inhibit the exercise of first amendment rights because it has been construed to embrace speech, which, unaccompanied by acts, need do no more than outrage the sense of public decency.

516 F.2d at 241.

[8] 523 F.2d 3 (4th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3229 (U.S. Oct. 14, 1975).

[9] VA. CODE ANN. § 18.1-238 (Supp. 1975) provided:

> If any person shall curse or abuse anyone, or use vulgar, profane, threatening or indecent language over any telephone in this State, he shall be guilty of a misdemeanor . . ..

[10] *See* NAACP v. Button, 371 U.S. 415 (1963).

[11] Squire v. Pace, 380 F. Supp. 269, 275 (W.D. Va. 1974). A statute which does not clearly define its prohibitions is void for vagueness since it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), *quoting* United

vagueness, a statute must prescribe a specific legislative standard without allowing or being susceptible to alternative and arbitrary interpretations and enforcement standards.[12] When particular rights protected by the first amendment are to be regulated, statutes must be sufficiently specific to prevent infringement or inhibition of such rights through deprivation of due process.[13] Overbreadth, in contrast, specifically encompasses the protection of first amendment rights; the doctrine prohibits statutory provisions which interfere with the use of such safeguarded rights.[14] A statute may not deter the exercise of first amendment rights by creating fear of punishment in an individual for exercising those rights.[15]

In *Squire,* the plaintiff challenged the constitutionality of Virginia's disorderly conduct statute. Squire was convicted for his activities during his placard demonstration at a University of Virginia ROTC review. The Virginia Supreme Court upheld Squire's conviction[16] without considering the constitutional validity of the statute either on its face or as construed by courts within the state.[17] Upon considering Squire's petition for writ of habeas corpus, the district court concluded that the statute could not satisfy the constitutional dictates against vagueness and overbreadth.[18]

The district court determined that Virginia's disorderly conduct statute was unconstitutionally vague and overbroad since the statute's terms provided no guidance as to the limits of proscribed behavior.[19] According to the district court, the state court had not narrowly

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States v. Harriss, 347 U.S. 612, 617 (1954). *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[12] *E.g.,* Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[13] *E.g.,* Grayned v. City of Rockford, 408 U.S. 104 (1972); Baggett v. Bullitt, 377 U.S. 360 (1964).

[14] *See* cases cited note 13 *supra.*

[15] *E.g.,* Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

[16] Squire v. Commonwealth, 214 Va. 260, 199 S.E. 2d 534 (1973), *cert. denied,* 417 U.S. 909 (1974).

[17] The statute had earlier been construed by the Virginia Supreme Court to include speech as prohibited conduct when it was "of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts." Hackney v. Commonwealth, 186 Va. 888, 890, 45 S.E.2d 241, 242 (1947), *quoting* 17 AM. JUR. 99. *See* 516 F.2d at 241.

[18] 380 F. Supp. at 280.

[19] The district court explained:

> The operative words—"behaves in a riotous or disorderly manner"—provide practically no guidance to the individual who might

construed the statute to prevent its unconstitutional application;[20] Squire could not have known which of his actions would violate the statute. Moreover, the court determined that the statute did not prevent the police, judge, or jury from making their own determinations as to what constituted disorderly or riotous behavior. Most importantly, the court found the statute to have "strong potential" for inhibiting the exercise of first amendment rights[21] by allowing public officials to prevent free expression according to what may be presently unpopular, challenging, or unsettling speech.[22]

> violate the statute or to police, prosecutors, judges or juries who are given the authority to enforce it.

380 F. Supp. at 276.

[20] *Id.* at 276-77. It had been within the power of the state court narrowly to construe the statute for practical application within legal limits. A statute's constitutionality is often dependent on appropriately limited application by state courts, and "[o]nly the [state] courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe state legislation.' United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971)." Gooding v. Wilson, 405 U.S. 518, 520 (1972).

Two Virginia cases which dealt with the statute applied only "usual definitions" of disorderly conduct which did not supply a limiting construction of the statute. In *Hackney v. Commonwealth,* it was

> conceded that the language used constitutes disorderly conduct within the usual definition of that term, which is "all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts."

186 Va. 888, 890, 45 S.E.2d 241, 242 (1947) (citation omitted).

Taylor v. Commonwealth, 187 Va. 214, 46 S.E.2d 384 (1948), concerned the failure of a black woman to move to another bus seat when so requested by the bus driver. Her conviction under the disorderly conduct statute was reversed since "[s]he was guilty of no definite misbehavior or misconduct in the sense that she was disorderly or turbulent." *Id.* at 221, 46 S.E.2d 384, 387. The court inferred that the statute could be violated by words having "vicious or injurious tendency, offensive to good morals or public decency." *Id.*

The district court in *Squire* stated:

> The judicial gloss placed on these words has simply been that of asking whether a given set of facts amounts to a corruption of public morals or an outrage to public decency. Rather than limiting the open-ended scope of the statute, such an approach magnifies its infirmities.

380 F. Supp. at 277.

[21] 380 F. Supp. at 278.

[22] *Id.* at 279. *See* Terminello v. Chicago, 337 U.S. 1 (1949).

The disorderly conduct statute in question has been amended to provide in part:

> Any person who shall behave in a riotous or disorderly manner or cause any unnecessary disturbance in any street, highway, public building, public place, or while in or on a public conveyance, and any person who shall willfully interrupt or unnecessarily disturb any meeting of the governing body of any political subdivision of this State or

Although the right of free expression must be jealously guarded against encroachment, a statute which regulates the exercise of free speech in a public place is a necessary tool for the states to maintain public order.[23] One manner in which a state fulfills its responsibility to maintain public order is exemplified by statutes intended to protect the public from harrassing or obscene speech which is not constitutionally protected.[24] A statute which prohibits unprotected speech is constitutional, however, only if its application does not inhibit protected speech;[25] the potentiality of such application will be established by state court construction of the statute.[26]

The Fourth Circuit applied these principles of overbreadth in *Walker v. Dillard*.[27] In *Walker*, the plaintiff had been convicted for violating Virginia's telephone misuse statute.[28] The district court's dismissal of Walker's petition for habeas corpus[29] was reversed by the Fourth Circuit. The Fourth Circuit determined that Walker's challenge was appropriate regardless of whether her actual speech might have been constitutionally prohibited under a more narrowly drawn statute.[30] The court concluded that the statute unconstitutionally

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> a division or agency thereof, or of any school, literary society or place of religious worship, or who, being intoxicated, shall disturb such a meeting, whether willfully or not, shall be guilty of a Class I misdemeanor.

VA. CODE ANN. § 18.2-415 (Repl. Vol. 1975).

[23] *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). State interests in maintaining order must be carefully balanced against protection of first amendment rights of expression. *See* Cox v. Louisiana, 379 U.S. 536 (1965).

[24] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Kois v. Wisconsin, 408 U.S. 229 (1972). It is well established that obscene material is not protected by the first amendment, Roth v. United States, 354 U.S. 476 (1957), but "[s]tate statutes designed to regulate obscene materials must be carefully limited." Miller v. California, 413 U.S. 15, 23-24 (1973). *See, e.g.*, Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968).

[25] *See* Walker v. Dillard, 523 F.2d 3 (4th Cir. 1975).

[26] Gooding v. Wilson, 405 U.S. 518 (1972).

[27] 523 F.2d 3 (4th Cir. 1975).

[28] *See* note 9 *supra*.

[29] Walker v. Dillard, 363 F. Supp. 921 (W.D. Va. 1973).

[30] The court stated that:

> the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

523 F.2d at 4, *quoting* Lewis v. City of New Orleans, 415 U.S. 130, 133-34 (1974); Gooding v. Wilson, 405 U.S. 518, 521 (1972). *See also*, Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

prohibited all curses, abusive comment, vulgarity, profanity, and any intemperate, indignant, or indiscreet utterance over the telephone without regard to specific circumstances or parties.[31]

The Fourth Circuit held that the statute was facially overbroad and its potential application had not been restricted by state court construction. Under traditional constitutional doctrine, only narrowly drawn statutes may prohibit unprotected classes of speech such as obscene, threatening, and harrassing telephone calls.[32] A statute overbroad on its face may, however, be preserved through a narrowing construction and application by state courts.[33] The Fourth Circuit rejected the district court's finding that Virginia's interest in eliminating telephone obscenity served by itself to narrow the scope of the statute within constitutional limits.[34] The circuit court concluded that the lower court erroneously construed the statute as proscribing only threatening and obscene phone calls,[35] since, in the absence of a restrictive state court construction, the entire statute was susceptible of overbroad interpretation and application.[36]

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[31] 523 F.2d at 5.

[32] *See* Gooding v. Wilson, 405 U.S. 518 (1972). The Fourth Circuit presumed that obscene telephone calls were unprotected speech. The basis for this presumption is well-established:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (footnotes omitted).

[33] *E.g.*, Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972). Federal courts "lack jurisdiction authoritatively to construe state legislation." United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971). *See e.g.*, General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944), which affirms the premise that state court application of state laws is controlling.

[34] 523 F.2d at 6. The district court had further determined that the statute's language was sufficiently explicit to be understood clearly and meaningfully.

> Impossible standards of specificity are not required. The test is whether the language conveys sufficiently definite warnings as to the proscribed conduct when measured by common understandings and practices.

363 F. Supp. at 927 (citations omitted). The Fourth Circuit did not consider a vagueness challenge against the statute in the absence of a record of lower state court proceedings.

[35] 523 F.2d at 6. A federal court cannot authoritatively anticipate the manner in which a state court may define or otherwise narrow a statute's application.

[36] *Id.* at 5. Most operative words of the statute were "susceptible of an overbroad construction." *Id.* "Threat" must be narrowly defined to prevent infringement of constitutionally protected speech. Watts v. United States, 394 U.S. 705 (1969). Proscrip-

Certain classes of offensive expression, whether written or oral, are not protected by the first amendment. These narrowly defined classes include obscene language and language which tends to provoke an immediate breach of peace.[37] The Fourth Circuit decisions in *Squire v. Pace*[38] and *Walker v. Dillard*[39] demonstrate the need for careful drafting of statutes regulating unprotected classes of speech. In *Squire,* the challenged disorderly conduct statute failed to present a specific standard which definitively categorized unprotected expression. Consequently, the statute was rendered constitutionally inadequate because of its potential applicability to all speech deemed "disturbing." Likewise, in *Walker,* the Fourth Circuit reaffirmed the principle that potential application of an overbroad statute's imprecise standard of conduct to constitutionally permitted speech renders that statute unconstitutional. A statute which regulates expression must avoid both overbreadth and vagueness by narrowly and explicitly classifying proscribed conduct.

B. Patronage Dismissal: First and Fourteenth Amendments Not Violated by Employee Dismissal from Non-Policy-Making Position

Historically, public employees have been subject to arbitrary patronage dismissals. However, legislation over the past century has provided increasing protection to public civil service employees from unwarranted patronage discharges.[1] Public employees not protected by civil service legislation are largely unable, however, to obtain judicial relief from patronage dismissals.[2] Nevertheless, important constitutional issues have been presented by patronage employees who

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tion of "abusive language" is unconstitutional where its meaning is not refined through state court interpretation to mean only, "fighting words." Gooding v. Wilson, 405 U.S. 518 (1972). What is "vulgar," "profane," or "indecent" is not necessarily obscene and is protected speech unless narrowly construed to prohibit obscenity alone. Cohen v. California, 403 U.S. 15 (1971). *See* Roth v. United States, 354 U.S. 476 (1957).

[37] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[38] 516 F.2d 240 (4th Cir. 1975).

[39] 523 F.2d 3.

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[1] *See* Arnett v. Kennedy, 416 U.S. 134, 148-150 (1974).

[2] Generally, the legislatures are considered the proper source of relief from patronage discharges. *See* Alomar v. Dwyer, 447 F.2d 482, 484 (2d Cir.), *cert. denied,* 404 U.S. 1020 (1972).

have challenged their removal from public employment. Such discharges have been challenged as violating both the first amendment's protection of political association and the fourteenth amendment's guarantee of procedural due process.

The Fourth Circuit recently confronted a challenge of a patronage dismissal in *Nunnery v. Barber*.[3] In that case, Nunnery challenged her release from a position as a West Virginia state liquor store manager. Nunnery complained that she was forced to vacate her position in order to allow the appointment of a more active political party member.[4] Plaintiff's position was not included within civil service coverage.[5] The Fourth Circuit affirmed the district court's finding[6] that relieving Nunnery of her employment responsibilities was not a deprivation of fourteenth amendment due process. Moreover, the circuit court found no violation of the plaintiff's first amendment rights.[7]

The Fourth Circuit reaffirmed the traditional view[8] that a patronage employee dismissal due to political affiliation is not constitutionally prohibited. Under conventional analysis, state interest in government is deemed sufficiently compelling—more compelling than employee interests in constitutional protection—that employee protection from political discharges is provided solely through civil service statutes. State legislation is the means by which any spoils system injustices are to be corrected.[9] The Fourth Circuit explained that judicial review of patronage dismissal challenges is not merited[10] unless summary removal violates due process.[11]

In view of a recent Seventh Circuit decision,[12] the Fourth Circuit's

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[3] 503 F.2d 1349 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975).

[4] 365 F. Supp. 691, 692 (S.D.W.Va. 1973).

[5] W. VA. CODE ANN. § 60-2-12 (1966). *See also* W. VA. CODE ANN. § 29-6-2 (1971 Repl. Vol.).

[6] 365 F. Supp. 691 (S.D.W.Va. 1973).

[7] 503 F.2d 1349, 1358-59 (4th Cir. 1974).

[8] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir.), *aff'd*, 341 U.S. 918 (1950).

[9] Alomar v. Dwyer, 447 F.2d 482, 483-84 (2d Cir. 1971). The *Alomar* opinion stated that "[i]f and when additional exempt positions are to be subject to civil service protection is a matter for action by the appropriate municipal and state authorities and not by a federal court." *Id.* at 484. The *Alomar* court rejected the plaintiff's complaint that she was discharged from her municipal position due to her political affiliation and was therefore deprived of her protected first amendment freedom of association. *Id.*

[10] *See* Nunnery v. Barber, 503 F.2d 1349, 1351 (4th Cir. 1974).

[11] *Id.* The Fourth Circuit cited Alomar v. Dwyer, 447 F.2d 482, 483 (2d Cir. 1971). *Id.*

[12] Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert.*

conclusion that the plaintiff's first amendment rights were not violated was especially significant. The Fourth Circuit examined the Seventh Circuit's proposition that judicial relief should be available "where the dismissal is based solely upon a reason expressly proscribed by the First Amendment."[13] The Seventh Circuit asserted in *Illinois State Employees Union v. Lewis*[14] that even though a "public servant has no constitutional right to public employment . . . [he] nevertheless may not be dismissed for exercising his First Amendment rights."[15] In a significant departure from traditional analysis of patronage discharges, the court held that, in certain situations, the first amendment prohibits dismissals on the basis of political affiliation. The Seventh Circuit found[16] that inhibition or interference with the constitutional rights of certain patronage employees is impermissible,[17] even where there may be no right to public employment.[18]

The Fourth Circuit interpreted *Lewis* as holding that the class of constitutionally protected patronage employees includes only those in non-policy-making positions performing non-discretionary, routine

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denied, 410 U.S. 928, 943 (1973).

[13] *Id.* at 579.

[14] 473 F.2d 561 (7th Cir. 1972). Plaintiffs in *Lewis* claimed that they were discharged from the Illinois Secretary of State's Office for reasons of political affiliation, such discharges violating their rights under the first and fourteenth amendments. Plaintiffs had been employed in routine building functions such as maintenance workers and janitors.

[15] 473 F.2d at 571, *citing* Perry v. Sindermann, 408 U.S. 593 (1972).

[16] Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972). The Seventh Circuit relied on the Supreme Court decision in Perry v. Sindermann, 408 U.S. 593 (1972). *See also* Board of Regents v. Roth, 408 U.S. 564 (1972). *Perry* and *Roth* developed important principles concerning deprivation of procedural due process from non-tenured public employees. *See* text and accompanying notes 39-49 *infra*. The cases, however, are analogously important when considering patronage dismissals resulting from failure to meet any conditions imposed on such employment.

[17] 473 F.2d at 571, *citing* Perry v. Sindermann, 408 U.S. 593 (1972). *Perry* dealt with a claim of right to employment by a teacher in a non-tenure system. The Supreme Court found that if non-renewal of a single-year contract was based on the teacher's exercise of his right of free speech, due process had been violated. In addition, if that teacher had "expectancy" or entitlement of employment, he was also entitled to procedural due process.

Perry held that a non-tenure system does not in itself defeat a claim under the first and fourteenth amendments. A benefit such as public employment cannot be denied through a discharge in a manner infringing on constitutionally protected rights. Thus, lack of tenure is immaterial to a claim that a benefit was denied as a result of the exercise of free speech.

[18] Although an employee has no right to a governmental benefit, the government may not infringe on his constitutional rights once a benefit is actually conferred. *See* Perry v. Sindermann, 408 U.S. 593 (1972); note 17 *supra*.

functions.[19] The court acknowledged that although legislatures are primarily responsible for eliminating patronage injustices and establishing civil service laws, courts are not prohibited from finding that patronage employment removals are unconstitutional. The *Nunnery* court found, however, that not all public employees can be protected by judicial review of constitutional challenges.[20] As a result, the Fourth Circuit resolved that constitutional protection for political activities of public employees depends on the classification of the employee and the nature of his assigned duties.[21]

In *Nunnery,* policy-making employees were differentiated from non-policy-making employees.[22] The court concluded that employees in policy-making positions or in policy implementation functions may be excluded from protection,[23] and that West Virginia had made a legislative determination that liquor store managerships were appropriately patronage positions.[24] In the Fourth Circuit's view, such an employee classification is subject to judicial scrutiny only if it is arbitrary or irrational.[25] The court found that the assignment of Nunnery's position as a policy-oriented function was neither arbitrary nor irrational since it conceivably resulted from the belief that "[l]iquor control is always a sensitive issue in government and requires strict supervision and control."[26]

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[19] 503 F.2d at 1354. The Seventh Circuit later characterized *Lewis* as having generally disapproved on first amendment grounds patronage dismissals of *non-policy making* public employees, while affirming the right of a public executive to use political philosophy or affiliation as a basis for discharging *policy making* officials.

Indiana State Employees Ass'n, Inc. v. Negley, 501 F.2d 1239, 1239 (7th Cir. 1974) (emphasis in original).

[20] *See* 503 F.2d at 1352-53.

[21] 503 F.2d at 1353.

[22] Such latter functions include positions in which employees are "maintenance workers, elevator operators, janitors and comparable employees." 503 F.2d at 1353-54.

[23] *Id. See* Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975), which found that justification for dismissal of a policy-making employee "turns on the specific duties and responsibilities of the particular employee, not his title." *Id.* at 1136.

[24] 503 F.2d at 1357. *See* W. VA. CODE ANN. § 60-2-12 (1966). *See also* W. VA. CODE ANN. § 29-6-2 (Repl. Vol. 1971).

[25] 503 F.2d at 1356-57.

[26] *Id.* at 1357. Such an exercise in policy position classification was anticipated by Judge Campbell in his concurring opinion in *Lewis,* in which he expressed apprehension over judicially classifying employees "engaged directly or indirectly in the formulation or implementation of policies." Judge Campbell stated:

> It is simple enough to say that janitors, clerk-typists and elevator operators are "non-policy making" employees, but how far up in the bureaucratic echelon can the distinction be judicially drawn?

Patronage employment conditioned on restriction of first amendment rights is unconstitutional unless justified by strong state interests,[27] and the state bears the burden of demonstrating its interest in regulating the speech of its employees.[28] The reasonableness of such regulation necessitates a balancing of the state's needs and requirements with the employee's rights and responsibilities.[29] Government administrators may require a method of personnel selection, such as patronage appointment, designed to assure consistency of views and performance objectives. In this regard, political affiliation may be relevant to compatibility.[30] Furthermore, state interest in a patronage system may include a reasonable desire for political loyalty and responsibility of employees.[31] Nevertheless, although a state may have important interests in monitoring the political affiliation of public

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473 F.2d at 578 (Campbell, J., concurring).

See Indiana State Employees Ass'n, Inc. v. Negley, 365 F. Supp. 225 (S.D. Ind. 1973), *aff'd*, 501 F.2d 1239 (7th Cir. 1974). In that case, plaintiffs challenged their political dismissal from the Indiana Department of Public Instruction as violating their freedom of association. The Seventh Circuit upheld the district court's determination that plaintiffs "could have been classified either as policy-making employees or as employees exercising the public functions of the Department." 365 F. Supp. at 232.

The district court in *Negley*, however, found that *Lewis* should be confined to its facts. *Id.* The court emphasized that patronage dismissals are not constitutionally prohibited and that the subject of political patronage employment is a matter for executive and legislative consideration rather than judicial restructuring. *Id.* at 233-34.

[27] *See* Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967). *Cf.* NAACP v. Alabama, 357 U.S. 449 (1958).

Some courts have determined that public employment may be subject to restrictive conditions on the basis that it is a privilege and not a right. *See* Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

[28] Pickering v. Board of Educ., 391 U.S. 563 (1968). In *Nunnery*, Judge Butzner stated in his dissent that "[t]his interest is confined, however, to the reasonable needs of promoting the efficiency and integrity of public service." 503 F.2d at 1361.

Restrictions of first amendment rights are justified only when either specifically delimited or in satisfaction of a public need. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960). Employees as well as state officials must be responsive to public need, and patronage appointments may provide employee responsiveness in this context.

[29] *See* Pickering v. Board of Educ., 391 U.S. 563 (1968). *See also* Judge Butzner's dissent in *Nunnery* which expressed doubt over the plaintiff's claim that legitimate state interests would not be advanced by required employee participation in partisan political activities. 503 F.2d at 1360.

[30] *See* Indiana State Employee Ass'n, Inc. v. Negley, 365 F. Supp. 225 (S.D. Ind. 1973), *aff'd*, 501 F.2d 1239 (7th Cir. 1974).

[31] *But see* Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), which found that political loyalty is immaterial to the productivity of a non-policy-making employee. *Id.* at 574.

employees, any curtailment of the freedom of expression must be carefully examined.[32]

The Fourth Circuit in *Nunnery* found that Nunnery had waived her constitutional rights by accepting a patronage position[33] which was conditioned on certain restrictions of those rights. Courts have traditionally held that a patronage employee who knowingly accepts political conditions of employment waives any objection to dismissal.[34] Courts have generally emphasized, however, that waiver of a constitutional right is subject to close examination[35] and must be shown to have been made voluntarily and with full knowledge of all consequences.[36] In *Nunnery,* the court pointed to the plaintiff's awareness that her employment was a political appointment—a position which could be terminated under the same circumstances as it had been granted.[37]

In addition to Nunnery's first amendment claim, the Fourth Circuit also considered whether discharge of a patronage employee was a deprivation of property without procedural due process in violation of the fourteenth amendment.[38] The court noted that a public em-

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[32] *See* NAACP v. Alabama, 357 U.S. 349, 360-61 (1958).

[33] 503 F.2d at 1358.

[34] The Fourth Circuit stated that plaintiff Nunnery "voluntarily accepted the patronage position, with a full realization of its conditions and its hazards." 503 F.2d at 1358.

American Fed'n of State, County and Mun. Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971), relied on the concept that an employee may waive his constitutional right to contest his dismissal on the basis of political affiliation: "Those who, figuratively speaking, live by the political sword must be prepared to die by the political sword." 280 A.2d at 378. That case held that patronage employees accept the terms of their employment and retain no right to procedural due process and no constitutionally protected right to political employment.

[35] *See* 473 F.2d at 573-74.

[36] Brady v. U.S., 397 U.S. 742, 748 (1970). *See* Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications,* 41 U. CHI. L. REV. 297, 314-15 (1974), which challenges the voluntariness of a patronage employee's waiver of objections to political dismissal.

[37] Plaintiff's employment was contingent on continued partisan political activities. The court stated that a public employee

> accepted his job with knowledge that he would be fired if, and when, the appointing officer was replaced by a member of the opposite party . . . waived any right to object to the fully anticipated event which has now come to pass.

503 F.2d at 1358. The court in *Nunnery* also pointed out that the plaintiff had voluntarily chosen a patronage position over an available civil service position and "knew from the outset she was entitled to no civil service status." *Id.* at 1359.

[38] *Id.* at 1352-56.

ployee has no property right to continued employment unless there is a "legitimate claim of entitlement."[39] A patronage appointee ordinarily has no expectation of continued employment under his terms of employment.[40] However, the *Nunnery* opinion suggests that, under the policy or non-policy classification system, due process protection might be provided to employees in non-policy-making functions.[41] Nevertheless, the Fourth Circuit emphasized that actual classification is a task more appropriately undertaken by the legislature.[42] Accordingly, patronage discharge is subject to judicial review only when the legislature's categorizations are arbitrary or irrational.[43]

Unconstitutional deprivation of rights will not ordinarily be at issue if a claimant is not actually entitled to a particular position. The Supreme Court has determined that in the absence of entitlement, an employee cannot be wrongfully deprived of his position;[44] legitimate employment expectancy depends on explicit rules and practices, rather than an employee's unilateral expectations.[45] In the aftermath of *Nunnery* and *Lewis,* rules for finding deprivation of a patronage employee's rights of due process might logically be predicated on whether his job is characterized as policy or non-policy oriented.[46] This distinction may be a viable basis on which to prove that a non-policy-making employee has a legitimate property interest in continued employment,[47] and should be protected from dismissal

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[39] *Id.* at 1352 n.10, *citing* Board of Regents v. Roth, 408 U.S. 564 (1972).

[40] *See* 503 F.2d at 1352. See also *Roth* which stated that a property interest in employment is "created and defined by the terms of . . . appointment." 408 U.S. at 578.

[41] *See* 583 F.2d at 1352.

[42] *Id.* at 1356.

[43] *Id.* The position of liquor store manager in *Nunnery* was characterized as a "sensitive" one, thus rationally classified by the West Virginia legislature as beyond the purview of procedural due process. *Id.* at 1357.

[44] The Supreme Court explained entitlement thusly:

> 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.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[45] The Supreme Court has stated that property interests are not constitutionally created, but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Arnett v. Kennedy, 416 U.S. 134, 151 (1974), *quoting* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[46] *See* 503 F.2d at 1356-60.

[47] *Perry* defined property interests as follows:

without procedural due process.[48]

The Fourth Circuit's analysis in *Nunnery* seemingly allows traditional principles of non-review by the judiciary to remain relatively unscathed. After *Nunnery,* and the Seventh Circuit's opinion in *Lewis* notwithstanding, courts may appropriately review the constitutionality of patronage dismissals of non-policy-making employees, although the first amendment still does not prohibit all patronage discharges on the basis of political affiliation. The Fourth Circuit affirmed that a state's legitimate interests in regulating public employees' speech and association will normally prevail over the interests of policy-making employees in exercising their first amendment freedoms..

C. Employment Discrimination: Mitigation of Damages and Reasonable Refusal of Alternative Employment

Unitary conversion school desegregation combines existing segregated schools into a single integrated system. This method has precipitated many procedural problems of integration.[1] Where school integration has resulted in school closings after consolidation, black educators have been particularly subject to discriminatory employment practices,[2] such as racially motivated dismissals and demo-

> "[P]roperty" denotes a broad range of interests that are secured by "existing rules and understandings." . . . A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . .

408 U.S. at 601, *quoting* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[48] If due process is not available to protect a patronage employee in the absence of a statutory right to employment, it has been argued that an employee should not be discharged solely for exercising his first amendment freedoms. Judge Butzner dissented in *Nunnery:*

> Mrs. Nunnery's lack of a property interest in her job affects her right to procedural due process. . . . It does not in itself defeat her claim that her discharge was an unlawful retaliation for her exercise of first and fourteenth amendment rights.

503 F.2d at 1360 (Butzner, J., dissenting).

[1] *See, e.g.,* Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir. 1969), *cert. denied,* 396 U.S. 1032 (1970).

[2] *See* note 27 *infra.* Discriminatory employment practices and procedures occurring upon desegregation through consolidation have been the focus of much judicial scrutiny. *See* Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir. 1969), which presented definitive criteria for establishing unitary conversion procedures. The criteria emphasized preventing demotions of black staff members. *See also*

tions.[3] When damages are sought for an allegedly wrongful discharge or demotion,[4] the questions of mitigation of damages and refusal of alternative employment become critical. The Fourth Circuit considered these issues in *Williams v. Albemarle City Board of Education*.[5]

In *Williams*, a black school principal sued for reinstatement and damages following the closing of his segregated school and his allegedly discriminatory demotion to assistant principal with teaching duties.[6] In its first decision of the case,[7] the Fourth Circuit affirmed the district court order that Williams be reemployed, holding that his demotion had been racially discriminatory. The circuit court concluded, however, that damages should have been reduced because of Williams' failure to mitigate his loss.[8] On rehearing, the court reconsidered the damage issue and reversed its original decision, holding that Williams was under no obligation to reduce his damages by accepting reemployment as an assistant principal.[9]

An employee who has been wrongfully discharged cannot generally recover damages for that amount which could have been earned with reasonable diligence.[10] The Fourth Circuit reaffirmed this principle[11] and the concept that "the aggrieved party is not compelled to

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Bassett v. Atlanta Indep. School Dist., 485 F.2d 1268 (5th Cir. 1973); Jackson v. Wheatley School Dist., 464 F.2d 411 (8th Cir. 1972); Lee v. Macon County Bd. of Educ., 453 F.2d 1104 (5th Cir. 1971); Hegler v. Board of Educ., 447 F.2d 1078 (8th Cir. 1971); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968).

[3] *Singleton* defined "demotion" as including reassignment to a position of less responsibility or remuneration or to a position requiring less skill. 419 F.2d at 1218.

[4] *See, e.g.*, Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966). *See generally* Griffis & Wilson, *Constitutional Rights and Remedies in the Non-Renewal of a Public School Teacher's Employment Contract*, 25 BAYLOR L. REV. 549 (1973); Jefferson, *School Desegregation and the Black Teacher: A Search For Effective Remedies*, 48 TUL. L. REV. 55 (1973); Note, *Damages Under § 1983: The School Context*, 46 IND. L.J. 521 (1971).

[5] 508 F.2d 1242 (4th Cir. 1974), *rev'g in part* 485 F.2d 232 (4th Cir. 1973).

[6] Williams brought suit under 42 U.S.C. § 1983 (1970). 485 F.2d at 232.

[7] 485 F.2d 232 (4th Cir. 1973).

[8] *Id.* at 233.

[9] 508 F.2d at 1244.

[10] RESTATEMENT OF CONTRACTS § 336, comment *d* at 537 (1932), explains that mitigation of damages is not a "duty" in that failure to lessen damages does not affect a plaintiff's legal action or available remedies.

The doctrine of avoidable consequences or efforts to minimize damages has been explained thusly:

> Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation.

RESTATEMENT OF CONTRACTS § 336(1) (1932).

[11] 508 F.2d at 1243. *See also* 11 S. WILLISTON § 1359 (3d Ed. 1968) [hereinafter

enter into any type of employment, and is permitted to decline a position which will degrade or lower his calling or usual means of support."[12] Additionally, the burden of proving the availability of suitable alternative employment is upon the employer.[13]

In *Williams,* the Fourth Circuit considered whether the plaintiff had unreasonably refused proffered employment as an assistant principal with teaching duties within the same school system.[14] The court affirmed the district court's finding that Williams' rejection of tendered employment was reasonable,[15] since he was not required to accept an "inferior," more "menial," or less familiar position which might jeopardize his future career and professional reputation.[16] The *Williams* court determined that acceptance by Williams of a teaching position in the same school system would have constituted acquiescence to his discriminatory demotion to an inferior position.[17]

The Fourth Circuit did not establish a specific standard to determine damages upon the reasonable refusal of a demoted school employee to accept alternative employment. The court held that Wil-

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cited as WILLISTON]. In a § 1983 civil rights action, "the normal rules of mitigation apply to these damage determinations." Smith v. Board of Educ., 365 F.2d 770, 784 (8th Cir. 1966).

[12] 11 WILLISTON, *supra* note 11, § 1359 at 307-08, *quoting* Canning v. Star Publishing Co., 130 F. Supp. 697, 700 (D. Del. 1955).

[13] 11 WILLISTON, *supra* note 11, at § 1360. In Hegler v. Board of Educ., 447 F.2d 1078 (8th Cir. 1971), the court stated: "[t]he overwhelming authority places the burden on the wrongdoer to produce evidence showing what the [plaintiff] could have earned to mitigate damages." *Id.* at 1081. *See* Jackson v. Wheatley School Dist., 464 F.2d 411 (8th Cir. 1972); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968). *Cf.* Hill v. Franklin County Bd. of Educ., 390 F.2d 583 (6th Cir. 1968).

[14] The court applied the standard that a demoted teacher or school administrator may not recover damages after unreasonably refusing acceptable alternative employment. 508 F.2d at 1243. *See, e.g.,* United States v. Chesterfield County School Dist., 484 F.2d 70 (4th Cir. 1973); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968).

[15] 508 F.2d at 1243-44. The court stated:

> The District Court in this case, it is conceded, made no explicit finding that the appellee's refusal of the offer of alternative employment was reasonable. However, such a finding is implicit in the findings made and conclusions reached by the District Court.

Id. The issue of reasonable refusal is ordinarily a factual issue, the determination of which is reversible only upon a showing clear error. *Id.* at 1243, *citing* Green v. Kaynar Mfg. Co., 369 F.2d 375 (9th Cir. 1966); American Trading Co. v. Steele, 274 F. 774 (9th Cir. 1921).

[16] 508 F.2d at 1243. *See* 11 WILLISTON, *supra* note 11, § 1359 at 306; RESTATEMENT (SECOND) OF AGENCY § 455, Comment *d* at 373 (1957).

[17] 508 F.2d at 1244. *But see* 508 F.2d at 1244-45 (Bryan, J., dissenting), which described Williams' subsequent employment as a teacher as a voluntary choice. *See* note 29 and accompanying text *infra.*

liams was not required to take an inferior position which might jeopardize his career. "Status" was held to be more determinative of a position's acceptability than comparable salary.[18] Unfortunately, the court failed to enunciate any criterion to measure the status associated with alternative employment.[19] Instead, the Fourth Circuit analyzed *Williams* as a close factual question.[20] The court did not consider specific standards to be applied objectively, but rather resolved the factual question from the subjective point of view of the injured party.[21] The *Williams* court considered broad concepts of position inferiority, insufficient experience qualifications, and injuries to career and reputation,[22] according to Williams' beliefs as perceived by the court.[23]

Comparability and suitability of employment alternatives may be objectively determined by evaluating an employee's background and experience.[24] Unacceptable employment includes only that which involves a reduction in responsibility or is essentially different from the work for which the employee is qualified.[25] In a school context, comparability of employment status can be determined by examining the essential difference in status between school administration and teaching.[26] This difference, and the related concept of demotion from

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[18] 508 F.2d at 1243. The court cited NLRB v. Madison Courier, Inc., 472 F.2d 1307 (D.C. Cir. 1972), to support the premise that a demoted or discharged employee is not required to lessen damages by seeking and accepting employment outside that field of work for which he is qualified. *Id.* at 123 n.2. That latter case, however, was subsequently reinterpreted by the District of Columbia Court of Appeals to require a broad duty to mitigate damages 505 F.2d 391 (D.C. Cir. 1974).

[19] *See* 508 F.2d at 1243.

[20] *Id.* The court explained that

> whether the refusal to accept alternative employment is so unreasonable as to preclude recovery of damages by the improperly discharged or demoted employee requires a weighing of many facts and circumstances.

Id.

[21] Although the court stated that the factual issues were matters for the district court, it considered possible avenues of subjective justification of Williams' refusal of the proffered alternative employment in the absence of objective criteria for evaluation. *Id.* at 1244.

[22] *Id.* at 1243.

[23] The Fourth Circuit was concerned with what Williams *believed* was an inferior or a more menial position, whether he "*felt* a possible lack of present qualification to engage in actual teaching," *id.* at 1244 (emphasis added), and whether Williams *believed* that his acquiescence would injure his reputation. *Id.*

[24] *See* Lee v. Macon County Bd. of Educ., 453 F.2d 1104 (5th Cir. 1971).

[25] *Cf.* Lee v. Macon County Bd. of Educ., 453 F.2d 1104 (5th Cir. 1971).

[26] The difference in employment status between school administration and teach-

administrative to teaching positions, is contingent on a quantifiable variance or loss of responsibility.[27] Loss of responsibility and professional status is prevented only by continued employment in a comparable position.[28]

The Fourth Circuit in *Williams* held that damages will be awarded to a wrongfully demoted school employee absent proof that the employee unreasonably refused an offer of employment in a position comparable to the employee's former position. However, the court failed to articulate the concepts to be applied in determining the propriety of a refusal, even though mitigation of damages "frequently involves the establishment of a standard of reasonable conduct."[29] In the school context, a teaching position is inferior in status to an administrative position, and a demotion to a teaching position may give rise to recovery of damages. The Fourth Circuit applied these principles without making an objective inquiry into Williams'

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ing was examined in Lee v. Macon County Bd. of Educ., 453 F.2d 1104, 1109-10 (5th Cir. 1971). In a fact situation similar to that in *Williams*, the Fifth Circuit in *Lee* held that a former black principal had the right to regain a comparable position as soon as possible following desegregation despite his interim holding of a higher-salaried teaching position. The court stated:

> if a principal is demoted or dismissed pursuant to a desegregation order and if his objective qualifications for his principalship do not diminish in an absolute sense after the issuance of the order and his demotion or dismissal, then he *must* be given opportunity to assume any new principalships or any positions tantamount to his lost principalship prior to the offering of the position to new applicants of another race.

Id. at 1111 (emphasis in original). *See* Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir. 1969), which presented criteria for reinstatement following desegregation-caused faculty displacement.

[27] The Fifth Circuit in *Lee* observed; "The real gist of demotion is a reduction in responsibility, not in salary." 453 F.2d at 1109. *Cf.* Jefferson, *School Desegregation and The Black Teacher: A Search for Effective Remedies*, 48 TUL. L. REV. 55 (1973), where it is stated,

> With the actual elimination of the black school, the principal is faced with complete separation from his profession or assignment to less prestigious and less profitable positions. The consequences of displacement for the black principal include greatly reduced authority and professional status, lowered visibility . . ..

Id. at 63.

[28] *See* Lee v. Macon County Bd. of Educ., 453 F.2d 1104 (5th Cir. 1971); Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir. 1969). *Cf.* Bassett v. Atlanta Indep. School Dist., 485 F.2d 1268 (5th Cir. 1973). Comparability of position and responsibility in a school context can often be gauged by distinct employment qualifications ordinarily recognized for administrative and teaching functions. *Id.*

[29] 11 WILLISTON, *supra* note 11, § 1353 at 274 (footnote omitted).