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VII. Constitutional Law

have unwritten differences in areas such as whether certain injuries are considered work related or whether certain surgery may be required.[97] Further, an injured worker in need of compensation may have neither the time nor resources to survey the applicable compensation acts. The worker's employer would be of little help in a survey of compensation acts as employers have an interest in limiting compensation costs and thus may suggest an employee apply for compensation in a state with lower benefits.[98]

In recognition of the difficulties faced by injured workers, many courts have stated a policy of interpreting workmen's compensation acts for the benefit of the injured worker.[99] The Fourth Circuit in *Pettus,* however, by effectively requiring the injured worker to survey available benefits and then risk losing benefits because of unanticipated events,[100] has interpreted the Virginia Act in favor of the employer.

SAMUEL A. FLAX

VII. CONSTITUTIONAL LAW

A. *First Amendment Rights of Public Employees*

Traditionally, a public employee has not enjoyed the full measure of constitutional rights afforded to private citizens. Justice Holmes summarized the basis of the courts' early denials of otherwise cognizable constitutional claims by public employees when he noted that a person may have a constitutional right to talk politics, but that person has no right to be a policeman.[1] Holmes' distinction between constitutionally protected rights of private citizens and unprotected governmental privileges allowed governments to condition employment upon terms which denied employees rights they enjoyed as citizens.[2] The Supreme

[97] At the time the *Pettus* plaintiff sought relief under the Virginia Act, he probably did not anticipate that he would be forced to undergo surgery, that he would refuse to undergo that surgery, and that his refusal would be unjustified in Virginia but reasonable in the District of Columbia. *See* text accompanying notes 10-19 *supra.*

[98] The potential for an unscrupulous employer to deprive an injured worker of available benefits is obvious. In *Magnolia,* the claimant was confined to a hospital bed and told to sign a certain form if he wished to receive workmen's compensation benefits. The claimant apparently was unaware that the form restricted recovery to the Texas Act. 320 U.S. at 450 (Black, J., dissenting). *See* text accompanying notes 57-62 *supra.*

[99] *See, e.g.,* Industrial Comm'n of Wis. v. McCartin, 330 U.S. 622, 628 (1947); Pettus v. American Airlines, Inc., 587 F.2d 627, 632 (4th Cir., 1978) (Hall, J., dissenting); Wheatley v. Adler, 407 F.2d 307, 313-14 (D.C. Cir. 1968).

[100] *See* note 97 *supra.*

[1] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). In *McAuliffe,* a policeman challenged his dismissal under a regulation which limited his political activities. *See* Van Alstyne, *The Demise Of The Right-Privilege Distinction In Constitutional Law,* 81 HARV. L. REV. 1439, 1439-40 (1968) [hereinafter cited as Van Alstyne].

[2] *See* Van Alstyne, *supra* note 1, at 1440-41. In a famous application of the distinction

Court employed this right-privilege distinction in 1952, upholding a state law that made anyone who was classified as a subversive ineligible for employment as a teacher.[3]

In 1967, however, the Supreme Court held that public employment may no longer be conditioned on the surrender of constitutional rights which could not be abridged by direct government action.[4] Public employees, such as policemen and teachers, are not relegated to a "watered down" version of constitutional rights.[5] Nevertheless, the Supreme Court has recognized that the state has a greater interest in regulating expression of its employees than in regulating the expression of the general public.[6] In *Pickering v. Board of Education,*[7] the Supreme Court used a balancing test to reconcile the competing interests of a teacher in commenting upon matters of public concern and the interests of the State in the efficiency of its services.[8] Although the Court expressly refused to enunciate a definite standard for judging statements made by public employees, *Pickering* did set out general guidelines for analysis.[9]

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between the right to constitutional protection and the privilege of working, the Supreme Court of Tennessee held that a teacher could not constitutionally challenge a regulation which prohibited the teaching of evolution. The court held that the fourteenth amendment did not hamper the state in dealing with public employees in their working capacity. Scopes v. State, 154 Tenn. 105, 109-10, 289 S.W. 363, 364-65 (1927); *see also* Bailey v. Richardson, 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd,* 341 U.S. 918 (1951) (first amendment guarantees free speech and assembly, but does not guarantee government employement).

[3] Adler v. Board of Educ., 342 U.S. 485, 492 (1952); *see* Note, *First Amendment Rights and Teacher Dismissal: A Survey,* 4 OHIO N.U.L. REV. 392, 392-93 (1977).

[4] Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967). *Keyishian* expressly rejected *Adler's* premise that employment with the state could be conditioned on a forfeiture of constitutional rights, 385 U.S. at 606 (citing Shelton v. Tucker, 364 U.S. 479 (1960)). *Shelton* invalidated an Arkansas statute which required a teacher to list all organizational memberships as a condition of employment. The Court held that the statute violated the teacher's right to free association, a right closely related to freedom of speech and one which is basic to a free society. 364 U.S. at 486; *see* Van Alstyne, *supra* note 1, at 1449-51.

[5] Garrity v. New Jersey, 385 U.S. 493, 500 (1967). *Garrity* held that a state cannot use the threat of discharge to secure incriminatory evidence from an employee. *Id.* at 499. The Court specified that the state may not condition the exercise of first amendment rights upon the exaction of a price. *Id.* at 500. *See* Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); Simpson v. Weeks, 570 F.2d 240, 242 (8th Cir. 1978).

[6] Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); *cf.* Brown v. Glines, 48 U.S.L.W. 4095 (1980) (Air Force regulations requiring prior command approval for circulating petitions on military bases do not violate servicemen's first amendment rights).

[7] *Id.*

[8] *Id.* at 568. In *Pickering,* the teacher sent a letter to the local newspaper criticizing the way the Board of Education had handled several bond issue proposals. Additionally, the letter criticized the Board's allocation of funds between the school's education and athletic programs. *Id.* at 566. The Board charged that numerous statements in the letter were false, and dismissed the teacher. *Id.* The Supreme Court held that the Board of Education could not lawfully discharge the teacher unless the Board could show "actual malice" as defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). 391 U.S. at 569. Actual malice is knowledge that the statement was false or reckless disregard of whether it was false or not. 376 U.S. at 279-80; *see* Stevens, *Balancing Speech and Efficiency: The Educator's Freedom of Expression after* Pickering, 8 J. OF L. & EDUC. 223, 224 (1979).

[9] 391 U.S. at 569. The *Pickering* Court cited several guidelines for analyzing the conflict

Underlying these guidelines were the Court's twin concerns of protecting the value of an efficiently run public service while simultaneously protecting free discussion of matters of "legitimate public concern."[10]

In order to define the limits of an individual's first amendment right to free expression in cases like *Pickering*, a court first must consider the purposes behind that right.[11] Traditionally, the first amendment is valued as a means to the socially desirable ends of maintaining a meaningful democracy,[12] as well as advancing knowledge and discovering truth.[13] The *Pickering* decision is premised on this "means" type of first amendment value by including in its test whether the public employee's speech involved a matter of "legitimate public concern."[14] But the first amendment is also valuable as an end in itself, as a protection of individual dignity and opportunity for self-fulfillment through expression.[15] By failing to expressly recognize the value of the right of

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between a claim to first amendment protection and the need for orderly school administration. The Court noted that Pickering's letter was in no way directed towards any person with whom appellant would normally be in contact in the course of her daily work. 391 U.S. at 569-70. Additionally, there was no evidence that the letter would foster controversy among the Board or the school community. *Id.* at 570. Further, the letter would have no impact on the actual operation of the schools. The Court also noted that, most importantly, the subject of the letter, funding of a school system, was a matter of legitimate public concern. *Id.* at 571.

[10] 391 U.S. at 568. Theoretically, the *Pickering* test requires that the interests of the individual be balanced against those of society in general. *See* text accompanying note 8 *supra*. Inquiring whether the speech involves a matter of legitimate public concern, however, shifts the focus of the test from the value of an individual's first amendment freedom to the value to society's interest in free speech. This shift risks transforming the test to a weighing of the value to society of first amendment freedoms against the value to society of efficient public services. In the process, the value of the first amendment freedoms to the individual would be lost. *See* notes 15 & 16 *infra;* R. DWORKIN, TAKING RIGHTS SERIOUSLY 189-99 (1977) [hereinafter cited as R. DWORKIN].

[11] *See* R. DWORKIN, *supra* note 10, at 200; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 578 (1978) [hereinafter cited as L. TRIBE].

[12] *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966)[hereinafter cited as T. EMERSON].

[13] John Stuart Mill demonstrated that free and open discussion produces social utility. *See* J. S. MILL, ON LIBERTY 75-118 (1974)[hereinafter cited as J.S. MILL]. Mill argued that there are only two possible outcomes when the government seeks to suppress expression. First, the expression may be true, in which case such expression clearly should be allowed. When the government silences discussion, it assumes infallibility. *Id.* at 77. Second, even where the expression is false, Mill points out that if the prevailing opinion is not fully and frequently discussed, that opinion will deteriorate from living truth into dead dogma. *Id.* at 97. The only safeguard for our beliefs is "a standing invitation to the world to prove them unfounded." *Id.* at 81; *see* L. TRIBE, *supra* note 11, at 576-77.

[14] *See* text accompanying notes 9 & 10 *supra*. *Pickering* characterized society's interest in having free debate on matters of public importance as the core value of the right of free speech. 391 U.S. at 573.

[15] Justice Brandeis, concurring in Whitney v. California, 274 U.S. 357 (1927), noted that the founding fathers valued liberty as both an end and a means. The purpose of governmental protection of freedom was to allow men to develop their faculties. *Id.* at 375; *see* J.S. MILL, *supra* note 13, at 119. In Cohen v. California, 403 U.S. 15 (1971), the Supreme Court struck down the appellant's criminal conviction for wearing a jacket bearing an obscene word in the context of a political statement, holding that the constitutional right of

free speech to the individual, *Pickering*'s balancing test allows a first amendment interpretation which is dangerously incomplete.[16]

The Fourth Circuit recently applied the *Pickering* balancing test in *Cooper v. Johnson.*[17] *Cooper* involved a claim brought by a county deputy sheriff against his superior. The deputy alleged that he had been wrongfully discharged from his job for exercising his first amendment right to free speech.[18] The alleged protected expression was an unmailed letter to the local newspaper which the deputy displayed to the sheriff. The thrust of the letter was that a recent newspaper article regarding a burglary case had unjustifiably omitted the deputy and other officers.[19] Shortly after the encounter, the sheriff fired the deputy.[20] After briefs on the issue of whether application of the *Pickering* balancing test is a matter for the judge or the jury, the district court submitted the test to the jury.[21] Following a verdict for the plaintiff, the court ruled that the balancing test was a question of law for the judge,[22] set aside the verdict,

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free expression stems from the premise of individual dignity and choice which underlies our political system. *Id.* at 24; *see* J.S. MILL, *supra* note 13, at 119-20; R. DWORKIN, *supra* note 11, at 198; Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1941).

[16] *See* note 32 *infra.* Hamilton, Jay, and Madison, the authors of *The Federalist,* advocated that the Constitution be ratified primarily to secure individual rights in a free government. G. DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 102 (1960).

[17] 590 F.2d 559 (4th Cir. 1978).

[18] *Id.* at 560. The plaintiff in *Cooper* brought his claim under 42 U.S.C. § 1983 (1976) which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See generally Developments In The Law, Section 1983 And Federalism, 90 HARV. L. REV. 1133 (1977).

The Supreme Court has held that a plaintiff must show two elements to recover under § 1983. The plaintiff first must prove that the defendant deprived him of a right guaranteed by the Constitution and laws of the United States and, secondly, that the defendant did so under color of any statute, ordinance, regulation, custom, or usage, of any state or territory. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

In Monell v. Department of Social Serv., 436 U.S. 658 (1978), a case brought by female employees charging sex discrimination, the Supreme Court held that local governing bodies, municipal corporations, and school boards are "persons" under § 1983. *Id.* at 690. *Monell* overruled Monroe v. Pape, 365 U.S. 167 (1961) insofar as *Monroe* held that local governments were totally immune from suit under § 1983. 436 U.S. at 633. *See also* Campise v. Hamilton, 382 F. Supp. 172, 183 (S.D. Tex. 1974) (sheriff is "person" for purposes of § 1983 action).

[19] 590 F.2d at 561.

[20] *Id.* The sheriff had the power to remove Cooper under VA. CODE § 15.1-48 (1950).

[21] Cooper v. Johnson, No. 76-0523-R, 1 slip op. at 2, (E.D. Va. Oct. 7, 1977) (mem.).

[22] *Id.* The district court held that the *Pickering* test was a question of law for the judge and therefore submission of the test to the jury was improper. The court reasoned that matters of constitutional construction involving an unstructured test such as that of *Pickering* cannot be left to the jury. The court indicated that the jury would not be able to under-

and entered judgment for the defendant.[23]

On appeal, the Fourth Circuit affirmed the district court decision.[24] The Fourth Circuit avoided the issue of whether the judge or the jury should apply the *Pickering* test to determine if the speech was protected by the first amendment.[25] The court held that, regardless of who should decide the issue, the speech was clearly not protected and therefore the defendant was entitled to judgment n.o.v.[26] In reviewing the application of the *Pickering* test, the Fourth Circuit affirmed the district court's analysis.[27] The circuit court held that the letter by the deputy would have a disruptive effect on the department because the letter related to a matter of internal organization and cooperation.[28] The Fourth Circuit adopted the trial court's reasoning that speech on "publicly debated matters" weighs more heavily in the *Pickering* balance than speech intended to serve one's private purpose.[29] Since the speech here was of a private nature and would tend to disrupt the department, the court held that the state interests outweighed the deputy's first amendment rights.[30]

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stand the complexity of the *Pickering* test. *Id.* at 3. The district court cited Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975) and Norbeck v. Davenport Community School Dist., 545 F.2d 63 (8th Cir. 1976) to support its holding. In No. 76-0523-R, slip op. at 2. In *Bertot*, the 10th Circuit granted the plaintiff a judgment n.o.v. on the basis that the evidence was such that without weighing the credibility of the witnesses there could be only one reasonable conclusion. 522 F.2d at 1176. In *Norbeck*, the Eighth Circuit treated the issue whether the plaintiff's expression in a § 1983 action was constitutionally protected as one for the court. 545 F.2d at 66-67.

[23] 590 F.2d at 560.

[24] *Id.*

[25] *See* note 22 *supra.*

[26] 590 F.2d at 562. In holding that the evidence in *Cooper* entitled the defendant to a judgment n.o.v., the Fourth Circuit cited Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975), for the proposition that a judgment n.o.v. is warranted when the evidence allows only one reasonable conclusion. 590 F.2d at 562. *Bertot* noted that a judgment n.o.v. may not be granted unless the evidence is susceptible of no reasonable inferences that sustain the position of the party against whom the motion is made. 522 F.2d at 1176.

[27] The district court in *Cooper* set out six factors derived from *Pickering* to consider in weighing the interest of the employee in speaking and the interest of the government in performing its functions. These factors include who was the target of the speech, whether questions of discipline were involved, the relationship between the employee and the target of his expression, the tendency of the expression to cause controversy, the subject matter of the speech, and finally the relationship of the plaintiff's employment to the subject matter of the speech. 590 F.2d at 561; *see* note 9 *supra.*

[28] 590 F.2d at 562.

[29] *Id.; see* 391 U.S. at 571; note 10 *supra.* A standard for protecting free expression which depends upon classification of speech as public or personal is difficult, if not impossible to apply. Speech may be both private and public. As Justice Widener pointed out in his dissent in *Cooper*, a reasonable person could construe the deputy's letter as addressing a matter of public concern such as the accuracy of newspaper reporting. 590 F.2d at 563. *See also* Givham v. Western Line Consol. School Dist., 439 U.S. 410 (1979). In *Givham*, the Supreme Court held that a public employee does not lose his protection against governmental abridgement of freedom of speech by expressing himself privately. *Id.* at 415-16.

[30] 590 F.2d at 562.

The *Pickering* balancing test, as interpreted in *Cooper*, is difficult to apply[31] and risks sacrificing the value of individual first amendment freedoms to the interests of society.[32] The Fourth Circuit's decision in *Jannetta v. Cole*,[33] when contrasted with *Cooper*, illustrates the inconsistency and unpredictability resulting from *Pickering*'s balancing analysis. In *Jannetta*, a white fireman brought suit claiming that he had been fired for circulating a petition questioning the promotion of a black fireman with less seniority than the plaintiff.[34] The Fourth Circuit framed the issue as whether there was an interference with the efficiency of the public services performed by the fire department as a result of the petition.[35] The court held that there was no such interference and that the plaintiff was entitled to first amendment protection.[36] The Fourth Circuit noted that, merely because the petition involved internal bickering within the department, the petition still commanded first amendment protection.[37] The *Jannetta* interpretation of *Pickering* focused on whether the speech caused significant interference with the public service.[38] By disregarding whether the nature of the communication is public or private, except with regard to the communication's effect on the public service, the *Janetta* analysis avoids the extreme difficulty of making that distinction.[39] More importantly, *Jannetta* protects the value of the right to free expression to the individual,[40] denying protection only when the communication clearly

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[31] *See* note 29 *supra*. *Pickering*'s balancing test is not a general standard but is instead an indication of the general lines along which an analysis should run. 391 U.S. at 569. The unstructured nature of the test leaves a court on its own to strike a general balance in light of its own best judgment. *See* T. EMERSON, *supra* note 13, at 54. The Supreme Court has recognized the difficulty with a balancing analysis in the libel area. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court noted that ad hoc balancing would lead to unpredictable results and render the Court's duty to supervise the lower courts unmanageable. *Id.* at 343.

[32] See note 10 *supra*. In addressing whether the Constitution protects a public employee's statement, the unstructured nature of the *Pickering* test allows a court to reach either conclusion in almost every case. Courts are therefore vulnerable to arguments that the interests of society outweigh an individual's claim to free speech, as illustrated by *Cooper*. *See* T. EMERSON, *supra* note 12, at 54; R. DWORKIN, *supra* note 10, at 198-200. *But see* L. TRIBE, *supra* note 11, at 600-01.

[33] 493 F.2d 1334 (4th Cir. 1974).

[34] *Id.* at 1336.

[35] *Id.* at 1336-37.

[36] *Id.* at 1337.

[37] *Id.* at 1337 n.5. The *Jannetta* court noted that the first amendment is not limited to issues of great social or political impact. *Id.* This position accords with the value of the right to free expression to the individual. *See* note 15 *supra*. The *Jannetta* court's protection of the plaintiff's right to circulate and present his petition is inconsistent with the Fourth Circuit's subsequent reliance on the private, employmental nature of the plaintiff's speech in *Cooper* to deny him first amendment protection. *See* text accompanying notes 28 & 29 *supra*.

[38] 493 F.2d at 1337.

[39] *See* text accompanying notes 28 & 29 *supra*.

[40] *See* text accompanying note 15 *supra*.

interferes with the efficient operation of the public service.[41]

Janetta's analysis focuses on the effect of the communication instead of its content and thereby eliminates many of the inherent weaknesses of the *Pickering* balancing test.[42] Conversely, *Cooper* illustrates the difficulty[43] and danger[44] of attempting to classify speech as public or private. By giving a more definite standard for determining when expression is protected by the first amendment,[45] *Jannetta* better preserves the guarantee of free speech as a meaningful right to the individual. The *Cooper* decision sacrifices the individual's right to the interests of society and thereby reduces the first amendment right to a mere weight in an abstract balance.

MARK A. WILLIAMS

B. *Implied Cause of Action for Damages Under the Fourteenth Amendment*

The fourteenth amendment to the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[1] Pursuant to the enforcement clause of the fourteenth amendment,[2] Congress enacted 42 U.S.C. section 1983 which provides that every "person" who acts under color of state law to deprive another of his constitutional rights shall be liable to the injured party.[3] Prior to 1978, the Supreme Court had held consistently that a municipality was not a "person" within the meaning of section 1983 and thereby was immune from suit under that statute.[4] In *Monell v. Department of Social Services,*[5]

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[41] 493 F.2d 1337.

[42] *See* notes 31 & 32 *supra.*

[43] *See* note 29 *supra.*

[44] *See* note 32 *supra.*

[45] *See* text accompanying note 35 *supra.*

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[1] U.S. CONST. amend. XIV, § 1. The fourteenth amendment also provides that no state shall make or enforce any law which abridges the privileges or immunities of citizens of the United States. *Id.*

[2] U.S. CONST. amend. XIV, § 5. Section 5 empowers Congress to enforce, by appropriate legislation, the provisions of the fourteenth amendment. *Id.*

[3] 42 U.S.C. § 1983 (1976). Section 1983 provides a remedy against any "person" who subjects, or causes to be subjected, any United States citizen to the deprivation of any rights, privileges, or immunities secured by the Constitution. *Id.* Congress enacted the forerunner of § 1983 in 1871. *See* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13; Butz v. Economou, 438 U.S. 478, 502 (1978). 28 U.S.C. § 1343(3) grants original jurisdiction to the district courts of § 1983 suits to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution or by any act of Congress providing for equal rights. 28 U.S.C. § 1343(3) (1976).

[4] *See, e.g.,* Moor v. County of Alameda, 411 U.S. 693 (1973); Monroe v. Pape, 365 U.S. 167 (1961). In *Monroe,* the plaintiffs sued the city of Chicago under 42 U.S.C. § 1983 (1976)

however, the Court overruled its earlier decisions and held that a municipality could be sued under section 1983 for legal or equitable relief when the allegedly unconstitutional action effectuates an official policy, ordinance, regulation or decision.[6] According to *Monell*, municipalities retain immunity from vicarious liability based solely on the misconduct of their employees and are thereby protected from suits filed under a theory of respondeat superior.[7] The municipal immunity retained under section 1983 after *Monell* might foreclose relief to an otherwise deserving plaintiff if another cause of action does not exist. Although 28 U.S.C. section 1331 grants jurisdiction to district courts for suits involving federal questions and amounts in controversy in excess of $10,000,[8] there is no statute other than section 1983 which allows an individual to assert a cause of action for fourteenth amendment violations under federal question jurisdiction. Whether a complaint states a cause of action is a matter of law to be decided after jurisdiction has been assumed by the court.[9] In the recent case of *Cale v. Covington*,[10] the Fourth Circuit Court of Appeals assumed jurisdiction but held that the fourteenth amendment alone does not imply a cause of action for damages against a municipality.[11]

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for the unlawful search of their house by thirteen city police officers. 365 U.S. at 169. The Supreme Court approved the dismissal of the complaint against the city, holding that the congressional response to a proposal calling for municipal liability was so negative that the Court was unable to believe that "person" in § 1983 was intended to include municipalities. *Id.* at 191. In *Moor*, the Court refused to recognize a cause of action against a county under § 1983 even though the county was subject to vicarious liability under California state law. 411 U.S. at 707-10; *see* CAL. GOV'T CODE § 815.2(a). *See also* City of Kenosha v. Bruno, 412 U.S. 507 (1973).

[5] 436 U.S. 658 (1978).

[6] *Id.* at 691. In *Monell v. Department of Social Services*, the Court reconsidered the congressional debates relating to § 1 of the Civil Rights Act of 1871 (current version at 42 U.S.C. § 1983 (1976)) and concluded that Congress intended "person" to include municipalities. 436 U.S. 658, 690-91 (1978).

[7] 436 U.S. at 663 n.7; *see id.* at 691-95.

[8] 28 U.S.C. § 1331(a) (1976). Section 1331 grants original jurisdiction to the federal district courts over all suits in which the amount in controversy exceeds $10,000 and the matter at issue arises under the Constitution, laws, or treaties of the United States. *Id.*

[9] Bell v. Hood, 327 U.S. 678, 682 (1946).

[10] 586 F.2d 311 (4th Cir. 1978).

[11] *Id.* at 313; *see* note 6 *supra*. The Supreme Court has recognized but failed to decide the question whether an implied cause of action exists under the fourteenth amendment which would not be bound by the limitations of municipal immunity under § 1983. *See* Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 278 (1977). Commentators disagree on whether *Monell* reflects the Court's unwillingness to approve an implied cause of action against local governments. *Compare* Note, Monell v. Department of Social Services: *Municipal Liability for § 1983 Actions*, 10 U. TOL. L. REV. 519, 537 (1979) (Court chose to avoid *Bivens* analogy) *with* Comment, *Post* - Monell *Viability of Implied Fourteenth Amendment Cause of Action Against Municipalities and Exercise of Pendent Jurisdiction Over State Law Tort Claims Against Municipalities in the Third Circuit*, 24 VILL. L. REV. 314, 328 (1979) (*Monell* substantiates viability of fourteenth amendment implied cause of action). The argument has been made that policy considerations persuaded lower federal courts to

The plaintiff in *Cale* was a police officer discharged from his duties by the Chief of Police of Covington, Virginia.[12] Cale sued the city rather than the Police Chief, claiming that his discharge by the Chief as the city's employee without notice or a hearing was a denial of due process under the fourteenth amendment.[13] The officer asserted jurisdiction under section 1331 and sought damages of $50,000.[14] The district court considered Cale's complaint a suit for relief under section 1983 and granted the city summary judgment, concluding that the city was not a "person" within the meaning of the statute.[15] On appeal, the Fourth Circuit addressed three issues.[16] First, the court considered whether the district court's judgment should be affected by the subsequent Supreme Court decision in *Monell.*[17] Second, the court considered whether the amount in controversy was sufficient to invoke subject matter jurisdiction.[18] Finally, the Fourth Circuit addressed the plaintiff's assertion that the fourteenth amendment implies a cause of action for damages against a municipality for the act of its employee.[19]

At the time of the district court's decision in *Cale,* a municipality could not be sued under section 1983.[20] The district court properly granted the city's motion for summary judgment by applying the law as it stood at the time.[21] The Fourth Circuit concluded, however, that it was required to apply the law as it existed at the time of its decision on appeal.[22] Because the intervening *Monell* decision reduced the immunity of municipalities under section 1983, the Fourth Circuit vacated the lower court's decision and remanded *Cale* for consideration under section 1983 in light of *Monell.*[23]

On appeal, the city of Covington argued that Cale's actual damages were less than the $10,000 amount necessary for jurisdiction under sec-

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circumvent immunity long before *Monell. See generally* Note, Monell v. Department of Social Services: *A Supreme Court Adoption of Lower Court Exceptions,* 1979 UTAH L. REV. 251. Circumvention was effected by assertions of substantive claims other than those arising under § 1983 and based on jurisdictional statutes such as § 1331. *See* Blum, *From* Monroe *to* Monell: *Defining the Scope of Municipal Liability in Federal Courts,* 51 TEMP. L.Q. 409, 414 (1978) [hereinafter cited as Blum]; notes 67-69 *infra; see, e.g.,* Pitrone v. Mercadante, 572 F.2d 98, 99-100 (3d Cir.), *cert. denied,* 439 U.S. 827 (1978); Gainer v. Giarrusso, 571 F.2d 1330, 1338-41 (5th Cir. 1978).

[12] 586 F.2d at 312.

[13] *Id.* at 313.

[14] *Id.* at 312.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 312-13.

[19] *Id.* at 313-18.

[20] *Id.* at 312.

[21] *Id.*

[22] *Id.; see* Cort v. Ash, 422 U.S. 66, 76 (1975). Federal courts must apply the law as it stands at the time of decision unless to do so would result in manifest injustice or unless there is contrary statutory direction or legislative history. *Id.*

[23] 586 F.2d at 312.

tion 1331.[24] The city maintained that Cale's claim of $50,000 in damages should be reduced to the extent of his wages obtained during employment subsequent to his discharge.[25] The Fourth Circuit upheld its jurisdiction, holding that the sum claimed by the plaintiff is controlling for jurisdictional purposes if made in good faith and if not appearing to a legal certainty to be insufficient.[26]

Although section 1983 clearly allowed Cale to sue the Chief of Police and possibly permitted suit against the city of Covington,[27] the plaintiff maintained that he could assert a cause of action against the city under the fourteenth amendment alone.[28] The Fourth Circuit rejected Cale's contention,[29] reasoning that the fourteenth amendment's enforcement clause,[30] Supreme Court precedent,[31] and lower court rulings[32] failed to support an implied cause of action for damages under the fourteenth amendment.[33] The *Cale* court distinguished jurisdiction from cause of action,[34] emphasizing that the federal question jurisdictional grant under section 1331 does not create a cause of action.[35] Section 1331 establishes jurisdiction for the federal courts to hear complaints, to determine whether a complaint states a cause of action, and to proceed on the merits only if a cause of action has been determined to exist.[36] The court determined that jurisdiction was properly invoked in *Cale,* but concluded that the plaintiff had failed to state a valid cause of action.[37]

To determine the propriety of an implied cause of action, the Fourth Circuit reasoned that the enforcement clause of the fourteenth amendment indicates that the framers intended for Congress to provide remedies for violations of the amendment rather than the courts.[38] The Fourth Circuit recognized that shortly after its adoption, the fourteenth amendment was acknowledged as the first instance in United States history in which Congress had been given power to enforce by legislation express prohibitions against the states.[39] Since the power of judicial review only

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[24] *Id.* at 313; *see* note 8 *supra.*

[25] 586 F.2d at 313.

[26] *Id.;* St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938); *see* Gomez v. Wilson, 477 F.2d 411 (D.C. Cir. 1973); Anderson v. Moorer, 372 F.2d 747 (5th Cir. 1967).

[27] 586 F.2d at 312, 314.

[28] *Id.* at 313-14.

[29] *Id.* at 317.

[30] *Id.* at 313-16; *see* note 2 *supra;* notes 43-45 *infra.*

[31] *Id.* at 313, 315-17.

[32] *Id.* at 314-15.

[33] *Id.* at 313.

[34] *Id.* at 313-14.

[35] *Id.* at 313. *See generally* Powell v. McCormack, 395 U.S. 486, 512-16 (1969); Baker v. Carr, 369 U.S. 186, 198 (1962); P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 786 (2d ed. 1973).

[36] Bell v. Hood, 327 U.S. 678, 682 (1946).

[37] 586 F.2d at 314, 317.

[38] *Id.* at 315-18; Ex parte Virginia, 100 U.S. 339, 345 (1880).

[39] 586 F.2d at 316; *see* The Civil Rights Cases, 109 U.S. 3, 45-46 (1883) (Harlan, J., dissenting).

allows federal courts to declare state statutes or actions unconstitutional,[40] the *Cale* court reasoned that the enforcement clause gave Congress power to afford affirmative relief which was not available under traditional exercise of judicial review.[41] The Fourth Circuit carefully distinguished protection of the fourteenth amendment guarantees from the remedy for violation of those guarantees.[42] The enforcement clause contemplates congressional legislation to implement the guarantees of the fourteenth amendment.[43] Supreme Court decisions following the ratification of the amendment indicate that congressional power to enforce the prohibitions is virtually exclusive.[44] The Fourth Circuit's refusal to approve an implied cause of action comports with the Supreme Court's reluctance to judge state action before Congress has exercised its power under the enforcement clause or before state courts have deprived individuals of due process or equal protection rights under the fourteenth amendment.[45]

In *Cale,* the Fourth Circuit emphasized that prior to *Bivens v. Six Unknown Named Agents,*[46] the Supreme Court had only once approved the recovery of damages under the Constitution alone.[47] In *Bivens,* the

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[40] *See* 586 F.2d at 316-17; note 39 *supra.* Chief Justice Marshall confirmed the judiciary's power of judicial review under the Constitution in Marbury v. Madison, 1 Cranch 137 (1803). *See* Martin v. Hunter's Lessee, 1 Wheat. 304, 352 (1816).

[41] 586 F.2d at 316.

[42] *Id.* at 316-17. States are incapable of providing immunity for their officers who act in violation of the Federal Constitution. Ex parte Young, 209 U.S. 123, 159-60 (1908).

[43] Ex parte Virginia, 100 U.S. 339, 345-46 (1880). Congress is authorized to enforce the fourteenth amendment prohibitions by whatever legislation is appropriate to reach the ends contemplated by the amendment. *Id.* In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court concluded that § 5 of the fourteenth amendment provided Congress with the same broad powers encompassed by the necessary and proper clause. *Id.* at 650; *see* McCulloch v. Maryland, 4 Wheat. 316, 421 (1819). Congress may enact legislation that has legitimate ends, appropriate means, and which is consistent with the letter and spirit of the Constitution. *Id.;* 384 U.S. at 650-51; *see* Development, *Congressional Power Under Section Five of the Fourteenth Amendment,* 25 STAN. L. REV. 885, 886 (1973).

[44] *See* Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966); The Civil Rights Cases, 109 U.S. 3, 11 (1883); Ex parte Virginia, 100 U.S. 339, 345-46 (1880). In *Ex parte Virginia,* the Court acknowledged that the absence of the enforcement clause of the fourteenth amendment might justify an argument that § 1 does no more than state a moral duty. 100 U.S. at 347-48; *see* note 2 *supra.* In the *Civil Rights Cases,* the Supreme Court emphasized that not only does the fourteenth amendment restrict state action, but that § 5 vests Congress with power to correct the effects of prohibited state action. 109 U.S. at 11; *see* note 43 *supra. See also* Slaughter-House Cases, 16 Wall. 36 (1872).

[45] *See* Slaughter-House Cases, 16 Wall. 36, 81 (1872). In the *Slaughter-House Cases,* the Court acknowledged the power of Congress to enforce the equal protection clause of the fourteenth amendment if states did not conform to the amendment's requirements. *Id.* The Court recognized, however, that its role with respect to the states was limited to determining the validity of state laws or court action. *Id. See also* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

[46] 403 U.S. 388 (1971).

[47] 586 F.2d at 317; *see* Jacobs v. United States, 290 U.S. 13 (1933); Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1542 (1972) [hereinaf-

Supreme Court allowed the recovery of damages on a claim for unlawful search and arrest under the fourth amendment.[48] The plaintiff's claim against the six federal agents was based on the fourth amendment itself because there was no explicit statutory provision allowing a suit against federal agents acting under color of government authority.[49] The Court approved recovery based on the historical recognition of damages as the ordinary remedy for invasions of personal liberty[50] and the power of federal courts to provide a remedy where there is a general statutory right to sue.[51] In addition, the Court approved the implied remedy because federal fiscal policy would be unaffected[52] and because no "special factors" indicated that the Court should hesitate in the absence of congressional action.[53]

The Fourth Circuit distinguished *Bivens* on two grounds.[54] First, the fourteenth amendment specifically provides for congressional action, whereas the fourth amendment, the basis for the plaintiff's claim in *Biv-*

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ter cited as Dellinger]; text accompanying notes 48-53 *infra*. Although the Supreme Court has never decided whether an implied cause of action for damages exists under the fourteenth amendment, *see* 586 F.2d at 317, one commentator has suggested without explanation that the Court's power to create a damage remedy under the Constitution would be relatively easy to establish. *See* Dellinger, *supra* at 1542. In *Jacobs*, the Supreme Court allowed the recovery of compensation under the fifth amendment subsequent to the government's exercise of its power of eminent domain. 290 U.S. at 16. The fifth amendment specifically provides that no property shall be taken without just compensation. *See* U.S. CONST. amend. V. Contrary to the Fourth Circuit's suggestions in *Cale* that the fifth amendment implied cause of action issue was not addressed in *Jacobs*, 586 F.2d at 317, the Supreme Court expressly stated that the compensation remedy rested upon the fifth amendment as an implied promise to pay and did not require statutory recognition. 290 U.S. at 16; *see* Davis v. Passman, 442 U.S. 228, 242 (1979). *See generally* text accompanying notes 62-65 *infra*.

[48] 403 U.S. 388, 397 (1971). The fourth amendment protects against unreasonable searches and seizures. U.S. CONST. amend. IV; *see* United States v. Calandra, 414 U.S. 338 (1974); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[49] *See* 403 U.S. 388 (1971).

[50] *Id.* at 395.

[51] *Id.* at 396. In *Bivens*, the government sought to distinguish Jacobs v. United States, 290 U.S. 13 (1933), *see* note 47 *supra*, on the grounds that money damages were expressly provided for by the fifth amendment and that the plaintiffs had no other possible remedy. Dellinger, *supra* note 47, at 1542 n.58.

[52] 403 U.S. at 396. Where a federal fiscal policy question is involved, the courts may refuse to infer a cause of action for damages absent a statute. *See* United States v. Standard Oil Co., 332 U.S. 301, 314-17 (1947). In *Standard Oil*, the Court denied recovery to the Government for the loss of services of a soldier hit by a truck. *See id.* at 304. The Court reasoned that Congress has almost exclusive control of fiscal affairs and when necessary, will act to prevent interference with federal funds. *Id.* at 314-15.

[53] 403 U.S. at 396. In *Bivens*, the Court emphasized that there was no express congressional declaration prohibiting the recovery of money damages under the fourth amendment from federal agents who have violated the amendment. *Id.* at 397. The Court did not clearly establish, however, what "special factors" other than federal fiscal policy might counsel hesitation in inferring a cause of action in the absence of congressional action. *See id.* at 396.

[54] *See* 586 F.2d at 317.

ens, does not.[55] By enacting section 1983 pursuant to the enforcement clause of the fourteenth amendment, Congress had expressly provided a remedy and taken the "affirmative action" which was not present in *Bivens*.[56] The Fourth Circuit reasoned that its approval of an implied cause of action against a municipality might contravene the fiscal policymaking of Congress evidenced by section 1983's limited immunity for municipalities.[57] Whereas the *Bivens* suit was directed against private individuals, Cale's suit was directed at the city of Covington.[58] If Cale were to recover, the taxpayers would ultimately pay for that recovery.[59] The *Cale* court was also reluctant to create a judicial remedy that might later conflict with congressional action.[60] If Congress subsequently provided a remedy different from the judicial remedy, the federal courts likely would be in the difficult position of having to determine whether the judicial remedy or the congressional remedy would control.[61]

The Supreme Court recently applied the *Bivens* rationale to approve a damage remedy under the due process clause of the fifth amendment in *Davis v. Passman*.[62] The plaintiff contended that her discharge from the staff of a U.S. Congressman was based on sex discrimination in violation

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[55] *Id.; see* U.S. CONST. amend. IV.

[56] 586 F.2d at 317; *see* note 51 *supra*.

[57] 586 F.2d at 317. The Fourth Circuit reasoned that the enforceability of a judicial decision affecting fiscal policy concerns may be open to serious question. *Id.* Prior to *Monell*'s recognition of municipalities as "persons" for § 1983 purposes, one commentator suggested that the fashioning of an independent damage remedy against municipalities by the judiciary would be contrary to basic notions of proper judicial functioning. Comment, *Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the* Bivens *Doctrine*, 36 MD. L. REV. 123, 127, 152 (1976). Another commentator has argued to the contrary that the judiciary is unable to fulfill its function unless it can provide relief and that the Fourth Circuit's remand in *Cale* may deny the plaintiff any remedy. *See* Note, *Judicial Refusal to Imply a Cause of Action Against Municipality Under Fourteenth Amendment After* Monell - Cale v. Covington, *586 F.2d 311 (4th Cir. 1978)*, 13 SUFFOLK U.L. REV. 1150, 1156 n.29 (1979) (citing Marbury v. Madison, 1 Cranch 137 (1803)).

[58] *See* 586 F.2d at 317.

[59] *Id.* Section 1983, as construed by *Monell*, provides for a cause of action against a municipal employee in circumstances which may not allow suit against the municipality for the same violation of the fourteenth amendment. *Id.; see* text accompanying notes 5-6 *supra*.

[60] 586 F.2d at 317-18. In *Cale*, the plaintiff had an alternative remedy under § 1983. However, Cale could only have asserted a cause of action against the city under § 1983 if his theory for recovery were other than respondeat superior. *See* text accompanying notes 6-7 *supra*. Although Cale could have sued the Chief of Police, 586 F.2d at 314, recovery might be precluded by the Chief's judgment-proof status. Commentators have argued that the Supreme Court's limitation of municipal liability to other than respondeat superior grounds was unconvincing because its distinction between direct and vicarious liability was invalid. *See* Blum, *supra* note 11, at 412-13; Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 215 n.15 (1979).

[61] 586 F.2d at 318.

[62] 442 U.S. 228 (1979).

of the fifth amendment.[63] The Court reasoned that those without other effective means to vindicate constitutional rights must be allowed to invoke the jurisdiction of the courts.[64] Although *Davis* did not involve municipalities or the fourteenth amendment, the Court's opinion does not foreclose the possibility of implied causes of action in cases like *Cale*.[65]

The Fourth Circuit's decision not to infer a cause of action under the fourteenth amendment placed it in the minority among the circuits.[66] The Second, Sixth, and Eighth Circuits have relied on *Bivens* to expressly approve implied causes of action under the fourteenth amendment.[67] Although the Fifth, Seventh, and Ninth Circuits have not directly addressed the issue, opinions in those circuits have suggested approval of an

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[63] *Id.* at 2267-68.

[64] *Id.* at 242.

[65] In *Davis*, the Court noted that injunctions were often issued to restrain state officers from violating the fourteenth amendment. *Id.* The *Davis* Court concluded that damages were appropriate because damages are the historical remedy for invasions of personal liberty interests and because the plaintiff lacked other possible forms of relief, including reinstatement. *Id.* at 245. The Court also emphasized that the relevant statute did not expressly foreclose alternative remedies. *Id.* at 246-47. The Court did suggest that the judiciary's power to enforce constitutional guarantees might not be presumed if the Constitution explicitly committed an issue to a different government branch. *See id.* at 242.

[66] 586 F.2d at 314-15.

[67] *Id.; see* Gentile v. Wallen, 562 F.2d 193 (2d Cir. 1977); Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), *vacated and remanded*, 438 U.S. 902, *aff'd on other grounds*, 589 F.2d 335 (8th Cir. 1978); Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975). *See also* Rowe v. Tennessee, 609 F.2d 259 (6th Cir. 1979); Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978). *But see* Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979); Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (per curiam); Jones v. City of Memphis, 586 F.2d 622 (6th Cir.), *cert. denied*, 440 U.S. 914 (1979). In *Gentile*, an elementary school teacher was denied tenure and discharged. 562 F.2d at 194. The teacher sued directly under the fourteenth amendment with jurisdiction based on 28 U.S.C. § 1331. 562 F.2d at 195. Although the Second Circuit affirmed judgment against the plaintiff, *id.* at 198, the court approved the implied cause of action. *Id.* at 196-97. In *Hanna*, the plaintiffs sued Euclid, Ohio under the fourth amendment for unreasonable searches of their homes by municipal building inspectors. 514 F.2d at 394. Although the Sixth Circuit did not mention the fourteenth amendment, the court recognized the cause of action with jurisdiction based on § 1331 apparently by applying the fourth amendment to the municipality via the fourteenth. *Id.* at 398. In *Owen*, the Chief of Police was discharged and brought suit against the city claiming a violation of due process. 560 F.2d at 926. Based on *Monell*, the Eighth Circuit ultimately concluded that there was no reason to infer a cause of action under the fourteenth amendment because the plaintiff could sue the city directly under § 1983. 589 F.2d at 337. Prior to *Monell*, however, the court had approved a fourteenth amendment implied cause of action based on *Bivens*. 560 F.2d at 932-33.

In *Turpin*, the Second Circuit refused to infer an implied cause of action against a municipality under the fourteenth amendment. 591 F.2d at 427. The court held that *Monell* allowed the plaintiff to proceed under § 1983. *Id.* Similarly, in *Holley*, the Second Circuit did not decide the implied cause of action issue under the fourteenth amendment because it was unnecessary for the court's judgment. 605 F.2d at 648. In *Jones*, the plaintiff sued the city of Memphis for his illegal arrest and beating by city police officers. 586 F.2d at 623. Based on the rationale of *Monell*, the Sixth Circuit disapproved an implied fourteenth amendment action on a respondeat superior theory. *Id.* at 625.

implied cause of action under the fourteenth amendment.[68] Those courts approving an implied cause of action have reasoned broadly that where there is a general right to sue, courts may use any available remedy if Congress has not limited the plaintiff to congressional remedies.[69] However, the Fourth Circuit's disapproval of an implied cause of action is consistent with the First Circuit's conclusion that judicial approval of municipal liability under the fourteenth amendment alone, contrary to

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[68] 586 F.2d at 315. In Roane v. Callisburg Indep. School Dist., 511 F.2d 633 (5th Cir. 1975), the Fifth Circuit concluded that jurisdiction under § 1331 may be appropriate for a suit alleging discharge from employment in violation of fourteenth amendment due process. *Id.* at 635 n.1. In Stapp v. Avoyelles Parish School Bd., 545 F.2d 527 (5th Cir. 1977), the court noted that jurisdiction over a school district exists under § 1331 for a suit for due process violations upon an employee's dismissal. *Id.* at 531 n.7. In Hostrop v. Bd. of Jr. College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975), *cert. denied,* 425 U.S. 963 (1976), the Seventh Circuit held that the discharge of a junior college president without due process entitled the plaintiff to damages in a suit under § 1331. *Id.* at 577, 579. In Fitzgerald v. Porter Mem. Hosp., 523 F.2d 716 (7th Cir 1975), *cert. denied,* 425 U.S. 916 (1976), the court noted that a suit against the hospital could probably be maintained under the fourteenth amendment via § 1331. *Id.* at 718 n.7. In Gray v. Union Co. Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. 1975), the Ninth Circuit held that a teacher whose contract had not been renewed met the requirement of § 1331 in an action alleging the violation of her first amendment and due process rights. *Id.* at 805. In Molina v. Richardson, 578 F.2d 846 (9th Cir.), *cert. denied,* 439 U.S. 1048 (1978), however, the court rejected an implied respondeat superior cause of action under the fourteenth amendment against the city of Los Angeles. *Id.* at 848. The Ninth Circuit concluded that § 1983 provided an adequate remedy. *Id.* at 853.

[69] *See, e.g.,* Owen v. City of Independence, 560 F.2d 925, 932 (8th Cir. 1977). Although *Owen* was modified on remand from the Supreme Court to approve a cause of action under § 1983, *see* note 67 *supra,* the Eighth Circuit had analyzed *Bivens* in depth. The court had held that the police officer discharged without a hearing stated a cause of action under the fourteenth amendment because the relief he sought was appropriate to vindicate his fourteenth amendment rights. 560 F.2d at 933. The Eighth Circuit's approval of the implied fourteenth amendment cause of action was based on its resolution of two factors emphasized in *Bivens.* First, the court found the remedies sought to be necessary or appropriate to vindicate fourteenth amendment rights. *Id.* at 932; *see* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (Harlan, J., concurring). Second, the court concluded that Congress had not limited the plaintiff to remedies specifically provided by Congress. 560 F.2d at 932; *see* 403 U.S. 388 (1971). Although the Sixth Circuit's decision in Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975), failed to rationalize its reliance on *Bivens,* the court's approval of an implied cause of action was particularly appropriate since both *Bivens* and *Hanna* involved fourth amendment claims. *See id.* at 397. *See also* Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment,* 70 NW. U.L. REV. 770, 777 (1975).

The Third and Tenth Circuits have not decided whether an implied cause of action exists under the fourteenth amendment. In Putzig v. O'Neil, 577 F.2d 841 (3d Cir. 1978), the plaintiffs argued that the city of Philadelphia could be held liable directly under the fourteenth amendment with jurisdiction based on § 1331 for false arrest. *Id.* at 850. The Third Circuit expressly refused to address the issue and cited two earlier decisions in which the issue had not been decided. *Id; see* Mahone v. Waddle, 564 F.2d 1018, 1024 (3d Cir. 1977), *cert. denied,* 438 U.S. 904 (1978); Gagliardi v. Flint, 564 F.2d 112, 115 n.3 (3d Cir. 1977), *cert. denied,* 438 U.S. 904 (1978). In *Mahone,* the court did not decide the issue because it concluded that an effective federal statutory remedy existed under § 1981. 564 F.2d at 1024. In Weathers v. West Yuma County School Dist., 530 F.2d 1335 (10th Cir. 1976), the Tenth

what Congress has deliberately excluded from the operation of section 1983, might be inappropriate.[70]

The Fourth Circuit's refusal to establish an implied cause of action for damages under the fourteenth amendment removes the court from fiscal policymaking.[71] The court has deferred to congressional enforcement of the fourteenth amendment prohibitions and has asserted for itself the power to adjudge only the constitutionality of congressional remedies.[72] Within the Fourth Circuit, municipalities retain their immunity from liability for their employees' actions unless the actions occur pursuant to municipal policies or decisions.[73] For an individual otherwise deprived of fourteenth amendment guarantees by a municipal employee, the only option available is suit against the employee under section 1983. *Cale* eliminates the possibility of an implied fourteenth amendment cause of action against the employee's employer.[74]

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Circuit did not consider the issue of jurisdiction under § 1331 because the court had concluded that no cause of action was present. *Id.* at 1342.

The Fourth Circuit upheld an implied cause of action for damages under the fifth amendment in State's Marine Lines, Inc. v. Schultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974). In Singleton v. Vance County Bd. of Educ., 501 F.2d 429, (4th Cir. 1974), Judge Winter, dissenting in part in the court's remand on jurisdictional grounds, suggested that jurisdiction was established under § 1331 and that money damages were necessary to afford relief for the violation of fourteenth amendment rights. *Id.* at 433.

[70] 586 F.2d at 314-15. In Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977), the First Circuit rejected an implied fourteenth amendment cause of action in a suit against a police officer who had shot the plaintiff's decedent. *Id.* at 44-45. *Kostka* was decided prior to the Supreme Court's decision in *Monell* that "person" in § 1983 included municipalities. *See* note 6 *supra.* As a result, the First Circuit argued that the exclusion of municipalities from the scope of § 1983 should preclude independent court action contrary to Congress' apparent intent to protect the fiscal integrity of political subdivisions. 560 F.2d at 44 n.6. The same consideration is relevant now in light of the limited municipal immunity still remaining under § 1983. The existence of a congressionally established remedy for fourteenth amendment violations militates against extension by the judiciary. 586 F.2d at 317. Cale could have sued the Chief of Police under § 1983. *Id.* at 314. In *Monell,* Justice Powell recognized that the Court's decision allowed the Court to avoid deciding whether an implied cause of action exists under the fourteenth amendment. Monell v. Department of Social Services, 436 U.S. at 712 (Powell, J., concurring). Justice Powell suggested that continued adherence to an interpretation of § 1983 providing absolute immunity for municipalities soon would require deciding whether the § 1983 limitations could be avoided by inferring a cause of action under the fourteenth amendment similar to that approved in *Bivens. Id.*

[71] *See* text accompanying notes 52 & 57 *supra.*

[72] *See* notes 43-45 *supra.*

[73] *See* 42 U.S.C. § 1983 (1976); note 6 *supra.*

[74] *See* 586 F.2d at 313.

C. *Political Patronage*

In *Elrod v. Burns*,[1] the Supreme Court held that the first and fourteenth amendment guarantees of freedom of belief and association protected "nonpolicymaking, nonconfidential" government employees from discharge or threat of discharge solely on the basis of political preference.[2] *Elrod* arose in Illinois after a newly elected Democratic sheriff discharged or threatened to discharge a number of employees of the Cook

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[1] 427 U.S. 347 (1976).

[2] *See id.* at 375 (Stewart, J., concurring). In *Elrod*, the Court was unable to agree on a majority opinion. Justice Brennan wrote for the plurality which also included Justices White and Marshall. 427 U.S. at 349-74. The plurality reasoned that the first amendment freedoms of belief and association and free functioning of the electoral process required limitations on political patronage practices. *Id.* at 355-56; *see* U.S. CONST. amends. I, XIV. In a separate opinion, Justices Stewart and Blackmun concurred in the result, but maintained that the facts of the case did not require the plurality's extended discussion of the patronage system, especially with regard to hiring. 427 U.S. at 374-75. Justice Stewart stated the holding of *Elrod*, that nonpolicymaking, nonconfidential public employees are to be protected from discharge on the sole ground of political belief. 427 U.S. at 375. Justices Stewart and Blackmun concurred in the judgment of the plurality only to the extent that it applied to the discharge of nonpolicymaking, nonconfidential government employees. *See id.* When no single rationale is approved by five Justices to explain the result of a Supreme Court decision, the holding is the narrowest position taken by the members concurring in the judgment. Marks v. United States, 430 U.S. 188, 193 (1977). Chief Justice Burger and Justices Powell and Rehnquist dissented, urging that longstanding practice and strong government interests supported patronage practices. 427 U.S. at 375-84. Although Justice Stevens took no part in *Elrod*, his opinion in Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928, 410 U.S. 943 (1973), protecting nonpolicymaking employees of the Illinois Secretary of State's Office from politically motivated discharges, indicated that he would concur in the result of *Elrod*. *See id.* at 576.

The *Elrod* plurality maintained that the government interest in implementing the policies of a new administration which are presumably supported by the electorate could be achieved by limiting patronage dismissals to policymaking positions. 427 U.S. at 367; note 50 *infra*. Recognizing that the policymaking exception required elaboration, the plurality indicated that whether the employee's responsibilities involve administrative determinations of office or agency direction is crucial. *See* 427 U.S. at 367-68. In his concurring opinion, Justice Stewart added that the Court's prohibition against patronage discharges did not extend to confidential employees. *See id.* at 375. The Fifth Circuit has held that the nonpolicymaking, nonconfidential language of Justice Stewart's opinion established two classes of employees subject to patronage discharges, those in policymaking positions and those in confidential positions. *See* Stegmaier v. Trammell, 597 F.2d 1027, 1040 (5th Cir. 1979). In *Stegmaier*, the Fifth Circuit approved the dismissal of a nonpolicymaking, confidential deputy clerk, even though the principal clerk did not hold a policymaking position. 597 F.2d at 1040.

Commentators have suggested that the *Elrod* exceptions are overly vague and will need to be clarified on a case-by-case basis. *See* Comment, *Patronage Dismissals and Compelling State Interests: Can the Policymaking/Nonpolicymaking Distinction Withstand Strict Scrutiny?*, 1978 S. ILL. U.L.J. 278; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 194 (1976) [hereinafter cited as *1975 Term*]. *See also* Rosaly v. Ignacio, 593 F.2d 145 (1st Cir. 1979); Johnson v. Bergland, 586 F.2d 993 (4th Cir. 1978); Newcomb v. Brennan, 558 F.2d 825 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977). In an effort to clarify and solidify the *Elrod* holding, in Branti v. Finkel, 48 U.S.L.W. 4331 (1980), a majority of the Supreme Court

County sheriff's office who had worked for his Republican predecessor.[3] In Virginia, the customary practice of newly elected sheriffs is to appoint new contingents of deputies at the start of their terms of office.[4] The Virginia state code specifically empowers newly elected sheriffs to appoint deputies to exercise the official duties of the sheriff during his term of office.[5] These new deputies are ordinarily affiliated with the same political party as that of the new sheriff.[6] Because the *Elrod* Court failed to agree on a majority opinion,[7] federal courts have confronted the task of determining what government interests are sufficient to protect political patronage practices.[8] In *Ramey v. Harber*,[9] the Fourth Circuit Court of Appeals addressed the issue of whether *Elrod* affects Virginia's statutorily based custom of deputy appointment.[10]

On January 1, 1976 Democrat Paul T. Harber took office as the newly elected sheriff of Lee County, Virginia.[11] Harber refused to reappoint any of the ten deputies of his Republican predecessor solely because of their political beliefs and affiliations.[12] Six months after Harber became sheriff the Supreme Court decided *Elrod*.[13] The former deputies filed suit in

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agreed that the policymaking, confidential labels are not the ultimate concern. *Id.* at 4334. Rather, the issue is whether the effective performance of the public office depends upon party affiliation. *Id.* Justice Stevens wrote the majority opinion in *Branti* and was joined by Chief Justice Burger and Justices Brennan, White, Marshall, and Blackmun. *Id.* at 4331. The Court affirmed the entry of an injunction against the termination from employment of two assistant public defenders. *Id.* at 4334. Justice Stewart dissented on the grounds that the assistants were confidential employees who could be discharged in accordance with *Elrod*. *See id.* at 4335. Justices Powell and Rehnquist also dissented, maintaining that the majority's standard is vague and uncertain, and contrary to substantial government interests served by political patronage. *See id.* at 4335-38.

[3] *See* 427 U.S. at 350-51.

[4] *See* Ramey v. Harber, 589 F.2d 753, 755-56 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979).

[5] VA. CODE § 15.1-48 (Supp. 1979). The sheriff may remove any of his deputies at any time. *Id.*

[6] *See* 589 F.2d at 755-56.

[7] *See* note 2 *supra*.

[8] *See, e.g.*, Rosaly v. Ignacio, 593 F.2d 145 (1st Cir. 1979); Johnson v. Bergland, 586 F.2d 993 (4th Cir. 1978); McCollum v. Stahl, 579 F.2d 869 (4th Cir. 1978), *cert. denied*, 440 U.S. 912 (1979); Newcomb v. Brennan, 558 F.2d 825 (7th Cir. 1977); Rosenthal v. Rizzo, 555 F.2d 390 (3d Cir.), *cert. denied*, 434 U.S. 892 (1977); Rivera Morales v. Benitez de Rexach, 541 F.2d 882 (1st Cir. 1976).

[9] 589 F.2d 753 (4th Cir. 1978).

[10] *Id.*

[11] *Id.* at 755.

[12] *Id. See generally* VA. CODE § 15.1-48 (Supp. 1979). In 1916, the Virginia Supreme Court established that § 817 of the Virginia Code of 1887, the forerunner of VA. CODE § 15.1-48, provided that a deputy clerk's tenure in office terminated with the term of the clerk. Farmer's Bank of Southwest Va. v. McGavock, 119 Va. 510, 512, 89 S.E. 949, 949 (1916). Section 15.1-48 applies to both deputy clerks and deputy sheriffs. VA. CODE § 15.1-48 (Supp. 1979). In *Ramey*, the Fourth Circuit stated that after an election, any deputies reappointed for the new term would have to requalify and take the appointment oath. 589 F.2d at 756.

[13] 589 F.2d at 755.

September 1976, alleging that they had been denied the free exercise of their rights of belief and association by Harber's refusal to reappoint them.[14] The district court ordered reinstatement of the deputies and the payment of attorneys' fees.[15]

On appeal to the Fourth Circuit, the deputies claimed that they were entitled to back pay and punitive damages and they urged the court to declare the Virginia deputy appointment statute unconstitutional.[16] Although the Fourth Circuit did not decide whether the defendant's refusal to reappoint the plaintiff deputies was prohibited by *Elrod*,[17] the court did distinguish *Ramey* from *Elrod* on two important factual grounds.[18] First, the Lee County term of appointment of the deputies is established by statute.[19] Second, the small size of the Lee County sheriff's office necessitates particularly supportive relations between the sheriff and his deputies.[20] Although these distinctions alone may be sufficient to render *Elrod* inapplicable,[21] the Fourth Circuit concluded that *Elrod* should not apply retroactively.[22] Since *Elrod* was decided after Harber had refused to reappoint the plaintiff deputies, the *Ramey* court set aside the district court's judgment against the defendant.[23]

The Fourth Circuit applied criteria established by the Supreme Court to determine whether *Elrod* was to have retroactive effect.[24] The court

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[14] *Id.* The plaintiffs' original action was brought under 42 U.S.C. § 1983 which provides that any person who subjects a United States citizen to the deprivation of any constitutional rights will be liable to that citizen in a legal, equitable, or other appropriate proceeding for relief. 42 U.S.C. § 1983 (1976); *see* 589 F.2d at 755.

[15] Ramey v. Harber, 431 F. Supp. 657, 670 (W.D. Va. 1977).

[16] 589 F.2d at 755.

[17] *Id.* at 757.

[18] *See id.* at 756-57.

[19] *See* VA. CODE § 15.1-48 (Supp. 1979); note 12 *supra*.

[20] 589 F.2d at 756-57.

[21] *See id.* at 761 (Hall, J., concurring).

[22] *Id.* at 760. The Fourth Circuit reversed the district court's order of reinstatement and award of attorneys' fees and costs. *Id.* The court did require, however, that any reinstated deputies be given thirty days notice prior to the termination of their employment. *Id.*

[23] *See id.*; notes 13 & 22 *supra*.

[24] 589 F.2d at 757-60; *see* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965); Lehman & McClatchey, *The Prospectivity Doctrine: Which Way Out of the Morass?*, 29 JAG J. 65 (1976); Note, *Retroactivity in Civil Suits:* Linkletter *Modified*, 42 FORDHAM L. REV. 653 (1974). *See generally*, Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533 (1977).

In *Ramey*, concurring Judge Hall urged that the retroactivity issue should not be reached unless *Elrod* applied to the facts in *Ramey*. 589 F.2d at 760-61. He maintained that *Elrod* was inapplicable, listing four factual grounds discussed by the majority to distinguish *Ramey* from *Elrod*. *Id.* at 761. Judge Hall noted that the deputies' terms were fixed by statute, that the deputies had actively campaigned against the new sheriff, that no pressure was exerted on the deputies to affiliate with the party of the new sheriff, and that the nature of the Lee County sheriff's office was small and intimate. *Id.* Although the *Ramey* majority agreed with the factual distinctions pointed out by Judge Hall, the court was unwilling to conclude that the distinctions rendered *Elrod* inapplicable. *See id.* at 757.

first considered whether *Elrod* established a new principle of law that was not clearly foreseeable.[25] Second, the court weighed the advantages of retroactive application of the *Elrod* rule.[26] Third, the Fourth Circuit analyzed the injustice or hardship that would result from retroactive application of *Elrod*.[27] Under the first inquiry, the Fourth Circuit concluded that *Elrod* clearly established a new principle of law.[28] The *Ramey* court emphasized the longstanding acceptance of political patronage in the United States[29] and reasoned that *Elrod* overruled a 1974 Fourth Circuit decision upholding a patronage discharge.[30]

The Fourth Circuit weighed the advantages of retroactive application of the *Elrod* decision by concentrating on the appropriateness of Harber's refusal to reappoint the ten deputies.[31] The court approved the sheriff's reliance on the deputy appointment provision[32] and the 1974 Fourth Circuit case approving patronage discharge.[33] In addition, the *Ramey* court asserted that there was no indication that retroactive application would facilitate the operation of the *Elrod* rule protecting the rights of political affiliation and belief.[34] The Fourth Circuit was convinced that the whole-

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[25] 589 F.2d at 757-58; *see* Lemon v. Kurtzman, 411 U.S. 192, 206 (1973); Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971).

[26] 589 F.2d at 758-59; *see* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971); Litwhiler v. Hidlay, 429 F. Supp. 984, 986 (M.D. Pa. 1977).

[27] 589 F.2d at 759-60; *see* Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971); Litwhiler v. Hidlay, 429 F. Supp. 984, 987 (M.D. Pa. 1977).

[28] 589 F.2d at 757-58.

[29] In *Elrod*, Chief Justice Burger and Justices Powell and Rehnquist indicated that the *Elrod* holding was unexpected and almost shocking. *See* 427 U.S. at 375-76, 389 n.12; 589 F.2d at 757-58. They argued that for 185 years the patronage system had not been thought to be unconstitutional. *See* 427 U.S. at 375 (Burger, C.J., dissenting); *id.* at 389 n.12 (Powell, J., dissenting). Justice Powell contended that patronage practices have been a significant contributor to the development of democracy in the American political system. *See id.* at 382. Offers of employment to supporters of successful candidates arguably encourage active participation in politics and the maintenance of the two-party system. *See* O'Neil, *Politics, Patronage and Public Employment*, 44 U. CIN. L. REV. 725, 735 (1975) [hereinafter cited as *Public Employment*]; Note, *A Constitutional Analysis of the Spoils System—The Judiciary Visits Patronage Place*, 57 IOWA L. REV. 1320, 1325-26 (1972) [hereinafter cited as *Spoils System*]. *See also* CSC v. Letter Carriers, 413 U.S. 548, 564-67 (1973); Perry v. Sindermann, 408 U.S. 593, 597-98 (1972); Keyishian v. Board of Regents, 385 U.S. 589, 605-09 (1967); note 55 *infra; see generally* C. FISH, THE CIVIL SERVICE AND THE PATRONAGE (1905); Schoen, *Politics, Patronage, and the Constitution*, 3 IND. LEGAL F. 35 (1969).

[30] 589 F.2d at 758. In Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975), the Fourth Circuit approved a patronage discharge, finding that the plaintiff's job was properly characterized as a sensitive and nonroutine position. *Id.* at 1357. Although the characterization of the plaintiff suggests that she came within the *Elrod* exceptions, the *Ramey* court rejected the plaintiffs' argument that Sheriff Harber's reliance on the *Nunnery* holding was misplaced. *See* 589 F.2d at 758 n.4.

[31] *See* 589 F.2d at 758-59.

[32] *Id.* at 759; *see* Lemon v. Kurtzman, 411 U.S. 192, 199 (1973); VA. CODE § 15.1-48 (Supp. 1979).

[33] 589 F.2d at 759; *see* note 30 *supra*.

[34] 589 F.2d at 758; *see* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). *See gener-*

sale reinstatement of employees not reappointed which would be required by retroactive application of *Elrod* would seriously disrupt state administration.[35]

Under the Supreme Court's third criterion, the Fourth Circuit concluded that retroactive application of *Elrod* would result in far greater hardship for the present employees than for the plaintiffs.[36] The court reasoned that the present deputies hired by Sheriff Harber reasonably expected to continue in their positions for the duration of Harber's term.[37] The plaintiffs knew of the customary practice in Lee County and were fully aware that they could expect to lose their jobs if their sheriff lost his next election.[38] Other courts have applied *Elrod* retroactively without expressly deciding the propriety of doing so,[39] but the only other court to address the issue of *Elrod*'s retroactivity supported the *Ramey* court's conclusion.[40]

Although the Fourth Circuit's conclusion that *Elrod* was to apply prospectively resolved the suit in *Ramey*, the question remains whether the *Elrod* rule ought to apply in circumstances similar to those in *Ramey*. The *Ramey* court indicated that *Elrod* might not apply because of the

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ally Note, *Patronage and the First Amendment After* Elrod v. Burns, 78 COLUM. L. REV. 468 (1978); *1975 Term, supra* note 2, at 190; Note, Elrod v. Burns: *Chipping at the Iceberg of Political Patronage*, 34 WASH. & LEE L. REV. 225 (1977) [hereinafter cited as *Chipping*].

[35] 589 F.2d at 760. The *Ramey* court reasoned that thousands of patronage appointments in Virginia might be open to question if *Elrod* were applied retroactively. *Id.* Although the plaintiffs contended that the statute of limitations protected most pre-*Elrod* appointments from attacks, the court reasoned that the possibly large numbers of pending cases based on pre-*Elrod* patronage weighed against *Elrod*'s retroactive application. *See id.* at 760 n.7.

[36] *Id.* at 760.

[37] *See id.*; notes 5 & 12 *supra*.

[38] 589 F.2d at 760; *see* note 12 *supra*. Although the plaintiffs obtained their jobs by the same method as the one they challenged, one commentator has argued that such employees can nevertheless complain because they were forced to accept the patronage system in order to obtain employment. *See 1975 Term, supra* note 2, at 191.

[39] In Rivera Morales v. Benitez de Rexach, 541 F.2d 882 (1st Cir. 1976), the First Circuit did not mention *Elrod*'s retroactive application, but applied *Elrod* to a pre-*Elrod* politically motivated failure to reappoint and affirmed a damage award. *Id.* at 885-86. In Rosenthal v. Rizzo, 555 F.2d 390 (3d Cir. 1977), the Third Circuit held that a city employee fired prior to *Elrod* had been wrongly denied a full trial to determine his status as a policymaker, but the court made no express determination of *Elrod*'s retroactivity. *Id.* at 394. In Alfaro de Quevedo v. De Jesus Shuck, 556 F.2d 591 (1st Cir. 1977), the First Circuit concluded that the *Elrod* rule did not affect a pre-*Elrod* discharge because the plaintiff was clearly a policymaker. *Id.* at 592-93. *See also* Retail Clerks v. Leonard, 450 F. Supp. 663 (E.D. Pa. 1978); Boyce v. School Dist. of Philadelphia, 447 F. Supp. 357 (E.D. Pa. 1978); Guerra v. Roma Indep. School Dist., 444 F. Supp. 812 (S.D. Tex. 1977).

[40] Litwhiler v. Hidlay, 429 F. Supp. 984 (M.D. Pa. 1977). In *Litwhiler*, the district court denied relief to a discharged clerk in the county assessor's office. *Id.* at 987. The court refused to apply *Elrod* retroactively, emphasizing that chaos would result if political patronage appointments prior to *Elrod* were declared invalid. *Id.*

factual differences between the two cases.[41] The Cook County deputies remain in office until discharged by the sheriff.[42] Although the Fourth Circuit stated that the Lee County deputy sheriffs are also nonpolicymaking, nonconfidential employees,[43] the court stressed that the tenure of employment for the deputies is governed by statute and terminates automatically at the end of the sheriff's term unless the deputies are reappointed.[44] The *Ramey* court also reasoned that the Cook County sheriff's office is less susceptible to the divisive influences of partisan politics and resulting animosities because the Cook County office is larger and likely to be more impersonal than the Lee County office.[45] The *Ramey* court suggested that the plaintiffs' active campaigning against the new sheriff did not promote the atmosphere of cooperation essential to the efficient functioning of the Lee County office.[46] There was no evidence that the *Elrod* deputies had campaigned for the Cook County incumbent.[47] The Fourth Circuit further emphasized the Cook County patronage requirement of support of the prevailing party as a condition of continued employment[48] and contrasted the lack of any such requirement in Lee County as a condition of reappointment.[49]

Despite the factual differences, the Fourth Circuit's unequivocal characterization of the Lee County deputies as nonconfidential, nonpolicymaking public employees,[50] and Harber's refusal to reappoint the plain-

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[41] *See* 589 F.2d at 757.

[42] *See* 427 U.S. at 351.

[43] 589 F.2d at 754.

[44] *See* note 12 *supra*.

[45] 589 F.2d at 757.

[46] *Id.* at 756-57.

[47] *Id.* at 757.

[48] *See* 589 F.2d at 756-57; 427 U.S. at 350-51.

[49] 589 F.2d at 756. The distinction between the Cook County requirement of party support and the lack of such a requirement in Lee County was irrelevant with respect to the effect on first amendment freedoms of belief and association. Employment in each case, whether by avoiding discharge or securing reappointment, was conditioned on political affiliation. In Branti v. Finkel, 48 U.S.L.W. 4331 (1980), the Court held that dismissed employees need not show actual or even apparent coercion, but that any requirement of party affiliation is sufficient to activate the protection of the *Elrod* principle. *See id.* at 4333-34.

[50] *Id.* at 754; *see* note 2 *supra*. The deputies in *Ramey* could conceivably be characterized as policymaking or confidential employees. *Cf.* McCollum v. Stahl, 579 F.2d 869, 872 (4th Cir. 1978). In *McCollum*, the Fourth Circuit concluded that the close relationship between the sheriff and his deputies could allow a jury to find that a deputy operated in a policymaking, confidential capacity, thereby exonerating the sheriff for the discharge of the deputy. *Id.* at 872-73. In Newcomb v. Brennan, 558 F.2d 825 (7th Cir. 1977), the court concluded that the city attorney needed loyal subordinates and that the deputy city attorney could be discharged for lack of loyalty to the city attorney. 558 F.2d at 830-31. The Seventh Circuit also emphasized the public interest in encouraging the policies of the city attorney and reasoned that the deputy attorney was a policymaker because he was vested with all the duties of the city attorney. *See id.* at 829-31. Although the *Ramey* deputies also were vested with all the duties of the sheriff, the responsibilities of the *Ramey* deputies did not as clearly fall within the policymaking function outlined by the *Elrod* plurality. *See* 427 U.S. at 367-68. The loyalty dimension mentioned in *Newcomb*, however, might apply in the *Ramey*

tiffs solely because of their political beliefs[51] suggest that the *Elrod* rule would apply to *Ramey*. Since the *Ramey* deputies are nonpolicymaking, nonconfidential employees, their conduct should not affect the functioning of the Lee County sheriff's office any more than the conduct of the Cook County deputies should affect the operation of that office.[52] Thus, the Lee County deputies arguably deserve as much protection from patronage practice as the Supreme Court afforded the Cook County deputies in *Elrod*. The only apposite factual distinction between *Ramey* and *Elrod* is the difference between discharges and refusals to reappoint.[53]

The *Elrod* holding specifically applies only to discharge on patronage grounds.[54] The precedent upon which the *Elrod* Court relied indicates, however, that the Court's disapproval of patronage discharges may extend to refusals to reappoint.[55] The *Elrod* Court relied upon previous decisions

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circumstances to bring the deputies within the confidential exception established by the *Elrod* concurrence. *See id.* at 375; note 2 *supra*. In Stegmaier v. Trammell, 597 F.2d 1027 (5th Cir. 1979), the court also emphasized loyalty and found a deputy clerk to be within the *Elrod* confidential employee exception. *Id.* at 1040. The Fifth Circuit based its decision on the existence of a statute empowering the deputy to conduct all the business of the clerk. *Id.* The *Ramey* facts are strikingly similar, although *Stegmaier* only involved the single deputy in the office, a circumstance in which loyalty and confidentiality may be especially important. *See id.*

[51] 589 F.2d at 755.

[52] Office morale appears to be a special concern of the Fourth Circuit. *See id.* at 756-57, 760; *cf.* Hollifield v. McMahan, 438 F. Supp. 591 (E.D. Tenn. 1977) (*Elrod* applied despite interest in morale). In *Hollifield*, the federal district court recognized the sheriff's legitimate interest in his department's morale, but applied *Elrod* to hold that the discharge of a nonpolicymaking deputy after the deputy's vigorous campaigning for an opposing sheriff candidate violated the deputy's first amendment rights. *Id.* at 593. In *Branti*, however, the Court held that even a nonpolicymaking, nonconfidential public employee may be discharged because of his party affiliation if his position is political in nature. 48 U.S.L.W. 4331, 4334 (1980). The Court also indicated that a public official is free to discharge subordinates from a prior administration if he lacks confidence in their loyalty for some reason other than their party affiliation. *Id.* n.14. *See also* note 2 *supra*; note 59 *infra*.

[53] *See* 589 F.2d at 756-57; text accompanying note 2 *supra*. From the standpoint of the employee, the practice of political patronage, whether discharge or failure to reappoint, results in the loss of employment. *See* 589 F.2d at 756.

[54] 427 U.S. at 375 (Stewart, J., concurring); *see* notes 2 & 53 *supra*.

[55] *See* Perry v. Sindermann, 408 U.S. 593 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967). In *Keyishian*, the Court held that a New York statute which flatly prohibited teachers from joining particular political organizations was an unconstitutionally vague attempt to keep subversives out of the schools. *Id.* at 603-04. The Court concluded that membership alone without intent to promote unlawful purposes of an organization was inadequate grounds for discharging teachers. *Id.* at 606. In *Perry*, the Court held that the nonrenewal of a teacher's one-year contract could not be based on the teacher's exercise of his freedom of speech. 408 U.S. at 597-98. *See also* Shelton v. Tucker, 364 U.S. 479 (1960). The *Perry* Court held further that a public school teacher is entitled to a hearing prior to nonrenewal of his contract if he is deprived of either a "liberty" interest or a "property" interest in continued employment by a decision not to rehire. 408 U.S. at 599.

In *Elrod*, concurring Justices Stewart and Blackmun relied upon *Perry* to establish the narrow rule limiting patronage discharges. 427 U.S. at 375. *Perry* suggests that Chief Justice Burger and Justices White, Stewart, Blackmun, Marshall, and Brennan would also limit

holding that public school teachers may not be deprived of "liberty" interests such as the free exercise of first amendment rights by discharge or by a decision not to rehire.[56] Although the Supreme Court would not likely limit *Elrod* to politically motivated discharges,[57] a majority of the Court has agreed that compelling government interests may justify restricting the exercise of freedoms otherwise protected under the first and fourteenth amendments.[58] Nonetheless, the *Elrod* plurality concluded

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refusals to reappoint on patronage grounds. *See generally* 408 U.S. 593 (1972). Given Justice Stevens' support of the *Elrod* principle in Branti v. Finkel, 48 U.S.L.W. 4331 (1980), a majority of the Supreme Court would likely find the Lee County deputy appointment practice constitutionally objectionable. *See* note 2 *supra*. In *Branti*, the Court intimated that no relevant distinction exists between refusals to reappoint and dismissals, but the Court concluded only that the lack of a reasonable expectation of continued employment is insufficient to justify a dismissal based on political affiliation. *See* 48 U.S.L.W. 4331, 4332 n.6 (1980).

[56] Perry v. Sindermann, 408 U.S. 593 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967); *see* note 55 *supra*.

[57] *See* note 55 *supra*. The Supreme Court recently ruled that the payment of union service fees is an unconstitutional condition of government employment when the employee holds ideologically-based objections to various union activities. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977). *See generally Chipping, supra* note 34; Comment, *Political Patronage and Unconstitutional Conditions: A Last Hurrah for the Party Faithful?*, 14 WM. & MARY L. REV. 720 (1973).

[58] In CSC v. Letter Carriers, 413 U.S. 548 (1973), the Supreme Court held that § 9(a) of the Hatch Act (current version at 5 U.S.C. § 7324(a)(2) (1976)), which restricted political management and campaigning of federal employees, was not unconstitutionally overbroad. 413 U.S. 548, 575-80 (1973); *see* United Pub. Workers v. Mitchell, 330 U.S. 75, 99 (1949). The Court maintained that employment by the federal government should turn on merit rather than political activity and the political influence of federal employees should be limited. 413 U.S. at 557. The Hatch Act forbids only that political activity of federal employees considered detrimental to efficiency. 330 U.S. at 99. In *Letter Carriers*, the Court recognized that the Hatch Act promoted the government interests in efficiency and establishing an unbiased bureaucracy in which federal employees are to act without favoritism toward any political group. *See* 413 U.S. at 564-65.

The Supreme Court requires the application of a test of "strict judicial scrutiny" when state action interferes with the free exercise of some fundamental personal right or liberty or when state action creates a "suspect" classification which discriminates against a discrete and insular minority. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); Buckley v. Valeo, 424 U.S. 1, 64 (1976); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17, 37-38 (1973); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100-102 (1943); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Only when a compelling state interest is involved will the state action be constitutional. *See* 424 U.S. 1, 25, 55 (1976); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 253-54 (1974); 411 U.S. 1, 97-98 (1973) (Marshall, J., dissenting). The state action cannot unnecessarily burden constitutional interests. NAACP v. Button, 371 U.S. 415, 438, 444 (1963).

The *Elrod* plurality indicated that the strict scrutiny standard shall be employed to determine when government interests are sufficiently compelling to require support of the governing party by employees. 427 U.S. at 363. According to the plurality, requiring political support by employees would be constitutional when some vital government purpose is served, when the means are the least restrictive of first amendment rights, and when the benefit outweighs the loss of the rights of the individual. *Id.*

that the government interests in efficiency, policy implementation, and preservation of the two-party system are not promoted by low-level political patronage and thus, do not require judicial protection of such patronage.[59] Given the Court's failure to agree on an opinion in *Elrod*,[60] however, and the Court's recent expansion of the *Elrod* holding,[61] it is not clear what deference the Court would extend to a state statute such as the Virginia deputy appointment provision which serves to legitimize political patronage hiring.[62]

The Fourth Circuit avoided potential widespread disruption throughout Virginia by applying Supreme Court standards to find that *Elrod*'s prohibition against patronage discharges should not apply retroactively.[63] With the passage of time, the effect of the *Ramey* decision regarding *Elrod*'s nonretroactive application will be minimized because fewer pre-*Elrod* claims will be asserted. The issues raised in the factual setting of *Ramey*, however, will require further refinement of the *Elrod* holding. Whether appointment or failure to reappoint on political patronage grounds is proscribed by the *Elrod* principle is an issue yet to be decided. The Fourth Circuit's analysis of the factual distinctions in *Ramey* indicates that the most significant remaining issue is determination of the government interests that are sufficiently compelling to override *Elrod*'s protection of political belief and association.

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[59] *See* 427 U.S. at 364-69. *See also Public Employment, supra* note 29, at 735; *Spoils System, supra* note 29, at 1342-47.

Reasoning that less intrusive means are available to achieve accountability to the public, the plurality rejected the suggestion that political patronage ensures the efficient and effective functioning of government. 427 U.S. at 364-67.In Branti v. Finkel, 48 U.S.L.W. 4331 (1980), however, the Court indicated that an employee's first amendment rights might be subordinated to the government interests in efficiency and effectiveness if his political beliefs interfered with the discharge of his duties. *Id.* at 4334. A federal district court has held that *Elrod* did not prevent the Pennsylvania Supreme Court from adopting a rule allowing the termination of public employees at will on nonpatronage grounds in order to promote efficient government administration. Covert v. Redevelopment Auth. of Huntingdon, 447 F. Supp. 270, 274 (M.D. Pa. 1978).

[60] *See* note 2 *supra.*

[61] *See* Branti v. Finkel, 48 U.S.L.W. 4331 (1980); notes 2, 49, 52, 55, & 59 *supra.*

[62] *See* VA. CODE § 15.1-48 (Supp. 1979); notes 58-59 *supra.*

[63] 589 F.2d at 760. In circumstances analogous to *Ramey* and *Elrod*, the Supreme Court has chosen to apply its decisions prospectively only. In Cipriano v. City of Houma, 395 U.S. 701 (1969), the Court held unconstitutional a Louisiana statute which only allowed property taxpayers to vote on the issuance of revenue bonds. *Id.* at 702. The Court refused to give the decision full retroactive effect, noting that significant hardship would result to cities, bondholders and others. *Id.* at 706. *See also* City of Phoenix v. Kolodziejski, 399 U.S. 204, 213-14 (1970) (electoral procedures relating to municipal financing declared unconstitutional); Allen v. State Bd. of Elections, 393 U.S. 544, 571-72 (1969) (elections for local officials under possibly discriminatory voting laws).