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Iii. Constitutional Law

III. CONSTITUTIONAL LAW

A. Sterilization by Private Physician Does Not Constitute State Action

For almost a century,[1] the federal courts have recognized that the provisions of the equal protection and due process clauses of the fourteenth amendment[2] and of the civil rights legislation[3] enacted thereunder applied only to state action and did not prohibit "[i]ndividual invasion of individual rights."[4] The dichotomy between private actions and actions of the state has become the focus of civil rights litigation during the past decade as courts have attempted to develop criteria for determining whether activity is private or state inspired.[5] While the Supreme Court initially adopted a very broad test for determining whether state action existed,[6] recent decisions by the Court have limited the circumstances in which a finding of state action is justified.[7] In the majority of recent cases, courts have

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[1] The Supreme Court first noted the necessity of finding state action in suits brought under the fourteenth amendment in the *Civil Rights Cases*, 109 U.S. 3 (1883).

[2] The fourteenth amendment provides in relevant part: "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[3] The section of the civil rights law which is most frequently the subject of litigation is 42 U.S.C. § 1983 (1970) which provides:

> 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 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.

Governmental involvement which rises to a level sufficient to establish state action for constitutional purposes is also sufficient to establish that the actions of private institutions were performed under color of state law for the purposes of 42 U.S.C. § 1983 (1970). United States v. Price, 383 U.S. 787, 794 n.7 (1966); Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 642 n.6 (4th Cir. 1975) (citing cases).

[4] *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

[5] *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). *See generally* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974); Comment, *State Action After* Jackson v. Metropolitan Edison Co.: *Analytical Framework for a Restrictive Doctrine*, 81 DICK. L. REV. 315 (1977); *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 139 (1975).

[6] The attempt to develop criteria for distinguishing between state and private activity began with Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). In *Burton*, the Court indicated that the sum total of all governmental connections with the ostensibly private entity were to be considered and noted that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722. State action was demonstrated under *Burton* if a symbiotic relationship existed between the state and the private entity making the actions of one the actions of the other. *Id.* at 725.

[7] While Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), is viewed generally as adopting a broad approach concentrating on the totality of state involvement and searching for a symbiotic relationship between the private institution and the state activity, recent

required a showing that a close nexus exists between the state involvement and the challenged activity of the private entity sufficient to make the activity of the private entity that of the state itself.[8] Nevertheless, most courts have been willing to look to the overall relationship between the state and the private entity if the injury is alleged to be the result of racial discrimination.[9]

The Fourth Circuit, however, has not limited itself to a close nexus analysis, adopting instead the overall relationship test.[10] Furthermore, the Fourth Circuit has not limited application of the overall relationship test to cases involving alleged racial discrimination.[11] In fact, the Fourth Cir-

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decisions by the Court emphasize the necessity of finding a nexus between the state involvement and the private activity which caused the injury. For example, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court held that the issuance of a liquor license by the state to a private, all-white club was insufficient to involve the state in the act of discrimination, because the state activity of issuing the license was not connected with the private activity which led to the discrimination. *Id.* at 175-77. The *Irvis* Court noted that the club served no public function and that the license was the only governmental contact. *Id.* at 171, 175-78. While *Irvis* usually is cited as requiring a showing of nexus between the state activity and the resulting injury, *see, e.g.*, Cannon v. University of Chicago, 559 F.2d 1063, 1068 (7th Cir. 1976), the Court noted that the facts in *Irvis* did not support a finding of state action based on the symbiotic relationship existing between the state and the private institution. 407 U.S. at 175. Thus, *Irvis* properly may be viewed as accepting either a "close nexus" or an "overall relationship" analysis. Braden v. University of Pittsburgh, 552 F.2d 948, 958 n.46 (3d Cir. 1977) (en banc).

The Court indicated a further desire to limit the analysis applied in state action cases to the close nexus analysis in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). In *Jackson*, the Court noted that the fact that private activity was subject to state regulation, provided an essential public service, or occupied a monopoly position did not by themselves convert the actions of the private entity into state action. *Id.* at 350-59. Rather, the Court maintained that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351. Though the *Jackson* Court held that a sufficiently close nexus did not exist on the facts of *Jackson*, the Court noted that a symbiotic relatinship between the state and the private entity was also absent. *Id.* at 357. Nevertheless, the Court intimated that the symbiotic relationship analysis should be limited to application where the facts involved a lessee of public property. *Id.* at 358.

[8] *E.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Schlein v. Milford Hosp., Inc., 561 F.2d 427, 429 (2d Cir. 1977); Cannon v. University of Chicago, 559 F.2d 1063, 1069 (7th Cir. 1976); Ascherman v. Presbyterian Hosp. of Pacific Medical Center, Inc., 507 F.2d 1103 (9th Cir. 1974); Ward v. St. Anthony Hosp., 476 F.2d 671 (10th Cir. 1973). The close nexus test was stated cogently by the Second Circuit in asserting that "the state must be involved not simply with some activity of the institution . . . but with the activity that caused the injury." Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

[9] *See, e.g.*, Schlein v. Milford Hosp., Inc., 561 F.2d 427, 428 n.5 (2d Cir. 1977); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963). *But see* Cannon v. University of Chicago, 559 F.2d 1063, 1071 (7th Cir. 1976) (nexus requirement must be satisfied in cases involving racial discrimination under *Irvis*).

[10] *E.g.*, Christhilf v. Annapolis Emergency Hosp. Ass'n, Inc., 496 F.2d 174 (4th Cir. 1974); Sams v. Ohio Valley Gen. Hosp. Ass'n., 413 F.2d 826 (4th Cir. 1969); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 967 (4th Cir. 1963).

[11] Sams v. Ohio Valley Gen. Hosp. Ass'n., 413 F.2d 826, 828 (4th Cir. 1969). In *Sams*,

cuit has been willing to find government involvement sufficient to constitute state action simply upon a showing that the private institution has received some form of federal, state or municipal funding.[12] The Fourth Circuit also has been persuaded that state action exists where the private entity receives special tax treatment,[13] has been granted the power of eminent domain and has exercised that power,[14] or is the subject of extensive state or federal regulation.[15] While the court has noted frequently that few of these circumstances would constitute state action by themselves,[16] the court has shown a willingness to view the state's involvement from the perspective of the totality of circumstances and to inquire whether the state, through its involvement, has placed its power, property and prestige behind the private conduct.

In *Doe v. Charleston Area Medical Center, Inc.*,[17] the Fourth Circuit acknowledged that it occupied a minority position among the circuits with respect to its willingness to find state action solely on the basis of the receipt of federal funds, but the court was reluctant to reconsider its prior decisions[18] because of a finding that the state was directly involved in the specific hospital policy under attack.[19] Thus, the Fourth Circuit found a consideration of the overall relationship between the state and the private

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the court stated that "[w]hile no race considerations exist here as were present in [our previous] decisions . . ., the constitutional principles [with respect to state action] there announced apply in full strength to the non-racial issues of this case." *Id.*

[12] Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975) (federal Hill-Burton construction funds and Medicaid/Medicare funds); Christhilf v. Annapolis Emergency Hosp. Ass'n., Inc., 496 F.2d 174, 178 (4th Cir. 1974) (federal Hill-Burton construction funds and county capital expenditure funding); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964) (state and federal capital construction subsidies).

The funding most frequently deemed sufficient to establish state action is the federal Hill-Burton construction program. 42 U.S.C. §§ 292-292j (1970 & Supp. V 1975). As the Fourth Circuit noted in Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963):

> Participation in the Hill-Burton program subjects hospitals to an elaborate and intricate pattern of governmental regulation, both state and Federal . . . .
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> . . . .
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> [U]pon joining the program a participating State in effect assumes, as a State function, the obligation of planning for adequate hospital care. And it is, of course, clear that when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the . . . [institution actually chosen to meet this State function] . . . would otherwise be private . . . .

Id. at 964, 968.

[13] Eaton v. Grubbs, 329 F.2d 710, 713 (4th Cir. 1964).

[14] *Id.*

[15] Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 643 (4th Cir. 1975).

[16] *E.g.*, Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964).

[17] 529 F.2d 638 (4th Cir. 1975).

[18] In fact, the Fourth Circuit reiterated its adherence to its prior decisions. *Id.* at 642.

[19] *Id.* at 643. The lower court in *Charleston Area Medical Center* made a specific finding, adopted by the Fourth Circuit, that the hospital's policy of refusing all but therapeutic abortions was based in part upon West Virginia's criminal abortion statute which prohibited non-therapeutic abortions. *Id.*

entity unnecessary since the plaintiff had demonstrated a close nexus between the state policy and the private activity.[20]

The opinion in *Charleston Area Medical Center, Inc.* indicated that the Fourth Circuit was willing to reconsider its position with respect to finding state action if the proper facts were presented. Recently, such a factual situation was presented to the Fourth Circuit in *Walker v. Pierce.*[21] *Walker* involved a suit by two black females against their obstetrician alleging that he had violated their civil rights by sterilizing them or threatening to sterilize them, solely because of their race and number of children, while they were receiving medical assistance under the Medicaid program.[22] The jury found against one of the women and assessed damages in favor of the other woman in the amount of five dollars.[23] Plaintiffs contended that the physician imposed his personal economic philosophy on the plaintiffs, requiring all Medicaid recipients who were delivering a third living child to consent to sterilization and that this philosophy was effectuated under color of state law through the Medicaid program administered by the state.[24]

The Fourth Circuit held that the obstetrician's conduct was private and that there was insufficient state involvement in his conduct to warrant a finding of state action.[25] The court maintained that since the prevailing plaintiff's doctor's fees were paid by a private insurer and not by Medicaid, there was no governmental involvement in the activity which led to the injury.[26] Finally, the Fourth Circuit noted that mere receipt of Hill-Burton

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[20] *Id.*

[21] 560 F.2d 609 (4th Cir. 1977).

[22] *Id.* at 610.

[23] *Id.* at 611.

[24] *Id.* The doctor testified that his policy of requiring sterilization was not limited to recipients of Medicaid, but also was imposed on any woman who was unable to pay her own bills. Of the two plaintiffs in *Walker,* the doctor's bills of the plaintiff who prevailed against the obstetrician were paid by her employer's insurer. Only her hospital bills were paid by Medicaid. *Id.* at 612. All of the medical bills of the plaintiff against whom the jury found were paid by Medicaid. *Id.* at 611.

[25] *Id.* at 613.

[26] *Id.* The *Walker* court also noted that the prevailing plaintiff was not sterilized. Rather, the plaintiff's only alleged injury was that she was discharged prematurely from the hospital. The Fourth Circuit found that accepted procedure was followed. *Id.*

[27] *Id.* The Fourth Circuit cited Ascherman v. Presbyterian Hosp., 507 F.2d 1103, 1105 (9th Cir. 1974), as supporting the proposition that receipt of Hill-Burton funds will not convert private conduct into state action. *Ascherman,* however, is directly contrary to prior Fourth Circuit authority. *Ascherman* involved a suit by a doctor who had been denied staff privileges by the defendant hospital. The doctor alleged that the denial of staff privileges was state action and asserted that the state action was evidenced by the receipt of Hill-Burton funds and federal and state tax exemptions. *Id.* at 1104. The Ninth Circuit specifically rejected Fourth Circuit precedent which held that receipt of Hill-Burton funds was sufficient to support a finding of state action. *Id.* The *Ascherman* court held that the mere receipt of Hill-Burton funds is not a sufficient connection between the state and the private activity of which the plaintiff complained to constitute state action and held that there must be a close nexus between the state activity and the private conduct. *Id.* at 1105. *Ascherman,* unlike

funds by a hospital would not convert the obstetrician's conduct into state action.[27] While the *Walker* court properly noted that a physician does not act under color of state law simply by practicing in an institution which receives federal funds, the opinion neither elaborates on the rationale for such a determination nor cites controlling authority.[28] The receipt of federal funds by the hospital in which the physician practices neither demonstrates a symbiotic relationship between the state and the physician sufficient to support a finding that the actions of the latter constituted the actions of the former[29] nor demonstrates a close nexus between the state funding and the challenged conduct of the physician.[30]

The *Walker* dissent argued that the obstetrician's role as a Medicaid administrator was sufficient to make his actions state inspired.[31] The dissent first distinguished between the obstetrician's professional role as a physician treating Medicaid patients and his role as an administrator of the fiscal and administrative aspects of the Medicaid program.[32] When a physician directs the performance of medical services based on the health needs of the patient, the dissent contended, the physician's actions are not under color of state law, but rather reflect the performance of professional duties uninfluenced by government policies.[33] Where the physician's conduct is the result of economic considerations rather than the health needs of his patients, however, the dissent asserted that an inquiry into whether the physician's activities constituted state action was justified.[34] The dissent concluded that because the obstetrician in *Walker* was motivated by his personal economic philosophy rather than the health needs of his patient and because the obstetrician was the patient's sole contact with the state funded program, a finding of state action was warranted.[35]

While the *Walker* dissent appears to base its conclusion on a finding of

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Walker, did not involve the conduct of a doctor, performed in a hospital which received federal funding, but involved the activity of the hospital itself. *Ascherman* is distinguishable from *Walker* on that basis. If the *Walker* court was inclined to reverse Fourth Circuit precedent contrary to *Ascherman*, the court should have confronted that precedent rather than ignoring it. Nevertheless, Fourth Circuit precedent would not have required a contrary result in *Walker* since the precedent involved finding state action with respect to the hospital's activities on the basis of funds received by the hospital rather than with respect to a doctor who did not receive federal funds but practiced in such a hospital. *See* text accompanying notes 10-20 *supra*.

[27] *See* note 27 *supra*.

[29] *See* text accompanying notes 6 and 16 *supra*.

[30] *See* text accompanying note 7 *supra*.

[31] 560 F.2d at 615 (Butzner, J., concurring in part, dissenting in part).

[32] *Id.* at 614.

[33] *Id.*, *citing* Byrne v. Kyser, 347 F.2d 734 (7th Cir. 1965).

[34] 560 F.2d at 614.

[35] *Id.* at 615. The *Walker* dissent maintained that the obstetrician had assumed a state function in that he was the sole contact between the state and the patient. The dissent found that the obstetrician handled all paperwork and the majority of the administrative responsibility for the operation of the program. *Id.* Finally, the dissent noted that the obstetrician received approximately $60,000 from the Medicaid program during the period in which the alleged injuries occurred. *Id.*

a symbiotic relationship between the obstetrician and the state, the dissent made no finding of any nexus between the obstetrician's policies and the state funding. The Medicaid officials neither encouraged nor condoned the obstetrician's conduct.[36] The *Walker* dissent's position, while consistent with precedent in the Fourth Circuit,[37] ignores the current trend toward requiring a finding of a close nexus between the state involvement and the challenged activity.[38] Nevertheless, the *Walker* majority fails to confront the long line of Fourth Circuit precedent opposing its approach in this area. *Walker* could represent the beginning of a shift from the broad analysis previously applied by the Fourth Circuit. If so, future litigants will no longer be able to depend on a showing of state funding to warrant a finding of state action. Rather future litigants should allege and prove facts sufficient to show a pervasive state role in every aspect of the private entity's affairs or allege and prove facts demonstrating a direct relationship between the state's involvement and the challenged activity.

B. Equal Pay Provisions Do Not Violate State Sovereignty

In *National League of Cities v. Usery,*[1] the Supreme Court resurrected the tenth amendment[2] concept of state sovereignty as an affirmative limi-

[36] Upon learning of the obstetrician's policies, the state administrator for the Medicaid program sought a statement from the obstetrician stating that he would no longer impose sterilization requirements on Medicaid patients or discriminate against them. Upon learning of the obstetrician's refusal to sign such a statement, the state administrator imposed a nonpayment sanction on all of his submitted Medicaid bills. *Id.* at 612.

[37] *See* text accompanying notes 10-20 *supra.*

[38] The district court for the Western District of Virginia recently noted that existing Fourth Circuit precedent in the state action area appeared tenuous in light of recent Supreme Court decisions. Large v. Reynolds, 414 F. Supp. 45, 46 (W.D. Va. 1976). As noted previously, *see* text accompanying notes 17-20 *supra,* the Fourth Circuit itself appears increasingly reluctant to find state action solely on the basis of receipt of public funds unconnected with the alleged injury. *See* Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975).

[1] 426 U.S. 833 (1976).

[2] U.S. CONST. amend. X, states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In United States v. Darby, 312 U.S. 100 (1941), the Supreme Court declared that the amendment was merely a "truism" and provided no substantive limitation of federal authority. *Id.* at 124. After the *Darby* decision, the tenth amendment was regarded simply as a statement of the relationship between national and state governments as it had been established by the Constitution. *See, e.g.,* Corwin, *The Passing of Dual Federalism,* 36 VA. L. REV. 1 (1950); Cowen, *What Is Left of the Tenth Amendment?,* 39 N.C. L. REV. 154 (1961). The *League of Cities* decision, however, resurrected the concept of structural federalism embodied in the tenth amendment as a proscription of delegated federal authority. *See generally* Matsumoto, *National League of Cities — From Footnote to Holding — State Immunity from Commerce Clause Regulation,* 1977 ARIZ. ST. L.J. 35; Michelman, *States' Rights*

tation on commerce clause authority.[3] The *League of Cities* Court held that congressional action extending the minimum wage and maximum hour provisions[4] of the Fair Labor Standards Act (FLSA)[5] to virtually all non-supervisory and non-elected personnel of state and local governments impermissibly operated "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . . ."[6] Because the *League of Cities* decision applied only to the wage and hour provisions of FLSA, questions as to the validity of other provisions of that statute remained unanswered.

Shortly after the Court announced the *League of Cities* decision, many states and their subdivisions moved to clarify some of the uncertainty engendered by that opinion by challenging the equal pay provisions of the FLSA under the tenth amendment.[7] Congress had enacted the Equal Pay Act[8] in 1963 as an amendment to the FLSA to prohibit sex-based wage discrimination.[9] When subsequent amendments extended the FLSA provi-

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and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery, 86 YALE L.J. 1165 (1977) [hereinafter cited as Michelman]; Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) [hereinafter cited as Tribe]; Note, *Emerging Concepts of Federalism: Limitations on the Spending Power and National Health Planning*, 34 WASH. & LEE L. REV. 1133, 1138-55 (1977) [hereinafter cited as *Federalism Limitations*].

[3] 426 U.S. at 852. U.S. CONST. art. I, § 8, cl. 1, states that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . . ."

[4] 29 U.S.C. §§ 206-207 (1970) (current version at 29 U.S.C. §§ 206-207 (1970 & Supp. V 1975)).

[5] *Id.* §§ 201-219 (1970 & Supp. V 1975) (originally enacted as Fair Labor Standards Act of 1938, Pub. L. No. 718, ch. 678, 52 Stat. 1060 (1938)).

[6] 426 U.S. at 852. In *League of Cities*, the appellants challenged the application of minimum wage and maximum hour requirements to state and local government employment. *Id.* at 839. Under the Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830 (current version at 29 U.S.C. §§ 203(d), 203(x) (1970)), and 1974, Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 55 (current version of relevant portions codified at 29 U.S.C. §§ 203(d), 203(x) (Supp. V 1975)). The Supreme Court previously had upheld the extension of the minimum wage and maximum hour provisions to the employees of state-operated hospitals and schools as a valid exercise of commerce clause authority. Maryland v. Wirtz, 392 U.S. 183, 188-99 (1968). The *League of Cities* Court, however, overruled *Wirtz*, *see* 426 U.S. at 855, and held that the tenth amendment protects functions essential to a state's separate and independent existence from congressional interference under the commerce clause. *Id.* at 852.

[7] The application of the Equal Pay Act to state and local employment has been challenged as a violation of state sovereignty in at least thirty-six cases since the decision in *National League of Cities v. Usery*. *See, e.g.*, Usery v. Allegheny Cty. Institution Dist., 544 F.2d 148 (1976); Nilsen v. Metropolitan Fair and Exposition Auth., 435 F. Supp. 1159 (N.D. Ill. 1977); Usery v. County of Oakland, 81 Lab. Cas. 47,847 (E.D. Mich. 1977) and cases cited therein; Usery v. Edward J. Meyer Memorial Hosp., 428 F. Supp. 1368 (W.D.N.Y. 1977).

[8] Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d)(1) (1970)).

[9] 29 U.S.C. § 206(d)(1) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, be-

sions to states and localities,[10] the equal pay amendments naturally also were extended. Thus, the Equal Pay Act seemed as vulnerable to a state sovereignty claim as the wage and hour provisions struck down in *League of Cities.*[11]

The Fourth Circuit, however, recently considered a tenth amendment challenge to the equal pay provisions of the FLSA in *Usery v. Charleston County School District,*[12] and held that those provisions are beyond claims of sovereign state immunity.[13] Because Congress expressly had based the Equal Pay Act on a commerce clause foundation,[14] the school district and the superintendent of schools contended that extending the equal pay coverage to the states was invalid as an impermissible limitation of state conduct under *League of Cities.*[15] Furthermore, these appellants argued that the Equal Pay Act no longer controlled their actions because the application of the Act's requirements to states and localities was dependent upon the definitions of "employer" and "employee" contained in the FLSA amendments that were declared invalid by the *League of Cities* Court.[16]

Although Congress had intended the equal pay provisions to rest upon a commerce clause base,[17] the Fourth Circuit did not consider that determination binding upon courts that must rule on the constitutionality of the act's requirements.[18] According to the court in *Charleston County,* the question was not whether Congress correctly surmised the source of its powers when enacting the legislation, but whether Congress had any authority at all to adopt the Act.[19] In resolving that question, the Fourth

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tween employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

[10] *See* note 6 *supra.*

[11] *See generally* Comment, *Applying the Equal Pay Act to State and Local Governments: The Effect of* National League of Cities v. Usery, 125 U. PA. L. REV. 665 (1977) [hereinafter cited as *Equal Pay Act*].

[12] 558 F.2d 1169 (4th Cir. 1977).

[13] *Id.* at 1172.

[14] Section 2(b) of the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, states:
It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in . . . industries [engaged in commerce or the production of goods for commerce.]

[15] 558 F.2d at 1171.

[16] *Id.*

[17] *See* note 14 *supra.*

[18] 558 F.2d at 1171.

[19] *Id.*

Circuit emphasized the anti-discrimination character of the measure and concluded that the Equal Pay Act "may be viewed as an exercise of Congress' power to adopt legislation enforcing the Fourteenth Amendment's guarantee of equal protection of the law."[20] Because the fourteenth amendment, unlike the commerce clause, was directed expressly to the states,[21] the court found no basis for the contention that the tenth amendment proscribed application of the equal pay amendments to the states.[22]

Since the equal pay provisions could be upheld under the fourteenth amendment, and therefore had a source of constitutional support distinct from the commerce clause basis of other FLSA requirements, the Fourth Circuit rejected appellants' assertions that the definitions contained in the amendments struck down in *League of Cities* also were invalid as applied to the Equal Pay Act.[23] The court indicated that although the definitions "may not constitutionally be used to subject states and their subdivisions to the FLSA's minimum wage and overtime provisions, they remain the relevant cross-references for purposes of the Equal Pay Act."[24] Noting that Congress added the Equal Pay Act to the FLSA "only for administrative convenience and economy"[25] rather than an intent to link the two statutes substantively, the Fourth Circuit emphasized that the broad separability clause of the FLSA, which assures the independent validity of each provision of the Act,[26] reinforced the Equal Pay Act's character as a distinct statute.[27]

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[20] *Id.* at 1170.

[21] U.S. CONST. amend XIV, § 1, states in part that:

> [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See generally Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Goldstein, *Death and Transfiguration of the State Action Doctrine — Moose Lodge v. Irvis to Runyon v. McCrary,* 1977 HASTINGS CONST. L. Q. 1.

[22] 558 F.2d at 1171.

[23] *Id. See* note 6 *supra.*

[24] 558 F.2d at 1171. At least two federal courts have rejected the severability argument, however, and held that the *League of Cities* nullification of the FLSA amendments applied to the Equal Pay Act as well. *See* Usery v. Owensboro-Daviess Cty. Hosp., 423 F. Supp. 843, 845 (W.D. Ky. 1976); Howard v. Ward Cty., 418 F. Supp. 494, 501 (D.N.D. 1976).

[25] 558 F.2d at 1171.

[26] 29 U.S.C. § 219 (1970) provides: "If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby."

[27] 558 F.2d at 1172. *See also* Usery v. Allegheny Cty. Institution Dist., 544 F.2d 148, 155 (3rd Cir. 1976); Usery v. County of Oakland, 81 Lab. Cas. 47,847 (E.D. Mich. 1977).

In Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938), the Supreme Court held that the separability clause contained in the Public Utility Holding Company Act of 1935, Pub. L. No. 333, ch. 687, 49 Stat. 803 (current version at 15 U.S.C. § 79z-6 (1976)), required that each provision of that statute be treated as an independent enactment. Referring to the separability clause, the Court stated that

By premising its ruling on the fourteenth amendment, the Fourth Circuit obviated the decision of the Equal Pay Act's validity under the commerce clause.[28] In *League of Cities,* the Supreme Court had declared the FLSA's wage and hour requirements impermissible as applied to the states because they exceeded Congress' commerce clause power.[29] The *League of Cities* Court, however, specifically refrained from deciding whether the tenth amendment would limit congressional attempts to affect integral operations of state government by exercising authority granted Congress

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> Congress has thus said that the statute is not an integrated whole, which as such must be sustained or held invalid. On the contrary, when validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced.

303 U.S. at 434. The separability clause in question in *Electric Bond* is virtually identical to the clause enforced by the Fourth Circuit in *Charleston County. Compare* 15 U.S.C. § 79z-6 (1976) *with* 29 U.S.C. § 219 (1970).

[28] The Fourth Circuit declined to discuss the validity of the Equal Pay Act under either the commerce or spending powers because the Act could be sustained without reference to those powers. 558 F.2d at 1170 n.9. Other federal courts have not been as reluctant as the Fourth Circuit, however, and have sustained the Equal Pay Act under the commerce clause as well as the fourteenth amendment. *See* note 29 *infra.*

[29] 426 U.S. at 851-52. Although the import of *League of Cities* clearly is the revival of the tenth amendment as an affirmative limitation on commerce clause authority, the Court's endorsement of the implicit structural limitations of the federal system does not clearly define a standard by which the limitation can be measured. Two possible tests have emerged — a balancing test and an essential function test. *See Federalism Limitations, supra* note 2, at 1149-52.

Under the essential function test, a core area of important governmental activities that traditionally have been performed by a state are isolated from congressional intervention under the commerce clause. Any activity classified as one of these essential functions is completely beyond the ambit of commerce clause legislation. *See Equal Pay Act, supra* note 11, at 672-76. An alternative interpretation of *League of Cities,* however, regards the Court as following a more flexible balancing approach. Under this rationale, the court would weigh the relative significance of the federal interest and of the state interest to be restricted. The more likely the state interest could be characterized as an essential function, the more likely that interest would prevail. *See Federalism Limitations, supra* note 2, at 1150-52. *See also* Note, *Toward New Safeguards on Conditional Spending: Implications of National League of Cities v. Usery,* 26 AMER. U.L. REV. 726, 727-31 (1977). Judicial balancing of such conflicting interests has been criticized, however, as an attempt by courts to "perform a surrogate legislative function." Fox, *Federal Public Sector Labor Relations Legislation: The Aftermath of National League of Cities v. Usery,* 26 U. KAN. L. REV. 105, 113 (1977).

The Equal Pay Act has been upheld as a valid exercise of the commerce power under both the essential function test and the balancing test. For an application of the essential function theory, see Usery v. Bettendorf Community School Dist., 423 F. Supp. 637 (S.D. Iowa 1976); Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976). For an application of the balancing test, see Marshall v. Board of Education of Milford, 14 Emp. Prac. Dec. 5785 (D. Conn. 1977). A similar analysis has been employed in cases considering the validity of the Age Discrimination in Employment Act, Pub. L. No. 93-259, 88 Stat. 74, current version at 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975). *See, e.g.,* Usery v. Board of Education of Salt Lake City, 421 F. Supp. 718 (D. Utah 1976).

One commentator has asserted, however, that the Equal Pay Act cannot stand as commerce clause legislation because the wage reduction proviso, *see* note 9 *supra,* increases the cost of dispensing state services in a manner similar to the minimum wage and overtime provision declared invalid in *League of Cities. See Equal Pay Act, supra* note 11, at 671-72.

under the enforcement clause of the fourteenth amendment.[30] Because congressional recitations of authority are not binding upon the judiciary,[31] the Fourth Circuit was free to determine the constitutionality of the Equal Pay Act under the fourteenth amendment without being constrained by the *League of Cities* commerce clause rationale.

Since the fourteenth amendment is designed to secure the rights of individuals,[32] the crucial question for the court in *Charleston County School District* was whether Congress was acting to further individual rights protected by the fourteenth amendment when it enacted the Equal Pay Act.[33] If the congressional goal was to protect such a right, the fact that Congress had characterized the Act as commerce clause legislation would be irrelevant. An examination of the equal pay provisions reveals that their purpose is to guarantee all persons equal treatment in employment by prohibiting sex-based wage differentials.[34] Anti-discrimination measures such as this traditionally have been based on the equal protection clause of the fourteenth amendment.[35] The Fourth Circuit thus concluded that, although Congress had characterized the Equal Pay Act as commerce clause legislation, the measure clearly was intended to be an anti-discrimination statute.[36] As such, the Act was a valid exercise of congressional power under the enforcement clause of the fourteenth amendment.[37]

Even though the *Charleston County* court justifiably concluded that the equal pay provisions could be construed as a fourteenth amendment enactment, the constitutionality of the provisions as applied to the states hinged upon the validity of the appellants' assertion that they infringed the sovereignty of South Carolina. The sovereignty claim, however, is not as persuasive in a fourteenth amendment context as it was in the commerce clause setting.[38] In *League of Cities,* the Supreme Court resolved the sovereignty issue by balancing the relevant federal and state interests concerned.[39] Such a resolution is unnecessary, however, when the interest

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[30] *See* 426 U.S. at 852 n.17.

[31] A conventional principle of statutory construction provides that a court will uphold congressional action as long as the court can perceive some appropriate constitutional basis for that action, regardless of whether that reason in fact underlies the legislative decision. *See* Griffin v. Breckenridge, 403 U.S. 88, 104-07 (1971); Katzenbach v. Morgan, 384 U.S. 641, 653 (1966); Flemming v. Nestor, 363 U.S. 603, 611-12 (1960); Woods v. Miller Co., 333 U.S. 138, 144 (1948); *see also Equal Pay Act, supra* note 11, at 679-81.

[32] *See* Tribe, *supra* note 2, at 1077, 1096-99.

[33] *See id.* at 1097.

[34] H. REP. No. 309, 88th Cong., 1st Sess. 2 (1963), *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 687, 688.

[35] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (statutory distinction as to benefits accorded the spouses of male and female members of the armed services violates equal protection clause).

[36] *See* text accompanying notes 19-22 *supra.*

[37] *Id.*

[38] Unlike the commerce clause, section one of the fourteenth amendment expressly curtails the authority and sovereignty of a state. *See* note 21 *supra.*

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

challenging the state's sovereignty is an individual liberty protected by the fourteenth amendment. Unlike the commerce clause, the language of the fourteenth amendment expressly subordinates the state's interest in sovereignty to the individual liberties secured by that amendment.[40] In *Ex parte Virginia*,[41] the Supreme Court clearly indicated the extent of Congress' power to enforce the equal protection clause against the states by stating that

> [t]he prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty.[42]

Only four days after the *League of Cities* decision, the Court reaffirmed this analysis in *Fitzpatrick v. Bitzer*.[43] The *Fitzpatrick* Court unanimously held that a state was liable for discriminating among employees on the basis of sex under Title VII of the Civil Rights Act of 1964[44] without considering whether those employees furthered a traditional governmental function.[45] The fourteenth amendment character of Title VII was dispositive of

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[40] *See* note 21 and text accompanying note 38 *supra*.

At least one Supreme Court decision has recognized, however, that the enforcement clause of the fourteenth amendment may be limited in some degree by the concept of state sovereignty. In Oregon v. Mitchell, 400 U.S. 112 (1970), Justice Black wrote that the power granted to Congress under the enforcement clause "was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation." *Id.* at 128 (opinion of Black, J.). Justice Black thus believed that the congressional attempt to lower the voting age in state and local elections challenged by the state of Oregon infringed the state power to regulate internal elections reserved to the states by the tenth amendment. *Id.* at 124-31. Five other justices agreed with Justice Black's position. *See id.* at 154-213 (opinion by Harlan, J.); and at 293-96 (opinion by Stewart, J.).

One further limitation has been suggested by analogy to the relationship between the supremacy clause, U.S. CONST., art. VI, cl.2, and the commerce clause. The argument contends that if *League of Cities* holds that commerce clause legislation may be limited by the tenth amendment although the supremacy clause binds all states to obey that legislation, then similar language in the fourteenth amendment directing the states to obey enactments under that amendment also should be limited by the tenth amendment. *See* Michelman, *supra* note 2, at 1183 n.59. Since the language of the fourteenth amendment was designed to secure individual liberties rather than enforce federal power, this comparison seems faulty.

[41] 100 U.S. 339 (1879).

[42] *Id.* at 346.

[43] 427 U.S. 445, 451-56 (1976).

[44] 42 U.S.C. § 2000e *et seq.* (1970 & Supp. V 1975). Title VII and the Equal Pay Act have the common legislative purpose of prohibiting sex discrimination in employment and long have been considered as complementary statutes. *See* Usery v. County of Oakland, 81 Lab. Cas. 47,847, 47,848 (E.D. Mich. 1977), and cases cited therein.

[45] 427 U.S. at 451-56. *Fitzpatrick* involved an eleventh amendment challenge to the authority of federal courts to award money damages in favor of a private individual against a state government that has violated the anti-discrimination provisions of Title VII. *Id.* at

the state sovereignty claim.[46] Because Title VII and the Equal Pay Act are complementary sex discrimination provisions,[47] with similar constitutional bases,[48] the *Fitzpatrick* Court's ratification of the constitutionality of Title VII also determines the constitutional validity of the equal pay provisions.[49]

By upholding the Equal Pay Act as a valid exercise of congressional power under the fourteenth amendment, the *Charleston County* court reaffirmed the immunity from state sovereignty claims accorded legislation enacted pursuant to that authority by the Supreme Court in *Ex parte Virginia* and *Fitzpatrick v. Bitzer*. The Fourth Circuit thus clarified a major uncertainty created by the *League of Cities* decision.[50] Although *Charleston County School District* defines a limitation on the concept of federalism embodied in the tenth amendment, the concept remains a potent defense in the commerce clause setting and stands as a potential restriction of other congressional powers.[51]

C. First Amendment and Public Employee Dismissal*

In *Shaw v. Board of Trustees of Frederick Community College,*[1] the Fourth Circuit examined another of an increasing number of cases involving teacher dismissals and first amendment freedoms.[2] In response to two college professors who alleged that they were discharged for constitutionally protected activity, the Fourth Circuit upheld the action of the college. The court held first that the conduct at issue was not pure speech and thus was not protected,[3] and second, that even assuming that aspects of pure

447-48. No reason exists, however, for distinguishing the concept of state sovereignty protected under the tenth and eleventh amendments. *See* Beaird & Ellington, *A Commerce Power Seesaw: Balancing* National League of Cities, 11 GA. L. REV. 35, 66-69 (1976); *Federalism Limitations, supra* note 2, at 1151 n.118.

[46] 427 U.S. at 456.

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

[48] *See* text accompanying notes 32-37 and 46 *supra.*

[49] *See Equal Pay Act, supra* note 11, at 678. *See also* Usery v. County of Oakland, 81 Lab. Cas. 47,847 47,848 (E.D. Mich. 1977).

[50] *See* 426 U.S. at 852 n.17.

[51] *See generally* Note, *Toward New Safeguards on Conditional Spending: Implications of* National League of Cities v. Usery, 26 AMER. U.L. REV. 726 (1977); *Federalism Limitations, supra* note 2.

* The Law Review acknowledges the contribution of research by George Huddleston III, a student at Washington & Lee School of Law.

[1] 549 F.2d 929 (4th Cir. 1976).

[2] *See e.g.,* Williams v. Day, 553 F.2d 1160 (8th Cir. 1977); Watts v. Board of Curators, 495 F.2d 384 (8th Cir. 1974); Gieringer v. Center School Dist. No. 58, 477 F.2d 1164 (8th Cir. 1973); Dean v. Burnett, No. H-75-1087 (D. Md., filed Nov. 23, 1977).

[3] 549 F.2d at 933.

speech were present, there was no impermissible motive for the dismissal of the plaintiffs.[4] Soon after *Shaw* was decided, the Supreme Court faced a similar situation[5] and described a test that arguably would have produced a better result in *Shaw*.[6] In fact, the Supreme Court's test subsequently has been applied by at least one district court in the Fourth Circuit.[7]

In *Shaw v. Board of Trustees*,[8] plaintiffs Shaw and Winn[9] joined a number of other faculty members in opposing a change in the tenure system of the college. The group decided to express their protest by refusing to participate in commencement exercises[10] and by not attending a faculty workshop.[11] Participation in both activities was a mandatory term of employment.[12] The teachers subsequently received letters from the college administration stating that their termination was being considered because of their failure to join in the two required activities.[13]

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[4] *Id.* at 934.

[5] *See* Mount Healthy City School Dist. v. Doyle, 97 S. Ct. 568 (1977).

[6] *See* text accompanying notes 35-45 *infra.*

[7] Dean v. Burnett, No. H-75-1087 (D. Md., filed Nov. 23, 1977).

[8] 549 F.2d 929 (4th Cir. 1976).

[9] Although Shaw was in fact a tenured professor and Winn held a "continuing appointment" with the college, these interests of the plaintiffs need not be shown in cases of first amendment attack. Normally, a liberty or property interest must be shown to invoke due process limitations on the discretion of a governmental employer to dismiss employees. Board of Regents v. Roth, 408 U.S. 564 (1972). However, in no circumstance may the state impose arbitrary or unreasonable conditions on continued employment. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967). This limitation proscribes employee dismissals based upon the employee's exercise of otherwise constitutionally protected rights, such as membership in political organizations, Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970), or speaking out on issues of public concern. Pickering v. Board of Educ., 391 U.S. 563 (1968). Thus an aggrieved employee need demonstrate no liberty or property interest in order to protect his exercise of constitutional right. *See also,* French, *Unconstitutional Conditions: An Analysis,* 50 GEO. L.J. 234 (1961); Note, *Unconstitutional Conditions,* 73 HARV. L. REV. 1439 (1960); Note, *Constitutional Rights of Public Employees: Progress Towards Protection,* 49 N.C.L. REV. 302 (1971); Comment, *Another Look At Unconstitutional Conditions,* 117 U. PA. L. REV. 144 (1968).

[10] The dissident faculty members voted to attend commencement, but not to march in the procession wearing academic regalia and not to sit in the designated section of the auditorium. 549 F.2d at 931. In fact they did attend the commencement, plainly identified by name tags, and sat with a majority of the faculty in one section, though not in the designated area. *Id.* at 936 (Butzner, J., dissenting).

[11] At a meeting of twenty-one faculty members held prior to either the workshop or commencement, the teachers, including Winn and Shaw, resolved that they would "not meet any professional obligations until the Board grants negotiating rights." *Id.* at 931. Pursuant to this resolution, the faculty group boycotted the workshop and the commencement. The group confined its protest to these two functions and clearly announced that its collective action was taken solely to protest the college policy. *Id.* at 935 (Butzner, J., dissenting).

[12] Section 3.203.2c of the Frederick Community College Policy Manual stated: "Attendance and participation shall be required at Commencement, scheduled staff meetings, scheduled workshops, and other scheduled activities." 549 F.2d at 931, n.3.

[13] *Id.* at 931.

After receipt of this letter, negotiations began between the administration and the threatened teachers. The result of this process was an agreement that if the teachers would sign a letter acknowledging that they had been in "neglect of professional duties," then the termination proceedings would be dismissed.[14] The plaintiffs Shaw and Winn failed to comply adequately with either this compromise,[15] or another,[16] and eventually were dismissed. Thereafter they brought suit under section 1983,[17] contending that they could not be discharged for violating the terms of their employment because the violations alleged were part of a protest protected by the first amendment.[18]

In examining the actions of the plaintiffs, the Fourth Circuit first stated the established principle that Shaw and Winn "did not surrender those [first amendment] rights [of association and expression] by virtue of accepting employment in a public education institution,"[19] and thus that the plaintiffs could not be prohibited from disagreeing with the tenure change or from stating their disagreement.[20] The court went on to say, however, that a college reasonably could expect a teacher to follow instructions and that a teacher could not "immunize himself against loss of position simply because his non-cooperation and aggressive conduct are verbalized."[21]

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[14] The dissident teachers were allowed to sign a form letter containing the following conditions: that they "acknowledged that the activities engaged in were a neglect of professional duties; promised not to participate in such activities in the future; and agreed that the Policy Manual was the basis upon which the college would be run." *Id.* at 931.

[15] The teachers were given a deadline by which to deliver their letters to the administration. Although the deadline was June 30, a Saturday, Shaw and Winn did not hand in their letters until July 2, the following Monday. Nevertheless the college declined to reinstate Shaw and Winn. *Id.* at 936 (Butzner, J., dissenting).

[16] Following hearings before the Board of Trustees, in August the school offered Shaw and Winn one year employment contracts, on the proviso that the work be performed off campus. Shaw and Winn refused this offer and were terminated. *Id.* at 932.

[17] Section 1983 provides that

> 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 . . . 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.

42 *U.S.C.* § 1983 (1970).

[18] 549 F.2d at 932.

[19] *Id.* In stating that plaintiffs did not surrender their rights by accepting employment, the Fourth Circuit relied on Perry v. Sindermann, 408 U.S. 593 (1972), and Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See* note 9 *supra.*

[20] 549 F.2d at 932.

[21] *Id.* The Fourth Circuit relied on its prior decision of Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972). In *Chitwood* the court denied summary judgment against teachers who asserted that their anti-war and protest activities, and statements critical of the college, were the cause of their dismissals. The Fourth Circuit remanded for a determination of whether the protected conduct was the cause of the termination, stating that the "force of the claims that protected speech occasioned the discharges would be far less shadowy if we knew how many other untenured teachers had engaged in comparable speech and how many of them had their contracts terminated." *Id.* at 361. Compare this approach with the investigation of

The Fourth Circuit drew a sharp distinction between protected speech and unprotected conduct and held that the plaintiffs' actions fell exclusively into the latter category. Distinguishing other cases involving speech in the educational community as involving conduct "closely akin to pure speech,"[22] the court held that the "conduct of Shaw and Winn went beyond pure speech into the realm of breach of express obligation of their employment."[23] The Fourth Circuit indicated that such conduct was not protected by the first amendment, and the Board of Trustees had the authority to discharge the teachers for non-participation in the workshop and the commencement exercises.[24] Thus the court held that while teachers could oppose the tenure policy, and express that opposition, the conduct of boycotting required college activities was not sufficiently speech-related to command constitutional protection.

Relying on *Pickering v. Board of Education*,[25] the dissent argued that more was involved in determining the extent of first amendment protection than the simple speech/nonspeech categorization by the majority. In *Pickering*, the Supreme Court held that a teacher's first amendment rights were not absolute, but that exercise of such rights could be restricted only when it interfered with performance of classroom duties or with the regular operation of the school.[26] The *Shaw* dissent contended that the majority should have inquired into the actual impact of the teacher's behavior on the college,[27] and only if the activity disturbed the normal operation of the school should Shaw and Winn not enjoy the protection of the first amendment. Raising a number of facts to demonstrate the good faith and moderation of the plaintiffs,[28] the dissent included the fact that the faculty mem-

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the majority in *Shaw*, 549 F.2d at 933-34, and the dissent, 549 F.2d at 934-35 (Butzner, J., dissenting). *See* text accompanying notes 41-45 *infra*.

[22] 549 F.2d at 933. The cases the Fourth Circuit distinguished were Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Pickering v. Board of Education, 391 U.S. 563 (1968); and Starsky v. Williams, 353 F. Supp. 900 (D. Ariz. 1972).

[23] 549 F.2d at 933.

[24] *Id.*

[25] 391 U.S. 563 (1968). In *Pickering*, a teacher was discharged for sending a letter critical of the school board to a local newspaper. Against the teacher's contention of first and fourteenth amendment protection, the board contended that the interests of the school system overrode the teacher's first amendment rights. The Supreme Court held that the teacher's interest as a citizen in making public comment must be weighed against the interest of the state in promoting the efficiency of public services. The test was whether the teacher's actions have "either impeded the teacher's proper performance of his daily duties in the classroom or . . . have interfered with the regular operation of the schools generally." 391 U.S. at 572-73. Only in those circumstances would the interest of the state be sufficient to restrict the protected speech of the teacher.

[26] *Id.* at 572-73; *see* note 25 *supra*.

[27] 549 F.2d at 935 (Butzner, J., dissenting).

[28] Examining the record, the dissent pointed out that Shaw and Winn had otherwise exemplary records, were well-qualified, clearly announced the purpose of their protest actions, fully performed all duties other than the two functions, played moderating roles within the faculty group, and acted in good faith on the advice of counsel. In addition, the dissent sought to demonstrate the triviality of the offenses committed and the minimal impact of the conduct on the operation of the college. *Id.* at 935-36 (Butzner, J., dissenting).

bers had announced that their nonparticipation in the events was solely to protest the tenure policy.[29] The dissent concluded on this issue that "the right of Shaw and Winn to protest the college's employment policies was protected by the first amendment. They did not forfeit this protection, for their protest neither impaired their own work nor interfered with the operation of the school."[30]

After determining that the actions of the plaintiffs were not constitutionally protected, the majority went on to rest its decision upholding the discharges on a second ground, motive. Even assuming the case did contain aspects of pure speech, the court could find no impermissible motivation for the termination decision by the Board of Trustees.[31] The court examined the facts for the "real motivation"[32] and concluded that the acts of the college administration[33] indicated that the assigned reasons of nonparticipation in required functions were not simply pretexts for the school to dismiss those who disagreed with its policies. Rather, the terminations were held to be a legitimate reaction to violations of the terms of employment, not influenced by any impermissible motivation.[34]

By phrasing its analysis in terms of the "real" motivation, however, the Fourth Circuit oversimplified the task before it and distorted its result. The difficulty obscured by the court's inquiry is that decisions often are not based on a single reason, but on several reasons.[35] If a teacher is discharged expressly because he engaged in protected speech, there is no trouble discerning "the real motivation." Similarly, if a teacher is discharged after engaging in protected speech, but the basis asserted for the termination consists of frivolous contentions, there is no trouble determin-

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[29] *Id.* at 936.

[30] *Id.*

[31] *Id.* at 933. The majority also rejected a claim by the plaintiffs that they had been denied equal protection in their discharge because they were forced to adhere to a June 30 deadline while other members of the dissident group were allowed to wait until August before submitting the letter of apology. *See* notes 14-15 *supra*. The Fourth Circuit upheld the district court's determination that a rational basis existed for the distinction, in that the contracts of Shaw and Winn began on July 1, while those of the other teachers did not. *Id.* at 934. The dissent contended, however, that there was not a rational relation between the classification and the treatment received. Because Shaw was tenured and Winn held a continuing appointment, the dissent contended that the June 30 deadline was irrelevant to either the plaintiffs' right to employment or the college's authority to dismiss them. *Id.* at 936-37 (Butzner, J., dissenting).

[32] *Id.* at 933.

[33] The majority stated that the acts of the college reflected an administration "willing to bend over backward to avoid having to discharge anyone, but unwilling to acknowledge the right of its teachers to disregard the rules with impunity." *Id.* at 933. The court recited the following facts: the president sought explanations and personal conferences with all the teachers involved; he negotiated with the group's attorney and was willing to accept a form letter or a letter of a teacher's own composition; and the Board offered one-year contracts of employment even after the deadline had passed. *Id.* at 933-34.

[34] *Id.* at 934.

[35] *See, e.g.*, Gieringer v. Center School Dist. No. 58, 477 F.2d at 1164 (8th Cir. 1973); Cook County College Teachers Union v. Byrd, 456 F.2d 882, 889 (7th Cir. 1972).

ing the "real" motivation.[36] When a teacher has engaged in a number of reprehensible actions and in protected speech,[37] however, the determination becomes considerably more difficult. The better analysis is to ask how important a role the impermissible motivation played in the termination decision.[38]

The Supreme Court faced a similar combination of reprehensible actions and protected speech recently in *Mount Healthy City School District v. Doyle.*[39] In that case the Court stated that once the employee-teacher demonstrated that protected conduct was a motivating factor in the decision to discharge, the burden rested on the school board to show that the teacher would have been terminated even absent the protected conduct.[40] This standard requires that the impermissible motivation play a dominant role, rather than simply a partial role, in the decision to discharge. If the impermissible motivation is shown to satisfy the *Mount Healthy* test, it clearly would satisfy the more ambiguous "real motivation" test.

The difference resulting from the methodology of these two approaches is illustrated by the dissent in *Shaw.*[41] Although the dissent did not state a rule comparable to the one later announced in *Mount Healthy,* it made much the same investigation that the *Mount Healthy* standard would demand. Judge Butzner, writing the dissenting opinion, examined prior instances of teachers committing the same violations as Shaw and Winn and compared the punishments received. The record showed that nonprotesting faculty members who did not attend other graduations or workshops were not dismissed, but only reprimanded or docked in pay.[42] While

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[36] *See, e.g.,* Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967).

[37] *See, e.g.,* Mount Healthy City School Dist. v. Doyle, 97 S. Ct. 568 (1977).

[38] *See* Mount Healthy City School Dist. v. Doyle, 97 S. Ct. 568 (1977). Prior to the *Mount Healthy* decision, courts had recognized the difficulty of numerous motivations for a discharge decision, but were left with the question of how stringently to protect first amendment activity. That is, once it is recognized that an impermissible motivation may play only a partial role in the decision, the issue becomes whether the decision should be invalidated if the bad motive played *any* role in it or only if the bad motive formed the dominant reason for dismissal. *Compare* Mabey v. Reagan, 537 F.2d 1936 (9th Cir. 1976) (partial factor) *with* Chitwood v. Feaster, 468 F.2d 359, 360 (4th Cir. 1972) ("the cause of the termination") *and* Williams v. Day, 412 F. Supp. 336, 340 n.1 (E.D. Ark. 1976), aff'd 553 F.2d 1160 (8th Cir. 1977) ("the actual reason"). The Supreme Court in *Mount Healthy* resolved this question by requiring a showing that the dismissal would not have taken place absent the impermissible motivation. *See* text accompanying notes 39-40 *infra.*

[39] 97 S. Ct. 568 (1977).

[40] Justice Rehnquist, writing for a unanimous Court, stated that:

> A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of the constitutionally protected conduct than he would have occupied had he done nothing. . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.

97 S. Ct. at 575.

[41] 549 F.2d at 934 (Butzner, J., dissenting).

[42] *Id.* at 934-35.