Washington and Lee Law Review

Volume 32 | Issue 2 Article 9

Spring 3-1-1975

Iii. Constitutional Law

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Recommended Citation

Iii. Constitutional Law, 32 Wash. & Lee L. Rev. 429 (1975).

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W.D.F.

III. CONSTITUTIONAL LAW

A. Staggered Term Elections Do Not Unconstitutionally Dilute Voting Power of Racial Minorities—*Cherry v. County of New Hanover,* 489 F.2d 273 (4th Cir. 1973).

Members of the County Board of Commissioners and the County Board of Education of New Hanover County, North Carolina, and of the City Council of Wilmington, North Carolina, are elected for four year terms. The terms are staggered so that one-half of the members are elected every two years.[1] In *Cherry v. County of New Hanover,*[2] black citizens alleged that this staggered-term system diluted their voting power in violation of their "constitutional right to elect members of their race to public office."[3] The only evidence offered by the plaintiffs in support of their claims was that although 20 to 25 per cent of the population of the constituent areas was black, no black had ever been elected to public office.[4] The district court dismissed the suit, holding that the staggered voting system did not violate the plaintiffs' constitutional rights.[5] In a per curiam opinion, the Fourth Circuit affirmed this decision.[6]

The challenge to the staggered-term[7] plan was apparently a novel one. The court thus relied entirely upon the authority of cases in which multi-member districting[8] had been in question. The Fourth Circuit interpreted the Supreme Court's decision in *Whitcomb v.*

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[1] Cherry v. County of New Hanover, 489 F.2d 273 & n.1 (4th Cir. 1973).

[2] 489 F.2d 273 (4th Cir. 1973).

[3] *Id.* at 273.

[4] *Id.* at 273-74.

[5] *Id.* at 274.

[6] *Id.*

[7] Staggered terms are apparently a means of preserving continuity in governmental bodies by assuring some hold-over seats at each election, as in the United States Senate.

[8] A multi-member district is one that is represented by more than one official on any one governmental body. Comment, *Constitutional Law—Equal Protection—At-*

Chavis[9] as supporting the proposition that minorities have no "constitutional right to elect members of their race to public office."[10] In *Whitcomb,* minority ghetto-dwellers had challenged a multi-member legislative district plan on the basis that it unconstitutionally diluted the voting power of the minority.[11] The Court, however, found no evidence of invidious discrimination[12] in spite of acknowledged criticisms of multi-member districting.[13]

In denying that the plaintiffs had suffered deprivation of their constitutional rights, the Fourth Circuit in *Cherry* held that a valid claim against an allegedly unconstitutional voting system must include certain types of allegations.[14] Such allegations would be that the plaintiffs' voting rights had been infringed[15] or that the challenged system had been designed purposely "to minimize or cancel out the voting strength of racial or political elements of the voting population"[16] or to "further historically engrained racial discrimination."[17] The plaintiffs in *Cherry,* however, made no such allegations.

Large Election of Parish Officials Unconstitutionally Dilutes Voting Strength of Black Voters Where There Persist the Effects of a State Policy That Has Historically Hindered Participation of Blacks in Electoral Process, 26 ALA. L. REV. 163 n.4 (1973) [hereinafter cited as Comment, 26 ALA. L. REV.]. A single-member district elects only one representative. D. RAE, THE POLITICAL CONSEQUENCES OF ELECTION LAWS 19 (1967).

[9] 403 U.S. 124 (1971).

[10] 489 F.2d at 274, *citing* 403 U.S. at 156-60.

[11] 403 U.S. at 144.

[12] *Id.* at 159-60.

[13] *Id.* at 157. *See also* Comment, 26 ALA. L. REV. at 174-75. Criticism has focused on two theoretical effects of multi-member districts. One criticism is that in a state legislature elected under a combination of single- and multi-member districting, the power of voters from the different districts varies sharply at the same time that proportional representation appears to be equal. 403 U.S. at 144-47. For example, under a mathematical definition of voting power, the power of a voter in a single-member district with a voting population of ten is less than that of a voter in a four-man district representing forty voters. *See* Banzhaf, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle,* 75 YALE L.J. 1309, 1314-24 (1966) [hereinafter cited as Banzhaf]. A second criticism is that minorities tend to be submerged and the majority tends to be over-represented in such districts. 403 U.S. at 144, 158-59.

[14] Plaintiffs challenging infringement of voting rights must bear the burden of proving their allegations. 403 U.S. at 149-53, *citing* White v. Regester, 412 U.S. 755, 765-66 (1973).

[15] 489 F.2d at 274; *cf.* 403 U.S. at 149-50.

[16] 489 F.2d at 274, *citing* Fortson v. Dorsey, 379 U.S. 433, 439 (1965). In *Fortson* the Court held that equal protection did not necessarily require the state's legislative apportionment scheme to be made up entirely of single-member districts. *Id.* at 438. The Court noted that a claim of minority discrimination had not been made and left open the possible validity of such a claim. *Id.* at 439.

[17] 489 F.2d at 274, *citing* White v. Regester, 412 U.S. 755, 766-70 (1973), discussed at note 24 and accompanying text *infra.*

Therefore, the plaintiffs' constitutional claim was invalid.[18]

Since members of the Wilmington and New Hanover County governmental bodies and school boards are elected at-large from their respective governmental units,[19] and since at-large election is essentially the same as multi-member[20] district election,[21] the plaintiffs could have selected the at-large provision for challenge.[22] Although the Supreme Court held in 1971 that multi-member districts for a state legislature were not per se unconstitutional,[23] in 1973 it held such districting unconstitutional in a Texas county where there had been a persistent history of minority exclusion practices.[24] Following the lead of the Supreme Court, the Fifth Circuit recently held for plaintiffs in two cases challenging at-large districting for local governmental bodies, finding that the plans unconstitutionally minimized the access of the black community to the political process.[25] Similarly, if it could have been shown that in Wilmington and New Hanover County dilution of the minority voting power had in fact moti-

[18] The Fourth Circuit's terse and unequivocal opinion exemplifies the general attitude of courts when examining constitutional challenges to voting schemes when such challenges are buttressed only by mathematical arguments and lacking in evidence of discrimination. *See generally* Whitcomb v. Chavis, 403 U.S. at 146; Banzhaf at 1324; Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny,* 1973 SUPREME COURT REVIEW 1, 24-29 (1973).

[19] 489 F.2d at 273 n.1.

[20] *See* note 8 *supra.*

[21] Turner v. McKeithen, 490 F.2d 191, 194 n.8 (5th Cir. 1973), *citing* Zimmer v. McKeithen, 485 F.2d 1297, 1315 (5th Cir. 1973) (Clark, J., dissenting). *See also* Kilgarlin v. Hill, 386 U.S. 120, 123-24 & n.2, *rehearing denied,* 386 U.S. 999 (1967); Comment, 26 ALA. L. REV. 163 & n.4.

[22] The possible improper effect of an at-large election scheme discussed as the second criticism in note 13 *supra* is the one which would have been relevant in *Cherry* and which has supported successful plaintiffs' cases in recent suits. *See* notes 24-25 and accompanying text *infra.* Comment on the dissimilar features of multi-member legislative districts and local at-large election districts in Brodhead v. Ezell, 348 F. Supp. 1244, 1250 (S.D. Ala. 1972), supports the vulnerability to constitutional challenge of at-large districting of local governmental bodies.

[23] Whitcomb v. Chavis, 403 U.S. at 159-60.

[24] White v. Regester, 412 U.S. 755, 768-69 (1973). The critical factors indicative of discrimination in Bexar County, Texas, were poll tax and the "most restrictive voter registration procedures in the nation." *Id.* at 768. *But cf.* Mahan v. Howell, 410 U.S. 315, 330-33 (1973) (multi-member districting approved as a remedy for other inequities).

[25] Turner v. McKeithen, 490 F.2d 191, 197 (5th Cir. 1973); Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973), *noted in* Comment, 26 ALA. L. REV. 163. These suits challenged proposed reapportionment plans for school boards and police juries in two Louisiana parishes. The two cases were different in that *Zimmer* disapproved of an at-large district in which blacks were in the majority, *id.* at 1309, while *Turner* disapproved one in which blacks were in the minority, 490 F.2d at 192.

vated majority activities, a challenge to the at-large provision might have succeeded.[26]

L.D.S.

B. Discriminatory Dismissal of Public School Teachers on the Basis of National Teacher Examination Scores—*United States v. Chesterfield County School District*, 484 F.2d 70 (4th Cir. 1973); *Walston v. School Board*, 492 F.2d 919 (4th Cir. 1974).

The Fourth Circuit recently decided two cases determining whether the fourteenth amendment[1] rights of black teachers were denied by their dismissals from teaching positions on the basis of National Teacher Examination (NTE)[2] scores. In both cases, *United States v. Chesterfield County School District*[3] from South Carolina, and *Walston v. School Board*[4] from Nansemond County, Virginia, local boards had been effectuating court-ordered desegregation plans. In the process, the boards reallocated students, terminated teacher

[26] Courts have acknowledged that majorities have sometimes attempted to fortify their electoral advantage by statutory devices designed to mitigate or eliminate the effects of minority concentration of votes, or bloc voting, in at-large or multi-member districts. Turner v. McKeithen, 490 F.2d 191, 194 (5th Cir. 1973), *citing* White v. Regester, 412 U.S. 755 (1973) *and* Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). *See also* Barnett, *Unitary-Multiple Election Districts,* 39 AM. POL. SCI. REV. 65, 66 (1945). The "single shot" vote, in which a voter in an at-large election casts only one of several votes allowed him, BALLENTINE'S LAW DICTIONARY 1183 (3d ed. 1969), is one method by which any group may attempt to intensify its power at the polls. "Single shot" effectiveness requires that only one candidate from a given bloc run for a position and that all members of that bloc vote only for that candidate. Devices protective against such bloc voting, including a prohibition of single shot voting, were operative in some governmental units in North Carolina until July 1, 1973, when legislative amendment eliminated them pursuant to a federal court ruling that they were unconstitutional. N.C. GEN. STAT. §§ 163-117, -151 & Annot. (Supp. 1973).

[1] U.S. CONST. amend. XIV, § 1, provides in pertinent part:

> No 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.

[2] The National Teacher Examination is a standardized test used in many teacher training colleges and in some teacher certification programs. The Educational Testing Service of Princeton, New Jersey, which produces the tests, specifically advises that the NTE scores contribute little to evaluation of experienced teachers and therefore should not be considered in determining whether to retain such teachers. Walston v. County School Bd., 492 F.2d 919, 924 n.4 (4th Cir. 1974).

[3] 484 F.2d 70 (4th Cir. 1973).

[4] 492 F.2d 919 (4th Cir. 1974).

stations, and did not rehire some teachers for 1970-71.[5] The majority of the teachers released on the basis of NTE scores were black.[6]

The challenged teacher dismissals were linked differently to NTE scores in the two counties. The Nansemond County school authority administered the NTE for the first time after the 1969-70 school year and then only to new teachers hired and to those transferring[7] between schools in the system. A minimum score was required for initial employment or for reemployment following transfer.[8] In South Carolina, however, NTE scores had been used for several years to grade teaching certificates issued by the State Board of Education. Candidates were graded from "A" through "D" depending upon the best NTE score made by the applicant before certification. The certificate, once issued, was valid indefinitely, but over the years the minimum score required for each grade certificate had been raised. Thus, a teacher with a more recent "C" certificate might have achieved a higher score than a teacher holding an older "B" rating. The policy applied in the Chesterfield County system beginning in 1970 was not to rehire "C" certificate teachers for the new term when teachers with higher graded certificates were available.[9]

In both cases the Fourth Circuit overruled the district courts and held that the application of NTE scores in the dismissal procedure was discriminatory.[10] The appeals court ordered reinstatement with back pay for teachers terminated on the basis of NTE scores, except for specified individuals whose dismissals were otherwise found to be "for cause."[11] Although each case was initiated under the equal pro-

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[5] *Id.* at 921-22; 484 F.2d at 71-72.

[6] In Nansemond County, fifteen black and two white teachers were released as a result of low NTE scores. Seventy percent of 21 black teachers who took the test and two percent of 106 white teachers failed. 492 F.2d at 922. In Chesterfield County, nine black and no white teachers were released as a result of the policy. Fifteen black and eleven white teachers were retained who had NTE scores identical to or lower than the nine black teachers released. 484 F.2d at 72.

[7] The facts are not clear as to whether this policy effectively required a greater proportion of black teachers than white teachers to take the test.

[8] 492 F.2d at 921.

[9] 484 F.2d at 71-72, 75, & App. A.

[10] 492 F.2d at 926-27; 484 F.2d at 75.

[11] 492 F.2d at 926-27; 484 F.2d at 76. The Nansemond County case was remanded for a determination of whether the "for cause" dismissals were appropriate under the Fourth Circuit holding that the school board had the burden of proving that the dismissals were not linked to discrimination. The facts of the "for cause" dismissals were not given. Injunctive and any further relief deemed necessary by the lower court was also authorized. 492 F.2d at 927.

In the Chesterfield County case, the dismissal of one teacher "for cause" was affirmed on the basis of the Fourth Circuit's finding that the evidence upon which the

tection clause of the fourteenth amendment,[12] the court in both opinions cited two lines of authority, one based on constitutional interpretation[13] and the other based on Title VII of the Civil Rights Act of 1964,[14] which specifically prohibits racial discrimination in employment.

The Fourth Circuit acknowledged that the same standard by which employment testing practices challenged under Title VII could be validated would also serve as a standard of validity in contitutional challenges of such practices.[15] With this acknowledgement, the court was prepared to apply the holding of a Title VII case, *Griggs v. Duke Power Co.*,[16] to the constitutional challenges of teacher dismissals based on NTE scores. In *Griggs*, the Supreme Court examined the validity of requiring a high school diploma or a minimum intelligence test score[17] as a condition of employment in, or transfer between, various jobs at a power plant.[18] The Court in *Griggs* explained that once a plaintiff had established that employment testing practices operated to exclude blacks, the burden was shifted to the defendant employer to demonstrate a manifest relationship between the tests and job performance.[19]

In addition to relying on the *Griggs* rationale, the Fourth Circuit also relied upon authority stemming from its earlier constitutional decision in *Chambers v. Board of Education*,[20] a case involving the discharge of a disproportionate number of black teachers incident to

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district court had acted demonstrated that the teacher lacked professional competence and that the administrative decision to dismiss her was not racially motivated. 484 F.2d at 75-76. Back pay ordered was to be mitigated in the amount of earnings from any actual or reasonably available interim employment, and lost benefits and privileges were to be reinstated. *Id.* at 76.

[12] 492 F.2d at 921; 484 F.2d at 73.

[13] *See* text accompanying notes 20-22 *infra*.

[14] 42 U.S.C. §§ 2000e *et seq.* (1970). Title VII was amended in 1972 to extend coverage to state and local government employees. Pub. L. No. 92-261, § 2 (Mar. 24, 1972), 86 Stat. 103, *amending* 42 U.S.C. § 2000e. Thus, the claims could not initially have been based upon the statutory prohibitions.

[15] 484 F.2d at 73.

[16] 401 U.S. 424 (1971). The Fourth Circuit had already reached other employment practice decisions based on *Griggs*. *See* Moody v. Albemarle Paper Co., 474 F.2d 134, 138 (4th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

[17] 42 U.S.C. § 2000e-2(h) (1970) allows "professionally developed" ability tests which are not intended to discriminate as to race.

[18] 401 U.S. at 425-26.

[19] *Id.* at 431-32. *See also* Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Co.*, 72 COLUM. L. REV. 900 (1972).

[20] 364 F.2d 189 (4th Cir. 1966).

desegregation.[21] In *Chambers* the court adopted the principle that once a plaintiff had established racially discriminatory effects in a teacher dismissal policy, the burden was shifted to the defendant school authority to show "by clear and convincing evidence" that the policy of teacher dismissal was accompanied by no discriminatory intent.[22]

While the Fourth Circuit discussed both of these lines of authority in the Chesterfield County case,[23] it stated that evidence bearing on the relationship of NTE scores to job performance was contradictory. Since the *Griggs* burden could therefore not be satisfied and, further, since the lower court had found proof supporting only a "reasonably related" connection between the NTE scores and teacher performance, the appeals court left the *Griggs* question unresolved.[24] Instead, it based its conclusion on a finding that the unevenly applied rating criterion, which allowed retention of twenty-six teachers with NTE scores equal to or lower than those of some of the black teachers who had not been rehired,[25] was "inherently capricious."[26] The court held that such a policy obviously constituted unequal treatment and rendered academic any discussion of rational standards. The result was that the defendants had not satisfied the *Chambers* "clear and convincing" standard of no discriminatory intent.[27]

In contrast, the Fourth Circuit in the Nansemond County case was faced with allegations by the defendants that "there were valid reasons for the use of the test"[28] and therefore no inference of discrim-

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[21] *Id.* at 190-91.

[22] *Id.* at 192; *accord,* Baker v. Municipal Separate School Dist., 462 F.2d 1112, 1114 (5th Cir. 1972); N.C. Teachers Ass'n v. Board of Educ., 393 F.2d 736 (4th Cir. 1968). The *N.C. Teachers* opinion outlines prior fourteenth amendment holdings of the Fourth Circuit relating to dismissals of black teachers. *Id.* at 739 & n.1. The Supreme Court in Keyes v. School District No. 1, 413 U.S. 189 (1973), adopted the burden-shifting principle, requiring the school authorities to show by clear and convincing evidence that school redistricting plans which had racially discriminatory effects had no discriminatory intent. *Id.* at 208. *Keyes* expressed approval of the Fourth Circuit's application of the burden-shifting principle in *Chambers. Id.* at 208-10.

[23] 484 F.2d at 72-73.

[24] *Id.* at 74-75. The *Griggs* opinion uses both "manifest relationship," 401 U.S. at 432, and "demonstrably a reasonable measure," *id.* at 436, to state the standard of connection to be proved between test and job requirements. *See* note 38 and accompanying text *infra.*

[25] *Id.* at 75. *See* note 9 and accompanying text *supra.*

[26] 484 F.2d at 75, *citing* Reed v. Reed, 404 U.S. 71, 76 (1971).

[27] 484 F.2d at 75. In *Chambers,* the school board attempted "to justify failure to hire some teachers with years of experience" by offering in evidence their low NTE scores, but the court did not accept the scores *inter alia* as clear and convincing evidence of no discriminatory intent. 364 F.2d at 191.

[28] 492 F.2d at 924.

inatory intent could be drawn. The Fourth Circuit drew upon the *Chambers* logic in finding that the original inference of discrimination arose with the dismissal of disproportionate numbers of black teachers and the burden then shifted to the school authority to show by "clear and convincing evidence" that segregative intent was not a factor in the dismissal policy.[29] Rather than confront the issue of whether the evidence adduced fulfilled this burden, the Fourth Circuit held under the *Griggs* rationale that "a demonstrable relationship" between the NTE and teacher performance had not been shown.[30]

Since the two standards of proof established by *Griggs* and *Chambers* were used conjunctively by the Fourth Circuit in these cases, the assumption naturally arises that the court found a logical connection between the two authorities. The Fourth Circuit stated in general terms that the standards for decision are equivalent for statutory and constitutional challenges to racially discriminatory employment practices.[31] The court did not, however, express specific equivalence between the *Griggs* and *Chambers* standards. The Nansemond County decision implied that the *Chambers* absence of discrimination burden was fulfilled only if the *Griggs* manifest relationship was proved.[32] Conversely, the Chesterfield County decision illustrated that a failure to meet the *Griggs* burden was not the only factor which could cause failure to meet the *Chambers* burden.[33] Thus, the two views are logically compatible.[34]

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[29] *Id.* at 924-25.

[30] *Id.* at 927. *See* note 19 and accompanying text *supra.*

[31] 484 F.2d at 73.

[32] The defense in the Nansemond County case suggested that proof of no discriminatory intent was equivalent to proof of a positive relationship between test and job performance, but the court did not express agreement or disagreement with the proposition. *Id.* A statement of equivalence between the two standards is found in the district court opinion in the *Walston* case. United States v. County School Bd., 351 F. Supp. 196, 203 & n.3 (E.D. Va. 1972).

[33] 484 F.2d at 75, *citing* Wright v. Emporia, 407 U.S. 451, 462 (1972), which held that discriminatory effect invalidates state action notwithstanding absence of discriminatory purpose.

[34] Logical compatibility between *Griggs* and *Chambers* seems less readily acceptable if an additional assumption is brought into the comparison. After enunciating the employer's burden to prove a manifest relationship between test and job performance, *Griggs* added that "good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in' headwinds for minority groups and are unrelated to measuring job capability." 401 U.S. at 432. On first glance this statement appears to contradict *Chambers,* which established that clear and convincing evidence of no discriminatory intent can redeem a practice which effectively discriminates. 364 F.2d at 192. On closer analysis, it appears that *Griggs* may have

Nevertheless, it is striking that the court in the Nansemond County case found the failure of the defendants to meet the *Griggs* burden a sufficient reason to hold against them,[35] while the court in the Chesterfield County case avoided grounding its holding on a similar failure of proof and resorted instead to the "inherently capricious" concept.[36] This difference in approach was apparently the result of substantial conflict between the two opinions on a technical issue.[37] The Chesterfield County decision did not reach the issue of whether the "reasonably related" relationship between test and job performance, which the lower court found, was the same as a "demonstrable" or "manifest" relationship required by *Griggs;* the court indicated, however, that the issue would have to be confronted in future cases.[38] This problem was apparently a factor in the court's unwillingness to decide the case on the *Griggs* basis.[39] The Nansemond County court, on the other hand, stated unequivocally that the "demonstrable" relationship standard of proof was much more rigorous than the "reasonably necessary" relationship which the lower court found, thus justifying its holding for the plaintiffs on a *Griggs* basis.[40]

In spite of the different approaches in these cases, their similar conclusions indicate that black teachers in recently desegregated school districts may expect the teacher dismissal policies to be revised to exclude any NTE score criterion. Although the decisions were that the particular applications of NTE scores were discriminatory

intended to emphasize the difference between simple good intention or absence of bad intention and that absence of discriminatory intent which must be shown by clear and convincing evidence.

A similar view was expressed by the dissent in Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1974), *citing Griggs,* which contended that simple assertion of a nondiscriminatory motive should not be a sufficient defense for a seller's refusal to sell a lot to a black purchaser. The *Madison* dissent recommended shifting the burden to the defense to prove a rational or business purpose, thus paralleling the *Griggs* requirement to show a manifest and demonstrable relationship between test and job performance. *Id.* at 118.

[35] 492 F.2d at 926.

[36] 484 F.2d at 75. The facts in the Nansemond County case apparently would have supported an "inherently capricious" finding as readily as did the Chesterfield County facts; there was little consistency in application of the policy, and exceptions were the rule. *See* 492 F.2d at 922-26.

[37] Even though the Chesterfield County case was decided more than five months earlier, the Nansemond County opinion did not refer to it. The two opinions were written by different judges and were based upon the deliberations of separate panels.

[38] 484 F.2d at 74 n.6. The fact that the *Griggs* opinion may not be entirely clear, *see* note 24 *supra,* may account for the Chesterfield court's perceiving this to be a continuing issue.

[39] *Id.* at 74-75.

[40] 492 F.2d at 924.

and thus did not necessarily invalidate all uses of the NTE,[41] it is reasonable to assume that almost any NTE use in dismissals may be held invalid, especially if courts hold, as the Fourth Circuit did in the Nansemond County case, that a "reasonably related" relationship between test and job performance does not satisfy the requirements of *Griggs*. Since the court accepted or conditionally accepted "for cause" dismissals,[42] the more flexible methods of evaluating professional competence, such as the recommendations of principals and supervisors, would apparently still be viable.[43] The courts' responses to challenges of dismissals based on such subjective criteria would, however, have to be on a case-by-case basis.[44]

L.D.S.

C. Revocation of Teacher's Certification Must Comply With Standards of Procedural Due Process—*Huntley v. North Carolina State Board of Education*, 493 F.2d 1016 (4th Cir. 1974).

In *Huntley v. North Carolina State Board of Education*,[1] the plaintiff, Mrs. Oliva S. Huntley, had been employed as a teacher by the Lumberton City Board of Education for the 1967-68 school year. The employment was pursuant to certification of Mrs. Huntley by the North Carolina State Board of Education as evidenced by the issuance of a teacher's certificate. Mrs. Huntley began teaching in September of 1967, but on October 9, she was informed by the State Superintendent of Public Instruction that the Attorney General's office had determined that she was not entitled to the teacher's certificate because she had obtained it by fraud. The letter to Mrs. Huntley stated that: "On the basis of this advice, I [the State Superintendent] am declaring invalid the Grammar Grade Certificate that was issued in your name on May 3, 1967."[2] Although she was never formally discharged, Mrs. Huntley's pay was terminated on November

[41] *Id.* at 927; 484 F.2d at 75.

[42] *See* note 11 and accompanying text *supra*.

[43] 484 F.2d at 76. In Vance v. Board of School Trustees, No. 73-2312 (4th Cir. Oct. 2, 1974), a dismissal of a black teacher, based largely on assessment of her qualifications and performance by school professionals, was upheld.

[44] *See* 492 F.2d at 927; 484 F.2d at 76.

[1] 493 F.2d 1016 (4th Cir. 1974).

[2] Brief for Appellant at 5, Huntley v. North Carolina State Bd. of Educ., 493 F.2d 1016 (4th Cir. 1974).

20, and this was admitted to be tantamount to discharge.[3]

Mrs. Huntley retained counsel, who wrote to the Attorney General's office on November 27 and requested information concerning the charges. On November 30, the Attorney General's office responded by outlining the charges and evidence, but refused to furnish the report of the State Bureau of Investigation without a court order. On this same date, the school board's counsel sent a registered letter to Mrs. Huntley, informing her that on December 7, the State Board of Education would afford her a hearing. This notice stated that an investigation had

> disclosed information from which the Superintendent of Public Instruction in his capacity as Secretary to the North Carolina State Board of Education is satisfied that Olivia S. Huntley was not the same individual who took the March 18, 1967 National Teacher's Examination and having so satisfied himself on October 9th, 1967 notified Oliva S. Huntley . . . that the Grammar Grade Certificate issued to her on May 3rd, 1967 as a result of the score reported on the March 18th, 1967 administration of the National Teacher's Examination, was declared invalid.[4]

The notice further provided that Mrs. Huntley could appear at the December 7 hearing "to show cause, if any she has, why the North Carolina State Board of Education should reinstate the Grammar Grade Certificate issued in her name on May 3, 1967 and subsequently declared invalid on October 9, 1967."[5] In response, Mrs. Huntley's counsel wrote on December 4, that the October 9 *ex parte* invalidation of the certificate denied the plaintiff due process of law. Furthermore, the fact that Mrs. Huntley had to show cause why she should be reinstated further enhanced the constitutional deprivation by placing the burden of proof on her. Thus, Mrs. Huntley's counsel informed the Board that the plaintiff would not appear at the hearing because such participation would be an admission that the October 9 revocation was valid.

On December 5, the Attorney General's office sent to the plaintiff's counsel additional information concerning the charges against Mrs. Huntley and stated that the hearing would proceed on December 7 as scheduled. The letter failed to mention whether Mrs. Huntley would have the burden of proof. The hearing took place on December 7 without Mrs. Huntley or her attorney, and, after the govern-

[3] 493 F.2d at 1017-18 & n.3.

[4] *Id.* at 1018.

[5] *Id.*

ment had introduced evidence pertaining to the charges against Mrs. Huntley, the Board of Education revoked her certificate. Mrs. Huntley then brought suit against the Board of Education in the district court on the theory that both the *ex parte* invalidation and the subsequent hearing denied her due process of law. When that court denied her injunctive relief and damages, she appealed to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit employed a two-step process in holding that the procedures used to invalidate Mrs. Huntley's certificate denied her due process. Initially, the court had to determine the effect of the *ex parte* invalidation of October 9. Since Mrs. Huntley had a property interest in her contract to teach,[6] and since the charges of fraud placed her reputation and honor at stake, the court reasoned that the plaintiff was entitled to notice and an opportunity to be heard.[7] Consequently, the Board's action in invalidating the plaintiff's certificate without giving notice was deemed unconstitutional.[8]

The question then became whether the December 7 hearing adequately cured the unconstitutional *ex parte* invalidation. In holding that it did not, the court of appeals found the December 7 hearing deficient for two reasons. Most importantly, the court reasoned that the notice of the December 7 hearing was inadequate. As pointed out by the court of appeals, "the Due Process Clause . . . at a minimum . . . require[s] that deprivation of . . . property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[9] Since the plaintiff had a property interest in her employment contract,[10] she was entitled to adequate notice. The notice that Mrs. Huntley received was a show cause order, which, if properly worded, could have constituted sufficient notice. In *Shirer*

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[6] As stated by the Supreme Court in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972):

> [t]he Court has held that a public college professor dismissed from an office held under tenure provisions [citations omitted], and college professors and staff members dismissed during the terms of their contracts [citations omitted], have interests in continued employment that are safeguarded by due process.

Id. at 576-77.

[7]
> [W]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

Id. at 573, *citing* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

[8] *See* notes 6 & 7 *supra*. The district court also found that the *ex parte* invalidation had denied Mrs. Huntley due process. 493 F.2d at 1018-19.

[9] Armstrong v. Manzo, 380 U.S. 545, 550 (1965), *citing* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[10] *See* note 6 *supra* and accompanying text.

v. Anderson,[11] the district court held a show cause order sufficient to meet the notice requirement where the order was "to show cause . . . why the certificate should not be *revoked*."[12] However, the Fourth Circuit stressed that Mrs. Huntley's notice provided that she should show cause why she should be *reinstated*.[13] The court of appeals, therefore, found that the show cause order did not meet the *Shirer* test since the notice implicitly stated that Mrs. Huntley's fraud had already been established and that the *ex parte* invalidation of October 9 was proper. Thus, she was given merely the opportunity to prove that the invalidation was improper. *A fortiori*, Mrs. Huntley would have been required to sustain the burden of proving that the invalidation was unjustified. As stated by the Fourth Circuit:

> [T]he differences between the notice approved in *Shirer* and the notice in this case are more fundamental than semantic. The notice in this case heralded a proceeding that was mistakenly premised on an unconstitutional invalidation of Mrs. Huntley's certificate. Building on this untenable foundation, it indicated that Mrs. Huntley would have the burden of proving the October 9 invalidation was unwarranted.[14]

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[11] 88 F. Supp. 858 (E.D.S.C. 1950).

[12] Id. at 861 (emphasis added).

[13] *See* note 5 *supra* and accompanying text.

[14] 493 F.2d at 1019. Note the district court's analysis of a similar problem that was raised in Jones v. State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969):

> [U]nder their contention that they have been denied due process, the plaintiffs assert that they were in fact expelled without a hearing and that when hearings were actually held, the F.A.C. was considering whether to "readmit" plaintiffs. The plaintiffs make much of the fact that the annonunced purpose of the F.A.C. in holding the hearings was stated as being whether to "readmit" plaintiffs and that, therefore, the burden of proof was placed upon the plaintiffs to convince the F.A.C. that they should be readmitted.
>
> . . . [T]he purpose of the hearing is to determine whether the charges are true. Disciplinary proceedings conducted by an educational institution are not to be tested according to the niceties of procedure required in a court of law. Inquiry into the technicalities governing burden of proof in civil or criminal trials is, therefore, irrelevant. This phase of plaintiffs' argument resolves itself basically into an unfounded argument of semantics brought about by the use of the word "readmit" by the F.A.C. In an administrative proceeding the "demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point . . . so long as the requisite hearing is held before the final order becomes effective." Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 152-53 (1941).

279 F. Supp. at 202. The district court in *Huntley* agreed that the distinction was one of semantics. Appendix of Brief for Appellant at 59, Huntley v. North Carolina State Bd. of Educ., 493 F.2d 1016 (4th Cir. 1974).

Having determined that the notice was inadequate,[15] the court of appeals then considered the procedure of the December 9 hearing itself. The court found that the purpose of the hearing changed from a determination of reinstatement to one of revocation. Initially, the hearing had convened with the expressed purpose of deciding whether Mrs. Huntley should be reinstated. This was evidenced by the staff Attorney General's opening statement, which stated that:

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[15] In his letter of December 4, Mrs. Huntley's attorney protested the shifting of the burden of proof presented by the notice as a denial of due process. Accordingly, he refused to participate in the December 7 hearing. The court of appeals found that his absence was not a waiver of procedural irregularities, even though it could have been so construed under Harris v. Smith, 418 F.2d 899 (2d Cir. 1969), which the court cited as opposing authority. Instead, the December 4 letter "amounted to a special appearance fully setting forth the reasons why she claimed she was denied due process by the *ex parte* invalidation of October 9 and why she protested the indicated shift in the burden of proof." 493 F.2d at 1019. The court of appeals cited no authority for its proposition that the December 4 letter amounted to a special appearance, one made solely for the purpose of challenging the court's jurisdiction without thereby submitting to the personal jurisdiction of the court, and usually evidenced by a motion to dismiss or to quash service. There appears to be no jurisdictional issue in *Huntley*. Furthermore, as to the failure to appear, the authorities are *contra*. Three of the cases cited by the court specifically state that due process entitles the plaintiff to an *opportunity* to be heard. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972); Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). *See* Grannis v. Ordean, 234 U.S. 385, 394 (1914) (the fundamental requisite of due process is the opportunity to be heard). Once the plaintiff has notice of the hearing, then it is his decision whether to attend. A failure to attend, as in *Huntley*, would appear to be a waiver. Thus, in Harris v. Smith, 418 F.2d 899 (2d Cir. 1969), where the appellant, Harris, chose to absent himself from a hearing, the Second Circuit stated: "Since Harris was informed of the matter pending and could choose for himself whether to appear or default, contest or acquiesce, due process notice requirements were met." *Id.* at 901. Similarly, in Sigma Chi Fraternity v. Regents of Univ. of Colorado, 258 F. Supp. 515 (D. Col. 1966), the court rejected the plaintiffs' contention that they were not given adequate notice: "They did not avail themselves of the opportunity to make a showing. . . . The important question is whether the plaintiffs were given an opportunity to be heard." *Id.* at 528.

It seems that there would be no less a waiver in *Huntley* even though the notice may have been procedurally deficient. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Supreme Court stated the necessary elements of notice:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314. Certainly Mrs. Huntley was apprised of the pendency of the action by the notice that the Board sent her. Furthermore, the very purpose of the notice was to let her come to the hearing to "present her objections." Thus, it appears that the court of appeals should not have allowed the December 4 letter to be a substitute for Mrs. Huntley's appearance, and further should have held that the notice was, in fact, adequate.

> The purpose of this hearing is to present evidence . . . so that [the State Board of Education] may determine whether a . . . certificate issued to Mrs. Oliva S. Huntley . . . on May 3, 1967, and *revoked* by letter of October 9, 1967, . . . should be *reinstated*.[16]

However, the staff Attorney General stated at the conclusion of the hearing that:

> [R]evocation of Mrs. Huntley's certificate on October 9, 1967, was in fact justified, and . . . this Board should reaffirm that particular revocation.[17]

Thus, the proceeding turned into a revocation hearing, which was precisely what Mrs. Huntley's attorney had been insisting that she was entitled to. This, however, was deemed inadequate to afford her due process, because the board "changed its procedure in midstream without giving her notice of its intentions.[18] The Board concluded the hearing with a resolution that Mrs. Huntley's certificate was "revoked now, effective as of the date of issuance . . . ."[19] The court of appeals further noted that the Board "did not vote on Mrs. Huntley's reinstatement, as its notice indicated it would."[20]

The Fourth Circuit relied on *Armstrong v. Manzo*[21] to support its decision that the subsequent hearing did not cure the unconstitutional October 9 invalidation. In *Armstrong*, the child's natural mother and stepfather failed to give the natural father any notice of adoption proceedings. Under Texas law, if the father did not substantially contribute to the child's support for a two year period, his

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[16] 493 F.2d at 1020 (emphasis added).

[17] *Id.* (emphasis added).

[18] *Id.*

[19] *Id.*

[20] *Id.* It appears by this statement that the court of appeals is being inconsistent. It would seem, according to the court's analysis, that it makes no difference whether the Board voted on Mrs. Huntley's reinstatement as the notice said it would, since the notice was constitutionally deficient in the first place. Furthermore, it is illogical to interpret the court's statement as meaning that the hearing would have been proper had the Board done what it said it was going to do in the notice, *i.e.*, vote on reinstatement. This is so because if the proceeding centered on reinstatement, then Mrs. Huntley would have been denied due process in that she would have had to have borne the burden of proof. Thus, under the court's analysis, the Board of Education loses two ways—(1) The proceeding was deficient because the Board gave notice that it would vote on reinstatement, but voted instead on revocation; and (2) the proceeding was deficient because the Board voted on revocation as required by due process, but did not given notice of such action—it only gave notice that it would vote on reinstatement.

[21] 380 U.S. 545 (1965).

consent to the adoption was not necessary.[22] The mother presented an affidavit to a juvenile judge that the natural father had not contributed to the child's support and the juvenile judge gave his consent to the adoption. When the father learned of the adoption, he brought suit to set aside the adoption and a full hearing was held. The father's evidence that he had supported the child was rejected by the court and the adoption was confirmed. On appeal, the United States Supreme Court reversed and held that the subsequent hearing given to the father did not cure the due process defect of the earlier adoption proceedings. The Supreme Court found that at the subsequent hearing, the burden was placed on the father to prove that he had provided adequate support for the child, while at the initial adoption hearing the burden of proof was on the natural mother. The Supreme Court stated that:

> The trial court could have fully accorded this right [the opportunity to be heard] to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.[23]

The appellee in *Huntley* argued, in effect, that *Armstrong* was inapplicable since the state had assumed the burden of proof by presenting evidence of the plaintiff's alleged fraud.[24] The Fourth Circuit, however, found in *Huntley* that part of the evidence presented was the invalid revocation of October 9, which the Board had never declared unlawful. Thus, the Board had not "wiped the slate clean." In conclusion, the court of appeals found "that the defective notice, the change in the purpose of the meeting without further notice, and the failure of the Board to recognize the invalidity of the October 9 revocation, denied Mrs. Huntley due process of law."[25]

The conclusion of the Fourth Circuit appears to be based primarily upon its determination that the notice sent to Mrs. Huntley by the Board of Education was insufficient. It seems arguable, however, that the notice was adequate, having met all of the necessary requirements.[26] Assuming *arquendo* that the notice was deficient, Mrs. Huntley was nevertheless put on notice of the hearing. The purpose

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[22] TEX. REV. CIV. STAT. ART. 46a (1969).

[23] 380 U.S. at 552.

[24] *See* Brief for Appellee at 14, Huntley v. North Carolina State Bd. of Educ., 493 F.2d 1016 (4th Cir. 1974).

[25] 493 F.2d at 1020.

[26] *See* note 15 *supra*.

of the notice was to afford Mrs. Huntley an "opportunity to present [her] objections."[27] She was accorded this opportunity. Had she appeared at the hearing, she would have found that it did not center on reinstatement, but on revocation, and the instant lawsuit could have been avoided.

Furthermore, there is authority for the proposition that it was immaterial whether "reinstatement" or "revocation" was used in the notice.[28] The Fourth Circuit relied on this distinction to show that the burden of proof had been improperly placed on Mrs. Huntley. However, since the purpose of an administrative hearing is "to determine whether the charges are true, . . . [i]nquiry into the technicalities governing burden of proof in civil . . . trials is . . . irrelevant."[29] The court of appeals itself stated that "[t]he proceedings of a board of education need not be conducted with the scrupulous regard for procedural niceties that the law imposes on courts."[30] Hence, the court's reliance on *Armstrong* seems misplaced because in that case the Supreme Court adopted a requirement of procedural "niceties" applicable only to civil cases.[31]

Furthermore, Mrs. Huntley's absence should have constituted a waiver of her objections.[32] Since her reason for not appearing was that she would have to assume the burden of proof, and since that argument is irrelevant in an administrative hearing, then she had no legitimate basis for failing to make an appearance.

The court of appeals premised its decision on two incompatible propositions. On one hand, the court reasoned that the notice and procedure of the December 9 hearing was deficient from a due process standpoint. However, the court also recognized in passing that the procedural technicalities imposed on courts of law are not necessarily applicable to administrative proceedings. Had the Fourth Circuit recognized the full implications of the latter, the result would necessarily have been that Mrs. Huntley was not denied due process of law.

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[27] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See* note 15 *supra*.

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

[29] Jones v. State Bd. of Educ., 279 F. Supp. 190, 202 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969). *See* note 14 *supra*.

[30] 493 F.2d at 1019.

[31] It is also to be noted that in *Huntley* the government did, in fact, assume the burden of proof. *Id.* at 1020.

[32] *See* note 15 *supra*.

D. Due Process Guarantees in the Termination of Doctor's Staff Privilege at a Private Hospital—*Christhilf v. Annapolis Emergency Hospital Association*, 496 F.2d 174 (4th Cir. 1974).

In *Christhilf v. Annapolis Emergency Hospital Association*,[1] the Fourth Circuit considered the extent to which the requirements of procedural due process of law applied to termination of a doctor's staff privileges at a private hospital. On the basis of the fourteenth amendment[2] and the Civil Rights Act of 1871,[3] the Fourth Circuit held that the doctor was entitled to a hearing before his privileges were terminated and set out guidelines to insure that any future hearing conducted by the hospital board met the requirements of due process of law.[4]

The litigation arose after the hospital board, alleging multiple infractions of hospital rules and regulation, terminated the doctor's staff privileges without affording him a hearing. The doctor brought suit in the district court seeking damages and reinstatement, and the court granted an interlocutory injunction preventing termination of his privileges until a hearing had been held. A hearing was duly convened by the board at which the doctor was allowed to defend himself against four specific charges. In addition to these, however, the board alleged 32 unspecified infractions, the merits of which the doctor was not allowed to contest. Because of an impasse over the question of his right to contest the additional charges and to use the hospital's records bearing on those charges, the doctor withdrew from the hearing; and his termination was subsequently approved. The

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[1] 496 F.2d 174 (4th Cir. 1974).

[2] U.S. CONST. amend. XIV, § 1 provides in pertinent part:

> No 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.

The applicability of this section to conduct such as that challenged in this case is triggered by the presence of "state action."

[3] 42 U.S.C. § 1983 (1970) 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 immunites secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other possible proceeding for redress.

The applicability of this amendment is triggered by conduct "under color of state law."

[4] 496 F.2d at 180.

district court denied the doctor further injunctive relief on the ground that he had waived due process protection by withdrawing from the hearing.[5]

The Fourth Circuit refused to accept the argument of waiver, finding on the facts that the plaintiff had strenuously asserted his rights while present at the hearing and had not withdrawn in acquiescence to the relinquishment of those rights, but rather in protest over their continued denial.[6] The fact that the doctor was afforded no opportunity to contest the merits of the long list of additional charges was a critical element in the court's finding that due process had been denied.[7]

The Fourth Circuit ordered restoration of the doctor's staff privileges unless the board afforded him a hearing within such reasonable time as the district court might specify.[8] The court also set out guidelines to insure that the hearing would conform to the requirements of due process.[9] The guidelines offered were that: (1) there must be a hearing before final action is taken; (2) the hearing must begin anew without reference to any past proceeding;[10] (3) the hearing must be held only on clear accusations of which the accused had notice and for which he had time to prepare answers, although any charges which had been brought previously in a due process hearing would not have to be reheard; (4) the accused must have access to all pertinent records in possession of the dismissing authority; (5) the accused must have the right to present evidence in his own favor, to rebut evidence against him, and to cross-examine; and (6) the powers of prosecutor, judge, and jury should not all be lodged within one hearing body.[11]

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[5] *Id.* at 176-79.

[6] *Id.* at 179-80. An essential factor in the doctor's favor was that he had promptly resorted to the court for enforcement of his rights. In other cases where voluntary choice was exercised in refusing to participate in a hearing, and no prompt claim was asserted thereafter, the default evidenced waiver. *Id.*, *citing* Harris v. Smith, 418 F.2d 899, 901 (2d Cir. 1969).

[7] 496 F.2d at 180.

[8] *Id.*

[9] *Id.* at 178-81, *citing* Milford v. People's Community Hosp. Authority, 380 Mich. 49, 155 N.W.2d 835, 839-40 (1968) (outlining procedural requirements).

[10] 496 F.2d at 180, *citing* Armstrong v. Manzo, 380 U.S. 545 (1965) (meaningful opportunity to be heard requires fresh proceedings which do not refer to previous unconstitutionally established decisions).

[11] An additional requirement was that the accused could not defend himself by countercharges against other doctors. 496 F.2d at 181, *citing* Woodbury v. McKinnon, 447 F.2d 839, 845-46 (5th Cir. 1971) ("one who fails to meet the standard has not been denied constitutional protection just because others have not likewise been held accountable").

The preliminary issue of whether the hospital's actions constituted state action or were under color of state law, as required by the fourteenth amendment and the 1871 Civil Rights Act,[12] was not discussed in detail by the Fourth Circuit. The court simply reasoned, as had the district court, that the private hospital was subject to due process requirements as a result of its receipt of federal, state, and county funds.[13] In support of this position, the Fourth Circuit cited its own prior holdings in which federal-state funding had provided sufficient grounds for maintaining claims under the fourteenth amendment.[14] That this is not a settled issue, however, is indicated by the recent opinion of the Southern District of New York in *Barrett v. United Hospital*.[15] In *Barrett*, the court described the issue of state action as central to a doctor's challenge of a private hospital's denial of his staff privileges.[16] The *Barrett* opinion recommended a three-pronged test to determine whether government funding constituted state action. Under that test, state action would be found if the funding was significant, had a nexus with the conduct complained of, and furthered the challenged activity.[17] The *Barrett* court used a broad base of authority to support use of the test[18] and concluded that the hospital's decision to terminate the doctor's staff privileges was entirely free of state action implications and therefore was not subject to federal judicial interference.[19]

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[12] *See* notes 2 & 3 *supra*.

[13] 496 F.2d at 178. The Hill-Burton Act, 42 U.S.C. §§ 291 *et seq.* (1970), which was a source of funds for the defendant hospital in *Christhilf*, allots federal monies to assist states in furnishing needed hospital facitlites.

[14] 496 F.2d at 178, *citing* Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969); Simpkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). *See also* Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964).

[15] 376 F. Supp. 791 (S.D.N.Y. 1974).

[16] *Id.* at 795.

[17] *Id.* at 979, 801.

[18] *Id.* at 797, *citing* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (state must have significantly involved itself with invidious discriminations for state benefits to subject private entities to fourteenth amendment requirements); Reitman v. Mulkey, 387 U.S. 369, 380 (1967); Bond v. Dentzer, 494 F.2d 302, 306 (2d Cir. 1974) (state action must be related to challenged activity); Shirley v. State Nat'l Bank, 493 F.2d 739, 741 (2d Cir. 1974) (must be joint activity of private person and state in challenged conduct); Powe v. Miles, 407 F.2d 73, 81-82 (2d Cir. 1968) (state funding must be substantial).

[19] 376 F. Supp. at 805-06. The *Barrett* court analyzed the standards used in the Second Circuit to subject private institutions to due process requirements, concluding that only in cases of racial discrmination and traditionally governmental activities would the three-pronged state action test be set aside. *Id.* at 796-805, *citing* Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968); Mulvihill v. Julia L. Butterfield Memorial Hosp., 329 F. Supp. 1020, 1022 (S.D.N.Y. 1971).