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I. INTRODUCTION

Eleven years have passed since Warren E. Burger was sworn in as Chief Justice of the United States. The Burger years have been some of the Supreme Court's most important in terms of resolving constitutional questions affecting public education. Yet one need only review this decade of litigation to ascertain that many of the Court's decisions have raised as many questions as they have answered.[1] The Burger years appear to represent, in a legalistic microcosm, a struggle taking place in society at large between two conflicting forces. The collectivist goal of promoting equality of attitude and experience in an effort to advance social uniformity and national cohesion confronts the individualist goal of freedom of choice consistent with the cultural diversity of a pluralistic society.[2] This tension between individuals and the state, as represented particularly in the public school system, is found in many of the Burger Court rulings. Although there has been something for everyone in these cases, such eclectic decisionmaking makes difficult any attempt to identify consistent trends. Nonetheless, there are some fleeting images in the

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1. Although many cases appearing before the Supreme Court during the past decade have had a direct impact on educational institutions, some of the more important ones include the following: Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ingraham v. Wright, 430 U.S. 651 (1977); Vorchheimer v. School Dist. of Philadelphia, 430 U.S. 703 (1977); Runyon v. McCrary, 427 U.S. 160 (1976); Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Lau v. Nichols, 414 U.S. 563 (1974); San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972); Lemon v. Kurtzman, 403 U.S. 602 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

2. For a discussion of these "tensions," see D. KRIP & M. YUDOF, EDUCATIONAL POLICY AND THE LAW (1974); Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612 (1970); Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373 (1976).

fog worthy of examination. One decision that stands out with unusual clarity is the unanimous ruling in *Mt. Healthy City School District Board of Education v. Doyle*,[3] decided January 11, 1977. This case has been with us long enough to view how it fits into a possibly developing Court philosophy that attempts to reduce the tension between the collectivist and pluralistic factions.

II. Facts

Mt. Healthy involved the rights of local school boards to dismiss teachers because of conduct that is constitutionally protected. The case arose when the Mt. Healthy School District Board denied tenure to Fred Doyle. Doyle sued the school board, contending that the reason for the school board's action was his communication with a local radio station and that this communication was protected by the first amendment's freedom of speech guarantee. Doyle argued that because the school board's action violated his freedom of speech, his dismissal was improper.

In light of the Court's ruling in *Mt. Healthy*, a detailed review of the facts is important. Doyle was hired by the school board under a one-year contract in 1966. He was rehired at the beginning of each of the next three years and received a two-year contract in 1969. Doyle was active in the local teachers' association and became its president in 1969. In 1970 he became a member of its executive committee. His terms in these positions were marked by tensions between the school board and the teachers' association. Furthermore, in 1970 he had an argument with a fellow teacher and an altercation with two cafeteria workers. Finally, he was accused of making an obscene gesture to two female students while on duty as a cafeteria monitor. All of these incidents were communicated to the school principal.

The following year a controversy arose in the school district over a dress code for teachers. The principal at Doyle's school sent a memorandum concerning the dress code to his teachers. Doyle communicated the contents of this memorandum to WSAI, a Cincinnati radio station, which used the information as a local news item. One month after the radio station made public the contents of the memorandum, the superintendent recommended that Doyle not be rehired. The school board adopted

3. 429 U.S. 274 (1977).

the recommendation. When Doyle was notified of the board's decision, he requested a statement of grounds for dismissal from the board. The board gave two reasons for the dismissal: the incident with the radio station and the obscene gesture.

At trial the federal district court found that a substantial part of the reason for the board's decision was Doyle's communication with the radio station. It further found that this communication was protected by the first amendment.[4] Although independent reasons supported the board's decision to not grant tenure, the district court held that when a *substantial part* of the reasons were based on constitutionally protected conduct, the board's decision could not stand.[5] The Sixth Circuit affirmed the decision of the district court without rendering an opinion.[6] Thereafter, the Supreme Court granted the school district's petition for certiorari.[7]

After dealing with questions of jurisdiction and local school district immunity from suit under the eleventh amendment, the Court turned to the substantive constitutional issues. Writing for the Court, Justice Rehnquist first enunciated the principles underlying the case. As an untenured teacher, Doyle could have been dismissed without reason and without a prior hearing.[8] But the Court also noted that teachers do not relinquish their first amendment rights as a matter of their employment and that teachers may be reinstated if the decision not to rehire them was made because they exercised those rights.[9]

Moving to its analysis of the case, the Court accepted the finding of the trial court that Doyle's communication with the radio station was protected speech.[10] Justice Rehnquist insisted, however, that the analysis could not stop there. An additional question must be asked: If the board would have decided not to

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4. *Id.* at 283.

5. In 1971, at the end of his two-year contract, Doyle was eligible for tenure. The denial of tenure at that time acted in fact as a dismissal. *Id.* at 283-84.

6. Doyle v. Mt. Healthy City School Dist. Bd. of Educ., 529 F.2d 524 (6th Cir. 1975), *aff'd in part and vacated in part*, 429 U.S. 274 (1977).

7. 425 U.S. 933 (1976).

8. 429 U.S. at 283 (citing Board of Regents v. Roth, 408 U.S. 564 (1972)). Under the fourteenth amendment, expectation of tenure is not a property right.

9. *Id.* at 283-84.

10. Justice Rehnquist noted that a public employee's exercise of protected speech must be balanced with legitimate governmental interests in the efficiency of the services it offers. Because the school district had no enunciated policy regarding the alleged misconduct of Doyle, Rehnquist characterized the board's reaction to Doyle's conduct as ad hoc. *Id.* at 284.

rehire in the absence of the constitutionally protected conduct, does the fact that the protected conduct played a "substantial part" in the board's decision entitle Doyle to a remedy? The Court thought not, since a contrary conclusion would place the teacher who exercises his constitutional rights in a better position than one who does not: "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."[11] The Court concluded its opinion with instructions to the district court concerning the allocation of the burden of proof. The court held that teachers must prove that their conduct was constitutionally protected and that this conduct was a motivating factor in the decision not to rehire. In turn, if the school board could prove by a preponderance of evidence that the same decision would have been reached in the absence of the protected conduct, the school board's decision would stand.[12] Accordingly, the Court vacated the judgement of the court of appeals and remanded the case to the district court for further proceedings.

Even though the Court at the outset stated the broad constitutional principles that governed the case, there should now be concern that it retreated from some of those principles in its final holding. In addition, a number of questions remain unanswered after the decision.

III. Background

In order to gain a historical perspective on *Mt. Healthy*, one must reach back into the common law of employer-employee relationships. Under the common law an employer could discharge an employee for any reason at all. This rule prevailed in the United States until Congress began to alter private employment practices in legislation designed to protect unionization. One alteration was the prohibition of discriminatory hiring and firing practices on the basis of an employee's freedom of association rights.[13] But, while the private economic sector was significantly affected by this governmentally imposed national labor policy, governmental employment itself was generally controlled by a separate set of principles. This dichotomy of treatment stemmed

11. *Id.* at 285-86.
12. *Id.* at 287.
13. Labor Management Relations Act of 1947 § 101, 29 U.S.C. § 158 (1976).

from reliance on principles of constitutional interpretation rather than on any legislative enactments.

The constitutional principles involved in the early treatment of governmental employment relationships provide, in themselves, historically important views of the due process clause of the fourteenth amendment. For the greater part of its life in our jurisprudence, the due process clause was concerned with interests in life, liberty, and property. In cases involving "economic due process," the Court developed a definitional approach to the scope of interests the due process clause protects. These interests were characterized as either "rights" or "privileges" and were accorded due process protection only if they fell within the definition of a right. Speaking of these rights in an early case, the Court described them as

> the right of the citizen to be free from the mere physical restraint of his person; [to] be free to use [all his faculties] in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper.[14]

This perception by the Court of due process rights resulted in the striking down of many attempts by state legislatures and Congress to regulate business, the economy, and the work environment.[15] In viewing the personal ownership and use of property as the core of these rights, the Court could only conclude that any governmental regulation or interference with that personal freedom was a deprivation of due process.[16]

This definition of economic due process rights by the Court has remained virtually constant, although its view of governmental regulation has changed.[17] While those rights remain as the core of protected interests, the Court has widened the scope of protected interests beyond these rights.[18] For example, one developing class of interests that has been afforded due process

14. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). The Court here was speaking of the freedom to contract as a liberty interest. The ability to contract no longer enjoys the exalted position that it did in the Supreme Court cases of a century ago.

15. *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

16. *See generally* Williams v. Standard Oil Co., 278 U.S. 235 (1929); Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

17. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); Williamson v. Lee Optical, 348 U.S. 483 (1955); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

18. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 514-15 (1978).

protection is governmental benefits.[19] Only a decade ago it was held that governmental benefits fell within the "privileged" class of interests.[20] They included the goods, services, and opportunities the government provides. Because these benefits were considered mere privileges to be granted or withheld as the government saw fit, no due process protections were deemed necessary or proper.[21] However, the characterization of governmental benefits as privileges changed as it became more apparent that government played an increasingly important role in society.[22] For many people government became the provider, the employer, or the protector of health and welfare. Recognizing that governmental actions led to an expectation of benefits, the Court sought to erase the right-privilege distinction.[23] The Court shifted its analysis to an examination of whether the government by its action created an *expectation* of benefits. If it had created an expectation of benefits, due process requirements would then attach where the government attempted to withhold or withdraw those benefits.[24] Where the source of governmental benefits is statutory entitlement or implicit mutual understanding, due process extends to protect them, and the form of due process required in the circumstances becomes a matter of balancing the interests of government and the individual.[25] Some claims of governmental benefit, however, do *not* invoke due process protection;[26] public employment is such an instance.[27]

The Supreme Court in the past has balanced the interests of the the individual and the government employer and found that where the chances of further employment are not seriously impeded by the discharge from government employment (the creation of a stigma, for example) no individual expectation ex-

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19. *Id.* at 515.

20. Goldberg v. Kelly, 397 U.S. 254 (1970).

21. *See, e.g.*, Board of Educ. v. Swan, 41 Cal. 2d 546-56, 261 P.2d 261, 268 (1953).

22. *See generally* Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261.

23. L. TRIBE, *supra* note 18, at 515. *See* Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A. L. REV. 751 (1969).

24. *See generally* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972). *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

25. *See generally* Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

26. L. TRIBE, *supra* note 18, at 510, 515.

27. *See, e.g.*, McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517-18 (Mass. 1892) (Holmes, J.) (employment as policeman classified as 'privilege').

isted that would mandate due process procedures.[28] The Court now looks to the nature of the interest involved in a claim of fourteenth amendment protection and finds that public employment involves neither a property nor a liberty interest. Therefore, public employment is accorded no special due process protection.[29] However, where the denial of government employment results from an employee's exercise of other constitutionally protected rights, the Court has rejected the premise that public employment may be conditioned upon a relinquishment of those rights.[30]

In 1968 in *Pickering v. Board of Education*,[31] the Court considered the issue of whether a public school teacher could be dismissed from his job for a public communication that was critical of the local school board. What made this case particularly difficult was that the communication—a letter to the local newspaper—was not only critical of the school board, but contained erroneous statements about a very sensitive board revenue proposal that had previously failed to gain voter approval.[32] The lower court held that the record contained substantial support for the school board's finding that the teacher's conduct was detrimental to the interests of the school and that he therefore merited dismissal.[33] On appeal, the Supreme Court recognized that as an employer the state has a particular interest in the speech of its employees. This interest is "not significantly greater," however, than that in the speech of the general citizenry.[34] The Court also "discovered" that this was not the only interest at stake in the case. The teacher also had an interest as a citizen in commenting on matters of public concern.[35] Thus, the Court identified two competing interests to be balanced: first amendment protection and orderly school administration.[36]

In striking a balance the Court first considered whether the speech of the teacher adversely affected harmony among fellow

28. *See, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

29. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 n.9, 578 (1972).

30. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

31. 391 U.S. 563 (1968).

32. *Id.* at 564.

33. *Id.* at 565.

34. *Id.* at 573.

35. *Id.* at 568.

36. *Id.* at 569.

teachers or generally disrupted faculty discipline.[37] Another consideration was whether the charges contained in the speech were susceptible of refutation or whether they were of such a nature that they could not be countered or rebutted by the board.[38] These two considerations support the collectivist goal of the administration and faculty, that goal being the education of students. This goal might be subverted if one teacher was allowed to undermine the faculty's loyalty to that goal or to undermine the community support of the faculty and administration with his misstatements. The Court, therefore, was concerned that the state's interest be weighted heavily where it can be shown that the school's interest would be harmed by the individual.

In *Pickering*, a collectivist goal came into apparent conflict with the individual rights of the teacher. The teacher expressed his opinion about the operation of his school in a letter to a newspaper. A teacher's interest in expressing his opinion clearly coincides with the public interest in free and open debate about matters of public concern. These first amendment rights are possessed by each citizen, and because of their great value, they are protected even to the point of false or malicious speech that results in actual harm. Accordingly, the Court set forth the critical test on which the analysis in *Pickering* turns: Where an employee speaks as a citizen on matters of public interest and "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by the teacher, . . . it is necessary to regard the teacher as the member of the general public which he seeks to be."[39] If the teacher is viewed as a public citizen, the board's interest becomes not that of maintaining an effective school system, but an interest no greater than if any other citizen had written a letter.[40] But if the teacher is viewed as speaking as an employee, the interest of the board becomes far greater. *Pickering* tells us that only beyond the threshold question of characterizing the person as teacher instead of citizen does the board's concern for confidentiality, trust, harmony, and effectiveness come into play. In this case, the teacher was found to have written the letter in his role as a citizen, and in the absence of a showing that false statements were knowingly and recklessly made, the teacher's

37. *Id.* at 569-70.
38. *Id.* at 572.
39. *Id.* at 574.
40. *Id.* at 573.

employment could not be conditioned on his exercise of protected rights.[41]

It is important to note that in *Pickering,* where the school board was required by state law to hold dismissal hearings,[42] the Court left unconsidered the ancillary procedural due process issues that are characteristic of teacher dismissal actions. The Supreme Court faced these procedural due process issues in two major companion cases decided four years after *Pickering: Board of Regents v. Roth*[43] and *Perry v. Sindermann.*[44] Although the Court applied the same principles to these factually similar cases, it reached different conclusions.

Both *Roth* and *Perry* involved university faculty members not being rehired at the expiration of their contracts.[45] These faculty members were not permitted hearings and were not given statements of the reasons for their dismissal. In analyzing these cases, the Court first defined property as something one already possesses.[46] It then asserted that the concept of property embodies tangible as well as intangible things.[47] Using property interests as the standard, the Court in *Roth* found no basis for any expectation that employment would continue.[48] But in *Sindermann,* the Court found a basis for this expectation.[49] The teacher in *Sindermann* worked for a university with a tacit tenure system.[50] The Court took a comprehensive view of the factual situation from which the case arose and was willing to look beyond the terms of the teacher's present contract in defining

41. *Id.* at 574.

42. *Id.* at 566.

43. 408 U.S. 564 (1972).

44. 408 U.S. 593 (1972).

45. Roth had been hired as an assistant professor of political science at Wisconsin State University under a contract extending from September 1, 1968 to June 31, 1969. Although a Wisconsin statute granted tenure after four one-year contracts, no statutory or administrative standards for reemployment had been adopted, which meant that the standard for rehiring was left to the discretion of the university administration. Roth was given notice prior to the expiration of his contract, but was not granted a hearing. Sindermann had taught under year-to-year contracts at Odessa Junior College in Texas. During his fourth year, he had become head of the local teachers association which at that time was engaged in a controversy with the board of regents. After his fourth year, on the basis of insubordination, he was not rehired. He was given neither a statement of reasons nor a hearing. *See* 408 U.S. at 566-68.

46. *Id.* at 576.

47. *Id.*

48. *Id.* at 578.

49. 408 U.S. at 599, 600.

50. *Id.*

reasonable expectations. On the other hand, the teacher in *Roth* worked under a system in which no understanding of tenure existed. A mere subjective expectation of continued benefits on the part of the teacher was not sufficient in the Court's view to constitute a property interest; rather, this expectation was to be supported by objective factual criteria adduced from the particular employment situation.[51]

In light of these cases, constitutional analysis in the area of public school employment must be viewed as following two lines. A successful claim of constitutionally protected rights based on the due process clause of the fourteenth amendment must be preceded by a showing of a property interest in employment arising from either a contract-tenure right to continued employment or from an implied contractual right or mutual understanding of continued employment. On the other hand, a claim of constitutionally protected interests based on first amendment rights does not require a property interest analysis. A denial of continued employment based on the exercise of first amendment freedoms is constitutionally prohibited. These are the principles that emanated from *Pickering, Roth,* and *Perry,* and constituted the base upon which *Mt. Healthy* came before the Supreme Court in 1977.

IV. What is a Constitutional Violation?

Having considered the cases that it is based upon, we may view the *Mt. Healthy* case from first amendment and fourteenth amendment perspectives. These two perspectives coincide with the two lines of cases leading up to *Mt. Healthy.*

A. The First Amendment Perspective

When the Supreme Court decided *Mt. Healthy,* it accepted as true a lower court finding that Mr. Doyle's conduct was constitutionally protected. What the Court did not do was find that this fact alone was sufficient to grant relief. There must be a test in constitutional cases to distinguish "between a result caused by a constitutional violation and one not so caused."[52] The test the Court developed required the plaintiff to show that his conduct was constitutionally protected and that it constituted the

51. 408 U.S. at 577.
52. 429 U.S. 274, 286.

motivating factor for the government's adverse decision. If the plaintiff meets his burden, it then becomes the government's burden to show by a preponderance of the evidence that the same decision would have been reached in any event.[53]

In many instances it has not proven difficult for courts to determine when a first amendment violation has occurred: the parade permit was denied, the protestor was jailed, or the pamphleteer was fined. But in more recent rumblings emanating from the Burger Court, the focus has shifted from looking solely at the result of a state's action to also reviewing the reasons why those actions were undertaken.[54] It now appears that *results*, and the *reasons* for the results, will serve evidentiary functions in determining whether a constitutional violation has occurred.

Before *Mt. Healthy*, once a first amendment violation was found, the Court proceeded no further in its analysis.[55] Rather, freedom of speech, considered by the Court to be the core of all freedoms, was surrounded by stringent protections, which, when violated, supported awards of at least nominal damages, even where no actual harm could be shown.[56] There were those who would have protected first amendment rights at nearly any cost—the late Justice Hugo Black being the prime example.[57] But, such a position has been abandoned for a new position in which first amendment rights are not seen as absolute; the Court now perceives other considerations as also important. This contemporary perception of competing values required courts to define and then to balance the various interests at stake in a lawsuit. How the interests are defined in any given situation will, to a great extent, determine the balance attained. If the speech of the teacher is defined as further from the core of first amendment rights, the state's interest in prohibiting the speech correspondingly increases. This concept was explored by Justice Rehnquist four years before his opinion in *Mt. Healthy* when he stated: "The government as employer or school administrator

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53. *Id.* at 287.

54. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Washington v. Davis, 426 U.S. 229 (1976); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

55. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

56. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 266-67 (1978). *But cf.* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (damages only recoverable when "actual malice" shown).

57. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (Black, J., concurring).

may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens."[58]

Whether or not the Court is in fact adopting the earlier Rehnquist view, just how much protection teachers' speech lying further from the "core" of protected activities requires appears to remain an unanswered question. What is more certain after *Mt. Healthy,* however, is that a constitutional violation is not evidenced by any particular result of the state's response to arguably protected conduct. Rather, it is the intent from which a result is produced that becomes evidence of a constitutional violation.

Because of the complexity of the considerations in retaliatory discharge cases, it is difficult to determine what standard of review the Court should adopt. A strict scrutiny standard is inapposite, because the inquiry is not simply definitional—that is, whether free speech conduct *exists* to make any discharge illegitimate—but rather, the inquiry involves the balancing of the role of that conduct in the decisionmaking with the role of all other actual grounds upon which the discharge may be legitimately based. Accordingly, the Court has not required a strict scrutiny standard of review in such cases.[59] The state may have many legitimate reasons for discharging an employee; to require the state to show a compelling state interest at the mere suggestion that constitutionally protected conduct is involved places an undue burden on the state.[60] At the same time it must be recognized that to require courts to apply only a rational basis standard of review may legitimatize a school board action that can be justified by pointing to any conceivable reason for the action.[61] The *Mt. Healthy* standard falls between these two extremes. It gives judicial imprimatur only to those decisions of the state that can be justified on grounds wholly independent of any constitutional activity.

Even though *Mt. Healthy* was a unanimous opinion, the concept of the proper standard of review must be reconciled

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58. Healy v. James, 408 U.S. 169, 203 (1972) (Rehnquist, J., concurring). *See also* Papish v. Board of Curators, 410 U.S. 667 (1973).

59. Comment, *Proof of Racially Discriminatory Purpose under the Equal Protection Clause:* Washington v. Davis, Arlington Heights, Mt. Healthy, *and* Williamsburgh, 12 HARV. C.R.-C.L. L. REV. 725, 750 (1977).

60. *Id.*

61. *See id.* at 729.

with the various philosophies present on the Court. One commentator has suggested that in the view of some of the Justices, the *Mt. Healthy* approach places a heavy burden on the defendant to show that any interference with constitutionally protected rights is harmless in that the same decision to discharge would have been reached in any event.[62] In support of this proposition is the fact that the *Mt. Healthy* test places the defendant's proof at a preponderance-of-the-evidence level while not requiring the plaintiff to prove the motivating factor by any such standard.

Notwithstanding its effect on appellate review, the major effect of *Mt. Healthy* will be felt, and struggled with, in the trial courts. *Mt. Healthy* provides little guidance to these lower courts on the amount and type of evidence required of the plaintiff to shift the burden of proof to the defendant. Nothing in *Mt. Healthy* suggests what kinds of evidence will be deemed probative of the defendant's motivations, or whether the subjective feelings of the defendant are necessary elements of proof. The requirement that the plaintiff produce evidence showing the motivating factors for the state's action is a higher threshold burden than was required before *Mt. Healthy*. Whether this burden is met will be for the judge's determination and failure to meet it may lead to a directed verdict for the defendant.

The lower courts may derive some guidance by examining a similar type of analysis in a line of equal protection cases brought under the Civil Rights Act where the Supreme Court has required a showing of discriminatory purpose on the part of the state in order to find an actionable constitutional violation.[63] This requirement may be compared to the motivating factor for state action in discharge cases.[64] In order to determine whether a discriminatory purpose on the part of the state did exist, the courts have employed various tests, and the results have largely depended on the test utilized.[65] The tests range from those favorable to the plaintiff's burden of proof to those difficult of proof, absent direct evidence of the state's discriminatory purpose.[66]

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62. *Id.* at 751-52.

63. *See* Washington v. Davis, 426 U.S. 229 (1976); Jefferson v. Hackney, 406 U.S. 535 (1972); Palmer v. Thompson, 403 U.S. 217 (1971).

64. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

65. *See* Comment, *supra* note 59 at 731.

66. Four readily ascertainable tests have been used: (1) discriminatory purpose

Another source of guidance in applying the *Mt. Healthy* test is found in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[67] which was decided the same term as *Mt. Healthy*. That case involved racial discrimination by the selective application of local zoning ordinances. The Court listed four factors that may be probative of discriminatory purpose: (1) the disproportionate impact of official action, (2) the historical impact of the decision, (3) the sequence of events leading to the decision, and (4) the administrative record of the decision.[68] Of these four factors, the last two may be more reliable indicators of motivation in a case like *Mt. Healthy*. This may be particularly true when viewing the third factor, which requires an evaluation of the sequence of events leading to a decision, for it may be possible to show by such an inquiry that the defendant's version of the elements of the decision are mere pretense.[69]

A contrary application of the Court's standard in *Mt. Healthy* would presume that the state's decision rested on legitimate grounds. The plaintiff, therefore, would need to present a prima facie case showing that the protected conduct was the motivating factor behind the action before the burden would shift to the defendant.

At the moment, *Mt. Healthy* must be viewed as a deviation from prior decisions. While stating the rule enunciated in *Pickering*, that an employment decision may not be based on constitutionally protected conduct, *Mt. Healthy*, by its causation test, attempts to fill a perceived pitfall in so simple an analysis. The inherent problem in a balancing of interests is that it requires the judiciary to look deeply into the policies lurking behind those interests and to make certain judgments about the merits of those policies.

Interestingly, some federal circuit and district court decisions prior to *Mt. Healthy* appeared to be expanding the scope of legitimate state action by developing approaches similar to

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demonstrated by the reasonably foreseeable adverse results of a governmental action; (2) proof of subjective motivation; (3) discriminatory purpose as evidenced by the government's actions taken as a whole; and, (4) presumptive discriminatory purpose which the government may rebut with a showing of legitimate motivation. *Id.* at 732-37.

67. 429 U.S. 252 (1977).

68. *Id.* at 265-68.

69. *See* DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of* Mt. Healthy Board of Education v. Doyle *Upon the NLRA*, 66 GEO. L.J. 1109, 1114 (1978).

the one later adopted by the Supreme Court in *Mt. Healthy*.[70] An underlying concern of those courts was the role of federal courts in local school board policy.[71] Whether that concern represents a feeling that federal courts should be hesitant in interfering with those traditionally local matters, or whether it represents a broader apprehension of the federal courts' intervention into every aspect of modern life, is unknown.

B. The Fourteenth Amendment Perspective

While the decision in *Mt. Healthy* altered the analysis of the first amendment issues involved, it added little to the *Roth-Sindermann* procedural due process requirements for teacher dismissal. Because the teacher in *Mt. Healthy* had no tenure rights, express or implied, the Court reiterated the traditional view that Doyle had no right to a hearing before his dismissal.[72] In the Court's view it was unnecessary to discuss the requirement of a hearing where a claimant asserts constitutionally protected conduct as the grounds of dismissal. *Roth* and *Sindermann* found that the interest in holding a teaching position at a state university did not, by itself, embody a free speech interest, and that the mere assertion of such an interest does not demand due process safeguards.[73] Without further Court consideration of these stated premises, the *Roth-Sindermann* precedent would still seem to apply. One subsequent Supreme Court case, *Bishop v. Wood*,[74] supports this proposition. This case involved a public employee's—though not a teacher's—right to a hearing before dismissal. The Court in *Bishop* found an insufficient expectation of continued employment to violate fourteenth amendment protections of liberty or property interests.[75]

Many policy reasons have been postulated in support of some form of due process procedures to be required in all instances of adverse government action, to some extent echoing the dissenting opinions of *Roth* and *Sindermann*. The practical

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70. *See* Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975) (using a causation test, the court found that interference with university faculty's constitutional rights is prohibited).

71. *See, e.g.*, Starsky v. Williams, 353 F. Supp. 900, 916 (D. Ariz. 1972).

72. 429 U.S. at 283.

73. 408 U.S. 564, 575 n.14.

74. 426 U.S. 341 (1976).

75. *Id.* at 347. *See also* Arnett v. Kennedy, 416 U.S. 134, 154 (1974) (statutory right may be directly limited by the same statute).

effect of the *Mt. Healthy* decision is to further confuse the due process requirements in teacher dismissal actions. Before allowing this confusion to be perpetuated in future decisions, the importance of due process should be reexamined. Due process assures reasoned decisionmaking by forcing each official to articulate the bases of any decision. It provides a forum for facts and the inferences to be drawn from those facts, thereby allowing discovery of any erroneous bases for the decision. The procedure may also allow the affected party an opportunity to speak for his own cause.

In education, the concept of academic freedom has been viewed as an important policy concern. It has received much attention by educators, legislators, and judges, and yet it has not been considered by the Court as representing an independent liberty interest.[76] Therefore, due process requirements have been seen as needed protection for the vitality of academic freedom. It is important to realize that *Mt. Healthy*'s impact may be wider ranging, particularly when considering due process concerns, than even the Court originally contemplated.

V. The Impact of *Mt. Healthy*

Finally, we must look beyond *Mt. Healthy* and assess its impact on subsequent rulings. The Supreme Court has cited *Mt. Healthy* in a variety of contexts since it was decided in 1977.[77] Although these cases do not point to a single proposition concerning *Mt. Healthy,* certain items of a constitutional dimension can be gleaned from them. In cases ranging from school desegregation[78] to the sixth amendment right to a jury trial,[79] the Court has looked to *Mt. Healthy* to support two areas of analysis. Those areas are the factors of causation when a claimed harm is said to result from a constitutional violation and the intertwined question of discriminatory purpose.[80] Both areas relate to the question previously presented in this discussion: When does a

76. Brown, *Tenure Rights in Contractual and Constitutional Context,* 6 J.L. & Educ. 279, 296-97.

77. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 700 n.27 (1979); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 398, 401 (1979); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 321 (1978); Andrus v. Charleston Stone Products Co., 436 U.S. 604, 607 n.6 (1978).

78. *See, e.g.,* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 n.13 (1979).

79. *See, e.g.,* Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979).

80. *See* East Texas Motor Freight Sys., Inc. v. Rodriquez, 431 U.S. 395, 404 n.9 (1977).

constitutional violation occur? The Supreme Court in these cases appears to reaffirm its opinion in *Mt. Healthy* that a direct causal connection between the intent to violate a protected right and the harm complained of are necessary elements of such a claim.

In the area of education, the Supreme Court has decided two major cases dealing with teachers' first and fourteenth amendments rights that refer to *Mt. Healthy*. In *Ambach v. Norwick*,[81] the Court in a five to four decision that relied on *Mt. Healthy* for support held that teaching is not a liberty interest protected by the fourteenth amendment.[82] At issue in that case was a New York State law that required state certification to teach, but which also forbade certification of persons who were not citizens of the United States. The Court's reasoning proceeded from the premise that teaching is entwined with the fundamental function of government to educate its citizens. The Court, using only a rational basis standard of review for the state's action, found in the state's goal to promote civic understanding a legitimate justification for restricting teaching to only United States citizens. Because the state could point to a legitimate rationale for its action, the teacher's interest in pursuing his profession was outweighed.

The second and perhaps most significant case was *Givhan v. Western Line Consolidated School District*.[83] There the Supreme Court reversed a circuit court ruling that ostensibly used *Mt. Healthy* as support for its holding that private conversations between a teacher and a principal are not protected under the first amendment. The Court restated the test as, "once the employee has shown that his constitutionally protected conduct played a 'substantial' role in the employer's decision not to rehire him, the employer is entitled to show 'by a preponderance of evidence' that it would have reached the same decision."[84] It is interesting to note Mr. Justice Rehnquist's choice of words. In *Mt. Healthy*, the Court found that a "substantial role" was a test too narrow in focus, and thus used "motivating factor." But in *Givhan*, the Court does not mention motivating factor, inserting in its place the once rejected "substantial role" notion. Whether it is a change in the application of the plaintiff's bur-

81. 441 U.S. 68 (1979).
82. *See id.* at 79 & n.10.
83. 439 U.S. 410 (1979).
84. *Id.* at 416.

den of proof or a slip of the pen is uncertain.[85]

The substantive ruling in *Mt. Healthy* has been paid scant attention in the lower federal courts. Rather, the opinion has been cited for its ruling regarding 28 U.S.C. § 1331(a) jurisdiction,[86] and its discussion of the eleventh amendment.[87] In those cases that have used *Mt. Healthy* for its substantive holding in the public educational context, the result has depended on the court's perception of the *Mt. Healthy* test. For example, the Fifth Circuit Court of Appeals had used a "partial retaliation" test in the past and found *Mt. Healthy* as support for its continued use.[88]

A case that arose in the Ninth Circuit Court of Appeals reached the Supreme Court some months after the *Mt. Healthy* decision; it was therefore remanded for consideration in light of that case.[89] The Ninth Circuit in a per curiam opinion stated that the jury as trier of fact was to make the determination whether the same decision of the school district would have been made in the absence of the constitutionally protected conduct. The court refused to disturb the jury's finding in favor of the teacher and thereby reaffirmed its prior opinion.[90]

VI. Conclusion

Our review of *Mt. Healthy* leaves one question: What does the case portend for the school administrator on the firing line? Certainly it means that school administrators have greater flexibility in dismissal cases that are entangled with constitutional and nonconstitutional issues. In a very real sense, constitutionally protected conduct cannot now be raised as an absolute shield to possible adverse actions. Although this result can give some solace to harassed school administrators, they still bear a substantial burden where the dismissal reasons are mixed. When coupled with due process requirements, this burden should indi-

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85. This change, or slip of the pen, has been noted in a circuit court decision. *See* Rosaly v. Ignacio, 593 F.2d 145, 149 (1st Cir. 1979).

86. *See* O'Grady v. City of Montpelier, 573 F.2d 747 (2d Cir. 1978); Arthur v. Nyquist, 573 F.2d 134 (2d Cir. 1978).

87. *See* Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977); Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977).

88. *See* Carmichael v. Chambers County Bd. of Educ., 581 F.2d 95 (5th Cir. 1978).

89. *See* Murray v. Wagle, 431 U.S. 935 (1977).

90. *See* Wagle v. Murray, 560 F.2d 401 (9th Cir. 1977).

cate to those who originally hailed the case that *Mt. Healthy* is not a return to the "good old days."