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CONSTITUTIONAL LAW

*Paul R. Baier**

FOREWORD: OF ALIENAGE, JUDICIAL HEROES, AND EQUAL PROTECTION

There was a time—fortunately buried in the United States Reports—when government could deny to aliens the ordinary means of earning a living without running afoul of the equal protection clause. In the old *Deckebach*¹ case, for example, the City of Cincinnati thought it would be a good idea to exclude aliens as a group from operating billiard parlors, and the Supreme Court unanimously affirmed the discrimination.² Whether aliens, as such, were less qualified than citizens to run pool halls was none of the Supreme Court's business: "It is not necessary that we be satisfied that this premise is well founded in experience."³ Rather,

It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong.⁴

The Court here seems to be throwing up its hands and exclaiming, "What do we know?" Old equal protection, it is fair to say, was no protection at all; the rational basis test was a mere champagne promise. This was 1927, the same year Mr. Justice Holmes curtly sanctioned cutting the Fallopian tubes of feeble-minded women: "The principle that sustains compulsory vaccination is broad

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The author wishes to acknowledge the able assistance of Mr. James Viator, Executive Editor, Louisiana Law Review, whose deep researches illuminated otherwise dark areas of the law.

1. *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927).
2. *Id.* at 397.
3. *Id.*
4. *Id.*

enough to cover cutting the Fallopian tubes.”⁶ As a law teacher, I should hope this sentence would startle my students. Plainly, these were the dark days of liberty and equality. To seek the shelter of the equal protection clause, Holmes could only quip, “is the usual last resort of constitutional arguments.”⁸

Other lights—some of our greatest judges—have perceived the fourteenth amendment and the duty of judges differently. To force a man out of his employment as a cook in a restaurant “simply because he is an alien,” Charles Evans Hughes recognized, would reduce the guarantee of equal protection of the laws to “a barren form of words.”⁷ Likewise, to sterilize larcenists but not embezzlers “is a clear, pointed, unmistakable discrimination,” as Justice Douglas declared in *Skinner v. Oklahoma ex rel. Williamson*.⁹ Nor should judges blink at discrimination touching “the basic civil rights of man.”⁹ As a judge, William O. Douglas’ instincts were different; he emphasized that:

[S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.¹⁰

Here the Court takes its own hard look at the challenged law; the burden falls on the State to defend it; the judges make up their own minds whether the statutory plan makes sense. This is the new equal protection: the fourteenth amendment is a bulwark, and the judges are guardians without blindfolds.

Justice Douglas was once asked which Supreme Court justice had the greatest influence on him. His answer:

5. *Buck v. Bell*, 274 U.S. 200, 207 (1927), to which Justice Holmes added: “Three generations of imbeciles are enough.” *Id.*

6. *Id.* at 208.

7. *Truax v. Raich*, 239 U.S. 33, 41 (1915).

8. 316 U.S. 535, 541 (1942).

9. *Id.* Justice Douglas’ reasoning in *Skinner* stands in bright contrast to Holmes’ dark declaration in *Buck v. Bell*, 274 U.S. at 207-08. Said Douglas:

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

316 U.S. at 541.

10. 316 U.S. at 541 (emphasis added).

I think probably one of our greatest judges in all history is Charles Evans Hughes, who was Chief Justice when I came on the Court, and I served with him about three years. I think he was preeminent in the field of civil liberties and was a very bold, courageous judge who saw clearly when it came to human rights, civil rights, the rights of minorities, and so forth. I think that probably Charles Evans Hughes had as much influence as any other single judge.¹¹

In the *Japanese Fishing Rights*¹² case, Hughes's example inspired Hugo Black to extend the shelter of the equal protection clause to aliens who wanted to fish off California's coast. "We are unable to find," Justice Black wrote for the Court, "that the 'special public interest' on which California relies provides support for this state ban on Takahashi's commercial fishing."¹³ The old deference is gone.

Enough history. Every law clerk today can recite the principle of *Graham v. Richardson*¹⁴ that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."¹⁵ This is a powerful—some would say dubious—analogy. It is ironic, at this molar point in the evolution of the law of alienage and equal protection, that the current Supreme Court should rely on the *Carolene Products* footnote. We are told: "Aliens as a class are a prime example of a 'discrete and insular' minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n.4 (1938)) for whom such heightened judicial solicitude is appropriate."¹⁶ Note 4 is, of course, attributed to Harlan Fiske Stone, but in point of historical fact the "discrete and insular minorities" idea was the footwork of Justice Stone's legal secretary, Louis Lusky, who has since written a book about the footnote.¹⁷ According to Professor Lusky, the Court's "abrupt announcement in the *Graham* case is incomprehensible."¹⁸ The idea that Stone would ever have held alienage a "suspect" classification calling for heightened judicial review is ut-

11. Interview with William O. Douglas, by Howard Langer (1957) (audio cassette, No. 200-2175, available from The National Archives, Washington, D.C.)

12. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

13. *Id.* at 420.

14. 403 U.S. 365 (1971).

15. *Id.* at 372 (footnotes and citations omitted).

16. *Id.* (per Blackmun, J., for the Court). All members of the Court, except Justice Harlan, joined in this equation.

17. L. LUSKY, *BY WHAT RIGHT?* ch. VII, at 108-14 (1975).

18. Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1105 n.72 (1982).

ter nonsense: "This is an amazing assertion," says Lusky.¹⁹ Justice Rehnquist makes precisely the same point about Stone in his telling dissent in *Sugarman v. Dougall*,²⁰ and it must be admitted that the Professor and the Justice are right. After all, the United States Reports plainly show it was Harlan Fiske Stone who wrote the *Deckebach* case, which we know *held*, without any footnotes about discrete and insular minorities, that aliens, as such, were unfit to run pool halls, or so Cincinnati could avouch without fear of contradiction in the nation's last resort of EQUAL JUSTICE UNDER LAW.²¹ No, it is to judges like Charles Evans Hughes—"the au-

19. *Id.*

20. 413 U.S. 634, 649-50, 656-57 (1973) (Rehnquist, J., dissenting):

[T]here is no language used in the [Fourteenth] Amendment, or any historical evidence as to the intent of the Framers, which would suggest to the slightest degree that it was intended to render alienage a "suspect" classification, that it was designed in any way to protect "discrete and insular minorities" other than racial minorities, or that it would in any way justify the result reached by the court

The mere recitation of the words "insular and discrete minority" is hardly a constitutional reason for prohibiting state legislative classifications such as are involved here, and is not necessarily consistent with the theory propounded in that footnote. The approach taken in *Graham* and these cases appears to be that whenever the Court feels that a societal group is "discrete and insular," it has the constitutional mandate to prohibit legislation that somehow treats the group differently from some other group.

Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find "insular and discrete" minorities at every turn in the road. Yet, unless the Court can precisely define and constitutionally justify both the terms and analysis it uses, these decisions today stand for the proposition that the Court can choose a "minority" it "feels" deserves "solicitude" and thereafter prohibit the States from classifying that "minority" differently from the "majority." I cannot find, and the Court does not cite, any constitutional authority for such a "ward of the Court" approach to equal protection.

21. So the expression appears, hammered in marble, in the west portico of the Supreme Court Building overshadowing the front steps to the Courthouse doors. Charles Evans Hughes, as Chief Justice and Chairman of the Building Commission when the Supreme Court's new home went up in 1932-35, handed down—really handed sideways to Van Devanter—a decision approving the architect's suggestion that the words "EQUAL JUSTICE UNDER LAW" be inscribed in the main frieze of the west portico. Someone later accused the Chief Justice "of having permitted tautology, verbosity and redundancy; each of which is an abomination in good usage." Hebert Bayard Swope to Charles Evans Hughes, Jan. 25, 1935, *quoted in* 2 M. PUSEY, CHARLES EVANS HUGHES 689 (1951). Hughes replied:

Immediate judgment. Indictment quashed.

The distress which led to your complaint may be somewhat alleviated if for a moment you will free yourself from the tyranny of the blue pencil and consider the history of the law. "Equal Justice" is a time-honored phrase placing a strong emphasis upon impartiality,—an emphasis which it is well to retain.

There is a long history in that phrase. Try to bear with it.

Id.

thetic voice of the American Constitution"²²—that aliens must look for judicial protection. It is largely through the work of judicial heroes that the law of alienage and equal protection has taken shape. And, in the words of Alexander Bickel, himself an alien when he reached America's shores: "It is gratifying . . . that we live under a Constitution to which the concept of citizenship matters very little indeed. It prescribes decencies and wise modalities of government quite without regard to that concept."²³

A. Citizenship and Notaries Public

Texas requires its notaries public to be United States citizens, a statutory classification that plainly favors Texans over resident Mexicans.²⁴ Again, this is discrimination based on alienage, and the judicial result depends on, first, what the judges think about the function of the notary public in relation to state government, and, second, on what sort of review—relaxed or strict—the judges will apply in testing the Texas scheme. In *Vargas v. Strake*,²⁵ two Fifth Circuit judges thought that Texas notaries are so connected to the day-to-day functioning of state government as to fall within the narrow exception to strict scrutiny for state officers who "participate directly in the formulation, operation, or review of broad public policy" and hence "perform functions that go to the heart of representative government."²⁶ Notaries public in Texas are constitutional officers: their appointment is authorized in the state constitution.²⁷ "The Texas political community depends upon the no-

22. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 381 (1973). I have borrowed Professor Bickel's description of the holding of *Truax v. Raich*, 239 U.S. 33, 41, (1915), and applied it to Hughes himself.

23. Bickel, *supra* note 22, at 387. When he wrote this article Bickel was Chancellor Kent Professor of Law and Legal History at Yale University. As a younger man, Bickel immigrated to the United States from his native Rumania in 1938 at the age of fourteen, and four years later he was naturalized as an American citizen. He took his public high schooling in New York City; thence to C.C.N.Y. and to the Harvard Law School. World War II saw him fighting as a machine gunner for America. "The product of his mind and pen—for in him substance and style joined beautifully—was always fresh, exciting, provocative, and, in the truest sense, educational." Sacks, *A Tribute to Alexander M. Bickel*, 88 HARV. L. REV. 689, 690 (1975).

24. The statute provides that "[t]o be eligible for appointment as a Notary Public, a person shall be a resident citizen of the United States and of this state . . ." TEX. REV. CIV. STAT. ANN. art. 5949(2) (West Supp. 1984).

25. 710 F.2d 190 (5th Cir 1983) (per Reavley, J., joined by Politz, J.).

26. See *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

27. *Id.* at 196. "The Secretary of State shall appoint a convenient number of Notaries Public for the state . . ." TEX. CONST. art. IV, § 26. Texas is one of only six states in which

tary public," says the majority,²⁸ and a stranger to Texas is in no position, presumably, to challenge this assertion. The office of notary public in Texas "is not a mere job or source of income,"²⁹ adds Judge Reavley, himself a Texan. A notary's job is like a policeman's "in importance to the functioning of state government."³⁰ Since Massachusetts can require its state troopers to be citizens without violating the Constitution,³¹ Texas can require as much of its notaries public. Applying relaxed review, the majority concludes that the citizenship requirement "bears a rational relationship to the state's interest in the proper and orderly handling of a countless variety of legal documents of importance to the state."³² This reasoning is reminiscent of the old blindfold approach to judging classifications based on alienage. "Texas has a valid interest and right to define for itself the qualifications for the position of notary public," according to the majority.³³ In other words, a good alien cannot make a good notary in Texas.

The amazing thing about this notary case is not that the Supreme Court promptly granted certiorari and reversed the Fifth Circuit by the lopsided vote of 8 to 1.³⁴ No, reversal was easily predictable. The amazing thing is that two intelligent Fifth Circuit judges and their law clerks should have made such a blunder in the first place. I realize, of course, that with hindsight even a fool is wise, but it seems necessarily to follow that since it is unconstitutional to require lawyers to be citizens,³⁵ Texas may not require its 300,000 notaries public to be citizens either.³⁶ The greater pronouncement, *In re Griffiths*,³⁷ barring Connecticut from discriminating against resident aliens in access to the Bar, logically includes the lesser proscription running against Texas's ideas about citizenship and notaries public. It is to Senior Circuit Judge Ingra-

the state constitution provides for the appointment of notaries. 1 G. BRADEN, *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 361-62 (1977).

28. 710 F.2d at 194.

29. *Id.* at 195.

30. *Id.*

31. *Foley v. Connelie*, 435 U.S. 291 (1978).

32. 710 F.2d at 195.

33. *Id.*

34. *Sub nom. Bernal v. Fainter*, 104 S. Ct. 2312 (1984).

35. *See In re Griffiths*, 413 U.S. 717 (1973).

36. Counsel for the State conceded that the number of Texas notaries exceeds 100,000. "Maybe there are 300,000 notaries," said Texas's lawyer at oral argument. *Bernal*, 104 S. Ct. at 2318 n.12.

37. 413 U.S. 717 (1973).

Board for spending more money on athletics than on education without fear of losing his teacher's job.⁴⁴ But Judge Higginbotham is surely right, in *Gonzalez v. Benavides*,⁴⁵ to discern that nothing in the *Pickering* line denies the relevance of other governmental concerns in different factual settings. "Indeed, the common conceptual strand to much of our First Amendment jurisprudence is context—time, place, and manner."⁴⁶ Holmes, it seems, lives still: "[T]he character of every act," Holmes recognized, "depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."⁴⁷ Sheila Myers' questionnaire caused a kind of fire in the District Attorney's office in New Orleans. As is widely known, she lost her job and the Supreme Court upheld the termination in *Connick v. Myers*: "The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment."⁴⁸ In other words, in the theater of public employment freedom of speech is no shibboleth. Judge Higginbotham's alert survey of the law of public employee free speech in *Gonzalez v. Benavides* is to the same effect: "First Amendment issues presented by speaking employees are not answerable by mechanical formulae; courts must engage in a weighing exercise, giving 'full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public.'"⁴⁹

Wieman v. Updegraff, 344 U.S. 183 (1952). By the time of *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), it was already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Requiescat in pace* O.W.H.

44. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), in which the Court held that a public employee does not relinquish first amendment rights to comment on matters of public interest by virtue of government employment. The Court also recognized that the state's interests "as an employer in regulating the speech of its employees . . . differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568. The problem, the Court said, was "to arrive at a balance between the interests of the [employee] . . . as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

45. 712 F.2d 142 (5th Cir. 1983).

46. *Id.* at 147.

47. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (citations omitted).

48. *Connick v. Myers*, 103 S. Ct. at 1694.

49. 712 F.2d at 147 (quoting *Connick v. Meyers*, 103 S. Ct. at 1692).

In *Gonzalez*, the executive director of a community action agency was fired for publicly denying the supervisory authority over his job performance of the county commissioners court. Gonzalez claimed that under the agency's own rules only the agency's governing board could evaluate his performance. The district court, applying the *Pickering* balancing act, held for Gonzalez on free speech grounds, but the Fifth Circuit remanded because "this record presents a possibility that the relationship between the commissioners and Gonzalez fell into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered [free] speech."⁵⁰ Doubtless, government has an interest in allowing elected officials free reign to implement policies for which they must answer to the voters. "In more familiar language, knowing that the buck stops, and where, is a substantial governmental interest."⁵¹ Thus, with respect to certain higher-ups in the executive chain, "[t]here is a governmental interest in securing those unique relationships between certain high level executives and the elected officials at whose grace they serve."⁵² This does not mean, however, that Gonzalez's disavowal of the commissioners' supervisory authority over him automatically removes him from first amendment protection. "[J]ealous protection of speech rights abjures mechanical response," insists Judge Higginbotham.⁵³ "[I]t follows that disruption of the relationship between an appointing authority and a holder of such a senior position may be weighed in the assaying of his First Amendment right to escape termination for a public disavowal of his appointing authority's power of supervision."⁵⁴ The *Gonzalez* court is very careful, however, to leave the matter of weighing the respective interests to the trial court on remand. "[W]e say no more than that such governmental interests are relevant to the First Amendment inquiry into the context of time, place, and manner."⁵⁵ If the interest identified by the appellate court is implicated, "weighing is required because we do not decide that all speech by persons in such relationships is unprotected. Rather, the speech must be weighed against its impact upon the relationship and the relationship's role in the elected offi-

50. *Id.* at 150.

51. *Id.* at 148.

52. *Id.*

53. *Id.* at 147.

54. *Id.* at 148.

55. *Id.*

cial's discharge of his duties."⁵⁶

One senses Judge Higginbotham knew he was walking on eggs in *Gonzalez v. Benavides*, that is to say, I have a hunch less sensitive judges might well have reversed outright in light of Gonzalez's executive status. Yet the panel's restraint is commendable in a free speech case involving a man caught between two competing legal masters and the call of public duty conscientiously pursued. Again, context is the key. On remand, the district court reaffirmed its decision favoring Gonzalez.⁵⁷ What will happen next when this "difficult legal play"⁵⁸ returns to the Fifth Circuit is obviously not for me to say. But it will be a play worth watching.

OF PUBLIC EMPLOYMENT, POLITICAL PATRONAGE, AND THE FIRST AMENDMENT

Wholesale replacement of low-level public servants for reasons having to do with their political affiliation violates the first amendment; this much is clear from a combined rereading of *Elrod v. Burns*⁵⁹ and *Branti v. Finkel*.⁶⁰ Thus, according to a majority of the Supreme Court, "the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs."⁶¹ Notice this says nothing at all about firing a deputy sheriff because he campaigns with all his might for the losing side in an election for sheriff. It may strike the ordinary voter as strange to learn that the winning candidate in a sheriff's race must rehire the defeated incumbent's deputies. However, that was the result reached by the Fifth Circuit a few years ago in *Barrett v. Thomas*,⁶² which saved the jobs of several Democratic deputy sheriffs in Dallas County, Texas, who were swept out of public employment in consequence of a Republican housecleaning effort. "The

56. *Id.* at 150.

57. "This Court has endeavored to faithfully perform the task assigned to it by the Fifth Circuit. So doing, it again concludes the Plaintiff Gonzales is entitled to prevail and a new judgment will be entered accordingly." *Gonzales v. Benavides*, Civ. No. L-80-46, at 13 (S.D. Tex. (Laredo Div. July 10, 1984) (Supplemental Findings of Fact and Conclusions of Law) (unreported to date).

58. By way of a "prologue" to his opinion in *Gonzalez*, Judge Higginbotham set forth the findings of the district court and added: "But these findings of fact only set the factual stage for a difficult legal play." 712 F.2d at 145.

59. 427 U.S. 347 (1976).

60. 445 U.S. 507 (1980).

61. *Branti*, 445 U.S. at 516-17.

62. 649 F.2d 1193 (5th Cir. 1981).

establishment of a political orthodoxy among public employees by an executive official is constitutionally impermissible," said Judge Williams' unanimous opinion for the court.⁶³ "Sheriff Thomas [the Republican winner at the polls; the loser in court] has not pointed to a vital governmental interest served by making his deputies toe the prescribed political line."⁶⁴ The discharged deputies were ordered reinstated with back pay, and their lawyer took his justly earned victory fee of slightly over \$34,000—all assessed jointly and severally against both the defendant sheriff and the Dallas County public treasury.⁶⁵

A. Garbage Workers

This term, in *Bueno v. City of Donna*,⁶⁶ the court, again per Williams, J., continued its first amendment assault on the citadel of political patronage, condemning the discharge of two garbage dump workers and several other non-supervisory public works employees who had been fired in retaliation for supporting defendants' opponents in a city election. The jury found it was a custom or policy of the City of Donna, acting through its officials, to cause the dismissal of city employees because of their support for opposition candidates in city elections. There was sufficient evidence of a conspiracy among the defendant city councilmen, and the panel approved the district court's legal conclusion that the individual defendants should have known their official actions "would violate basic, substantial constitutional rights" of the public employees involved.⁶⁷ Citing *Elrod v. Burns*,⁶⁸ Judge Williams' opinion concluded: "[A]t the time of the firings, the law was 'settled' that non-policy making employees cannot be discharged from their public employment because of their political activities"⁶⁹ The *Bueno* opinion, it should be noted, protects public employees in their political "activities," whereas *Elrod* and *Branti* guardedly speak only in terms of public employees' "private political be-

63. *Id.* at 1200.

64. *Id.*

65. Note well ye lawyers: "It is now settled law that a § 1988 attorney's fees award may run against a public treasury for § 1983 violations by public officers acting in their official capacities even though the public entity is not named as a defendant in the suit." *Barrett v. Thomas*, 649 F.2d at 1201 (citing *Hutto v. Finney*, 437 U.S. 678, 699 (1978)).

66. 714 F.2d 484 (5th Cir. 1983).

67. *Id.* at 495.

68. 427 U.S. 347 (1976).

69. 714 F.2d at 495 (emphasis added).

liefs.”⁷⁰ This distinction meant nothing to the *Bueno* court, nor should it in a case involving non-supervisory, non-policy making garbage workers. *Bueno v. City of Donna* is a very satisfying, indeed heroic, first amendment decision. It should be added, by way of introducing the judicial storm center next discussed, that Judges Garza and Rubin were also on the panel in *Bueno*, each voting in favor of reinstating the discharged public employees to their jobs.

B. Deputy Sheriffs Revisited: The Small County Context

This brings us to *McBee v. Jim Hogg County, Texas*,⁷¹ another political patronage case that proves the truth of Holmes’ aphorism concerning life inside powerful appellate tribunals: “We are very quiet there, but it is the quiet of a storm centre, as we all know.”⁷² Having played a small part in *McBee*, appearing by leave of court as amicus curiae on one of the briefs,⁷³ and having sat inside the en banc eye of the Fifth Circuit when this case was orally argued, I confidently believe that *McBee v. Jim Hogg*

70. “Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment.” *Elrod v. Burns*, 427 U.S. at 356 (footnote omitted) (plurality opinion of Brennan, J.). Justice Stewart’s vote in *Elrod*, which was the key to unlocking 5, was explicitly limited to discharges based on belief: “The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot.” *Id.* at 375 (Stewart, J., concurring in the judgment).

71. 703 F.2d 834 (1983), *vacated on reh’g en banc*, 730 F.2d 1009 (5th Cir. 1984).

72. O.W. HOLMES, *Law and the Court* (1913), in *COLLECTED LEGAL PAPERS* 291, 292 (1920).

73. On behalf of certain former deputy sheriffs of Natchitoches Parish, Louisiana. See *Dove v. Fletcher*, 574 F. Supp. 600 (W.D. La. 1983) (granting summary judgment and dismissing deputies’ claims as a matter of law), *vacated*, No. 83-4782, slip op. (5th Cir. 1984) (summary calendar) (per Clark, C.J., Politz & Higginbotham, JJ.) (unpublished per curiam opinion). The Natchitoches Parish deputy sheriffs case followed on the coattails of the *Jim Hogg County* case:

The case at bar is factually and legally on all fours with this court’s en banc ruling in *McBee*. In fact, *Dove* provides a stronger case than *McBee* for letting the trier of fact decide the issues. Natchitoches Parish, Louisiana, has a population of approximately 40,000, and the sheriff’s department employs 31 deputies, as compared with Jim Hogg County, Texas, which has a population of less than 6,000, and only 6 field deputies. While *McBee* specifically rejected a mechanical formula that relies solely on the size of the county, the facts indicate that the political activity of the Louisiana plaintiffs would have less impact upon the efficient functioning of their sheriff’s department than in the Texas case. Because we required that the facts in *McBee* be decided by the jury, the instant case also should reach the trier of fact. *Dove*, No. 83-4782, slip op. at 8.

County, Texas, is this term's most spectacular thunder and lightning. The case is an excruciating test of judicial acumen, regardless of which side of the judicial divide one happens to favor.

Geography sometimes affects legal judgment. It plainly did when the *McBee* case first hit the Fifth Circuit. Judge Garza's panel opinion distinguishes *Barrett v. Thomas*:⁷⁴ Jim Hogg County, unlike Dallas County, is a small place in rural South Texas; the sheriff's office is likewise small; therefore:

Unlike *Barrett*, in the small county sheriff's department with merely six deputies, the sheriff may well work closely on a personal and confidential basis with his staff. The "absence of political cohesion between sheriff and deputy" may indeed be shown "to undermine an intimate working relationship." Accordingly, the exception of *Elrod* is much more implicated.⁷⁵

Elrod, of course excepts "policy making positions" from its intended coverage, that is to say, a new President need not keep an old Cabinet.⁷⁶ But under *Branti* this exception is narrow. Labeling a particular position "policymaking" is not enough; rather, the burden falls on the public employer to show the connection between political loyalty and the job in question.⁷⁷ As the *McBee* panel viewed the facts and the law: "We believe the evidence in this case supports a finding that the plaintiff deputies and dispatchers fall within the *Elrod-Branti* exception."⁷⁸ Furthermore, the panel tossed out as unsupported by the record the district court's findings of forbidden political animus.⁷⁹ The trial court's

74. 649 F.2d 1193 (5th Cir. 1981).

75. 703 F.2d at 841.

76. *Elrod v. Burns*, 427 U.S. 347, 367 (1976) (plurality opinion, Brennan, J.):

A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end.

77. "In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

78. 703 F.2d at 842.

79. *Id.* at 844:

Our review of the record leaves us with the "firm conviction" that Ybanez' decision not to rehire the plaintiffs was not shown to be based upon the plaintiffs' exercise of their right to freely associate and support another candidate . . . [T]he rec-

judgment for plaintiffs was reversed and the petition for rehearing en banc was promptly denied. There the matter sat while counsel for the defeated deputies proceeded to get his petition for certiorari in order, including the printing, at considerable expense, of the required appendix.

Then lightning struck. The court sua sponte "Recalled" its order denying rehearing en banc; later still the court granted what it had earlier denied. *McBee* was ordered reheard en banc with oral argument and on supplemental briefs.⁸⁰ Obviously, something was brewing behind the scenes, probably some heavy judicial armtwisting among the judges. In the living memory of the clerk's office, such procedural drama was unprecedented. At any event, at least eight of fourteen judges voted to rethink whether the first amendment should restrain a newly elected sheriff's desire to bring in his own political partisans.

Judge Gee's opinion for the en banc court is masterful judicial statesmanship. It represents a lapidary balancing of interests that adjusts earlier tests, factors *Connick v. Meyers* into the analysis, and marshalls the weight of eleven circuit judges, including all members of the original *McBee* panel. Under the majority's view, the first amendment protects public employees in their political activities; they are free to talk politics and to campaign for candidates of their choice. But if they should find themselves swept out of office because of their politics, they have no absolute or automatic first amendment right to get their jobs back. It depends on the circumstances of each case, duly weighed and balanced, to wit:

[t]he standard to be applied by us in resolving such public employee discharge or nonrenewal cases as this is the *Pickering* balancing test. Each case must be considered on its particular facts, sifting through such factors and circumstances as the *Connick* Court outlined in order to strike the proper balance between the employee's speech and associational rights as citizen and the state's right as an employer to

ord does not support the district court's conclusion that Ybanez' nonpolitical reasons for nonreappointment were merely "pretextual afterthoughts." . . . [W]e do not believe that plaintiffs proved their *Elrod-Branti* allegations. Moreover, we are even more convinced that defendant would have so acted for reasons totally unrelated to constitutionally protected conduct.

80. Rehearing en banc was initially denied on June 2, 1983 (per Reavley, J.), the order recalling the denial of rehearing en banc was handed down on July 25, 1983 (per Clark, C.J.), and rehearing en banc was ultimately voted by at least eight of fourteen Fifth Circuit judges on August 12, 1983 (per curiam).

loyal and efficient service.⁸¹

Personal support for an individual candidate, the majority recognized, goes beyond mere private political beliefs.⁸² As a matter of law, the time, place, and especially the manner of a subordinate employee's support for the other side, are relevant factors to be weighed in the required first amendment balance.

[t]he Constitution has not repealed human nature; and it is one thing to work with a subordinate who has expressed a reasoned preference for another superior and quite another to have forced on one's organization an individual who has blackguarded one's honesty and ability up and down the county.⁸³

Judge Gee is careful not to reject entirely the panel's small county reasoning. Closeness of working relationships in a small sheriff's office is just one factor to be considered under the majority's new "comprehensive but flexible" analysis.⁸⁴ That Jim Hogg County is small, however, is not an automatic, categorical bar to public employee claims of retaliatory, politically motivated refusals to rehire.⁸⁵ The majority opinion cautions that "the 'closeness' of a working relationship as it affects job performance is not to be gauged merely by the size of the office or the number of employees. Rather, it is a function of the particular 'public responsibility' being carried out."⁸⁶

Following *Branti*, the court held that it makes no difference that the complaining deputies were terminated by a "failure to rehire" rather than a "dismissal"; this distinction is irrelevant to the question whether they were impermissibly terminated for exercising their first amendment rights.⁸⁷ It makes a big difference whether these deputies in fact asked the newly elected sheriff to be rehired. "Put another way, must a new sheriff consider for ap-

81. 730 F.2d at 1014.

82. *Id.* at 1017: "[T]o the extent that the district court's analysis suggests that as a matter of law it will never be relevant to First Amendment inquiry whether the speech involved constitutes personal as distinguished from party political support, it stands corrected by *Connick* and *Gonzales*."

83. *Id.*

84. "*Connick*, and *Gonzales* following it, read *Pickering* to require a comprehensive but flexible analysis—a balance which weighs the particular aspects of the government's interest in effective service and the plaintiffs' interest in freedom of speech that arise in each fact situation." *Id.* at 1016.

85. *Id.*

86. *Id.*

87. *Id.* at 1015 (citing *Branti*, 445 U.S. at 512 n.6).

pointed positions ex-employees who do not seek reinstatement? The First Amendment imposes no such obligation.”⁸⁸ Having laid down its new balancing test, the en banc *McBee* court stopped short of resolving the merits, opting instead to vacate the district court’s findings of fact—without approving or disapproving them—and to remand the record back to the trial court for re-evaluation in light of the required “particularized inquiry.”⁸⁹

At this point the reader is invited to inspect the *McBee* opinions in their entirety so as to get the full drift. I confess, were I the lower court on remand, I would be perplexed as to what to do with the “completely free hand” given me by the Fifth Circuit.⁹⁰ Everything seems up in the air. I mean no disrespect of either Judge Garza’s or Judge Gee’s opinions, which I have read and re-read. They are worthy efforts. Judge Gee is to be commended for his success at marshalling the court on what is a difficult problem with far-reaching implications. But duty as surveyor, as well as duty to the court, requires the suggestion here that the en banc majority opinion in *McBee* balances its reader all over the place. Constitutional law is made of balancing, to be sure, but there is an outer limit here, as in the lapidary art. A diamond faceted out of proportion loses its brilliance.

Judge Tate, concurring only in the result, is all alone in sticking to the original panel’s small county rationale:

In a small office like the present, of necessity there must be an intimate relationship between the sheriff and his appointed staff, each of whom—in a small county context—will be regarded by the public (and the voters) as the alter ego of the new sheriff in all their official acts.⁹¹

Judge Tate’s bright line would foreclose the *McBee* plaintiffs’ claims as a matter of law. To hold otherwise would effectively grant an incumbent deputy perpetual tenure so long as he actively supports his respective incumbent sheriff’s reelection efforts. “I do not believe that the *Elrod-Branti* rationale intended that the First Amendment be used as a sword instead of a shield.”⁹² Some will

88. 730 F.2d at 1015.

89. *Id.* at 1017.

90. “The panel determinations were automatically vacated by our grant of en banc consideration. In order that the district court may act with a completely free hand in applying this opinion, we vacate its findings also.” *Id.* at 1016 n.18.

91. *Id.* at 1026 (Tate, J., concurring in the result).

92. *Id.*

say there is much practical wisdom in this special concurrence, especially those familiar with "the practical realities involved in the administration of a government office."⁹³ But Judge Tate's views are not the law of this circuit. In defense of his isolated opinion, Judge Tate, undaunted, pointed his finger at the views of the Fourth Circuit, which we all know is a flag to the Supreme Court.⁹⁴

Now for the dissent: "Deep conviction and warm feeling are saying their last say with knowledge that the cause is lost."⁹⁵ Here, too, is work finely done in this case. Alvin Rubin's dissent on behalf of Jimmie McBee has its own brilliance—"in the process of exposition he is practicing an art."⁹⁶ Again, I leave the merits of the dissent to the reader, and to the Supreme Court should this kind of case ultimately be called up. I mean to say no more here than that I admire the style of the *McBee* dissent. Those who have given an hour to writing a single sentence will know what I mean. Judge Rubin's opening is powerful prose:

The spoils system, which views public employment as pure political patronage, inhibits the free functioning of the electoral process. . . . By holding a public employee's job hostage to his political activities or affiliation, the rebirth of the spoils system sanctioned by the majority allows an incumbent or a victorious challenger to accomplish indirectly what neither could legally do by mandate: the coercion of political support from the public employee.

The first amendment protects a public employee when he expresses and acts on political beliefs no less when he supports a losing candidate than when he adheres to a losing political party. Its armor does not guard only "abstract political views" held *in pectore* or expressed by simple party affiliation: it protects the entire range of free expression of beliefs and actions so long as they do not adversely affect the public employee's ability to perform his job efficiently.⁹⁷

Judge Rubin's analysis starts with the facts found by the district court, facts too quickly vacated under the majority's "rub it all out

93. *Connick v. Myers*, 103 S. Ct. at 1694.

94. The "small county" exception that Judge Tate would apply as a matter of law was first declared in dictum in *Ramey v. Harber*, 589 F.2d 753, 755-57 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979), and then followed by the panel in *McBee*, 703 F.2d at 841.

95. B. CARDOZO, *Law and Literature*, in *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 3, 36 (1931).

96. *Id.* at 40.

97. 730 F.2d at 1017-18 (Rubin, J., dissenting).

and start over" approach.⁹⁸ The defendant sheriff admitted it was the custom in Jim Hogg County for a new sheriff to fire his predecessor's staff; the defendant wanted "his people" in office; "politics was politics."⁹⁹ The district court found the sheriff's asserted reasons for not rehiring the plaintiff deputies were "pretextual afterthoughts, offered to justify his political decisions."¹⁰⁰ On these facts, recovery should be allowed under *Elrod-Branti*: "[C]ontinued employment of deputy sheriffs and dispatchers cannot properly be conditioned on their allegiance to a newly elected sheriff," Judge Rubin said.¹⁰¹ "I cannot follow a distinction between abstract belief and party allegiance on the one hand and support of a candidate on the other, for in my opinion, the first amendment protects both."¹⁰² *Connick v. Myers*, on which the majority hung its new balancing test, "does not take one whit from *Elrod* or *Branti*."¹⁰³ The reader may find it mysterious that Judge Higginbotham, the court's paragon *Connick* balancer earlier in the term—recall *Gonzalez v. Benavides*—joined Judge Rubin's dissent in *McBee*. So did Judge Randall, another *Gonzalez* balancer. These three align themselves in *McBee* because

[t]he distinction the majority opinion fails to acknowledge is that *Elrod* and *Branti*, like this case, involved retaliation for political beliefs and associations—free expression that did not threaten the efficient conduct of public office unless the employees' position required political loyalty. *Pickering*, like *Connick* and similar pre-*Connick* cases, involved speech that arguably threatened the integrity of employer-employee relations, and therefore each case required the interests to be balanced anew.¹⁰⁴

However, in the instant case, the replaced persons were neither insubordinate nor incompetent. "The failure to rehire them squarely violated *Elrod*; it does not entail the factors considered in *Picker-*

98. Because we are neither legislators nor constitution-writers, but appellate judges, let us start, as all cases must, with the facts Nothing in the majority opinion states that the district court factfindings are clearly erroneous, nor indeed, on the record before us, could they be found in error. Yet the majority opinion vacates those findings Even when an appellate court remands for application of a new rule of law, it is not given the option of disregarding the district court's fact-findings by simply saying, "rub it all out and start over."

Id. at 1018.

99. *Id.* at 1018-19.

100. *Id.* at 1019.

101. *Id.* at 1020.

102. *Id.*

103. *Id.* at 1021.

104. *Id.* at 1022 (footnote omitted).

ing.”¹⁰⁵ The dissent goes on to emphasize the defendant sheriff’s failure to show that political affiliation was “‘essential to the discharge of the employee[s]’ governmental responsibilities.”¹⁰⁶ Moreover, unlike Judge Tate, Judges Rubin, Randall, and Higginbotham are unwilling to assume as a matter of law that a small sheriff’s office “necessarily demands political fealty to function effectively. Sheriff Ybanez never even asserted that it did.”¹⁰⁷ No evidence whatever established that plaintiffs’ political associations in any way impaired their job efficiency. “‘As to the dispatchers, the Defendant made no showing of any kind why political loyalty was necessary for proper performance of their duties.’”¹⁰⁸ And the dissenting opinion rejects any intimation that the first amendment is diluted when applied to public employees who happen to work in a one-party county: “The Constitution applies alike to Illinois and to Texas, to Cook County and to Jim Hogg County. Its standards do not vary with the size of governmental units or the supposed perceptions of local voters.”¹⁰⁹

With respect to the two deputies who did not ask for reinstatement, Judge Rubin’s answer to the majority’s cold shoulder is direct and, characteristically, anchored in the record: “We do not exact meaningless gestures. Application would have been futile [T]he established practice was to give jobs to the new sheriff’s people.”¹¹⁰ One of the two deputies testified that the new sheriff “‘approached me and he stated that he was sorry, but politics was politics . . . that at a later date some thing might come up, but not under him.’”¹¹¹

With respect to Jimmie McBee, who was severed from a promised dispatcher’s job because she complained to county officials about the new sheriff’s patronage practices, the dissent agreed that the *Pickering-Connick* analysis applied. “But nothing in the majority opinion tells us how ‘the balancing test’ affects her claim. Its

105. *Id.*

106. *Id.* “Once the district court found that the sole reason for Ybanez’s failure to rehire the employees was his desire to staff the office with his ‘own people,’ the only issue was whether political affiliation was ‘essential to the discharge of the employee[s]’ governmental responsibilities.” *Id.* (quoting *Branti*, 445 U.S. at 518).

107. 730 F.2d at 1023 (footnote omitted).

108. *Id.* (quoting the district court’s conclusion) (footnote omitted).

109. *Id.*

110. *Id.* at 1023-24. On more than one occasion during the en banc *McBee* argument, Judge Rubin questioned counsel by specific reference, volume and page, to the record. Judge Rubin’s dissent is built upon the same granite foundation.

111. *Id.* at 1024 (emphasis in original).

application requires her reinstatement.”¹¹² McBee’s protests involved matters of public concern protected by the first amendment; she addressed them to appropriate officials on her own time and in a circumspect manner; she did not challenge Sheriff Ybanez’s authority over her, attack him personally, or seek to foment public antipathy for his administration. “Her speech deserves protection not only because it was free speech, but also because it was manifestly a petition for the redress of a grievance from the only governmental body able to afford relief.”¹¹³

In summing up, the dissent urged that “[a] rule that protects *only* abstract beliefs is almost meaningless. Abstract beliefs need little protection.”¹¹⁴ At this point, Judge Rubin’s sentences remind one of Mr. Justice Jackson’s ringing prose—built of snap and go, infused with the glow of conviction.¹¹⁵ “Words unspoken win no converts. Political beliefs cherished only in the mind win no elections,” wrote Judge Rubin.¹¹⁶ “The first amendment does not protect only freedom of belief or the use of words. It safeguards conduct that is part of freedom of expression.”¹¹⁷ Judge Rubin wound up the dissent with an elegant peroration, or so it seems to this surveyor of judicial style:¹¹⁸

Job sacrifice may not be exacted as a reprisal for the exercise of free expression. Today’s decision makes possible just such retaliation. It undermines the first amendment bulwark of *Elrod* and *Branti* and threatens the firing of every public employee who does not support the incumbent if the incumbent wins, or who does not support the incumbent if he loses. Loss of a job may not constitutionally be made the price of attending—or failing to attend—a pachanga.¹¹⁹

112. *Id.*

113. *Id.* at 1025.

114. *Id.*

115. In fact, the dissent opens with one of Justice Robert Jackson’s classic first amendment formulations: “‘If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’” (730 F.2d at 1017 *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Mr. Justice Jackson wrote beautiful opinions. They teach the power of brevity.

116. 730 F.2d at 1025.

117. *Id.*

118. All who make a living by reading appellate opinions develop an eye for style, and the writer has made something of an academic specialty of his interest in the subject. See P. BAIER, *THE IDEA OF STYLE IN APPELLATE JUDICIAL OPINIONS* (2d ed. 1977), a collection prepared in connection with a seminar on writing for all Fifth Circuit law clerks, New Orleans, September 1977.

119. 730 F.2d at 1025. Judge Rubin had earlier in his dissent defined a “pachanga”:

Surely this is beautiful writing, whatever one thinks substantively.

I will add but a thought, a lawyer's reflection from the academic chair about the functioning of the Fifth Circuit as a whole in this case from Jim Hogg County, Texas. The case is an object lesson in the pull and push of the judicial process and in the art of case analysis. *Elrod* and *Branti* are not self-defining solutions to the difficult problems presented. There is room here, as in most penumbral cases, for judicial choice—for a legitimate difference of views—regarding the scope of the first amendment, weighed as some would weigh it against the competing demands of executive discretion in a representative democracy.¹²⁰ What I'm trying to say here has been said much better by another law teacher who has also learned from seeing a real writ.¹²¹ Professor Cox was talking about the Supreme Court, but I believe his words fit the Fifth Circuit as I have seen it adjudicating fighting cases:

But my view is deeply prejudiced. One who has sat in the Supreme Court almost daily awaiting oral argument or the delivery of opinions acquires both admiration and affection for the Court and for all the justices. The problems with which they deal are so difficult, the number and variety of cases are so overwhelming, the implications are so far-reaching, that one sits humbled by the demands upon them. That the institution of constitutional adjudication works so well on the whole is testimony not only to the genius of the institution but to the wisdom and courage of the individual justices.¹²²

So it is with our own Fifth Circuit, sitting en banc, adjudging Jimmie McBee's case.

"The campaign was spirited. Each candidate sponsored parades and rallies, locally called 'pachangas.'" *Id.* at 1018.

120. Or as Dean Griswold explained it during a television interview: "Now it will always be true that there are borderlines, and—to use an unfortunate word—'penumbras,' where it is doubtful as to just what the law is." *A Life Lived Greatly in the Law: Erwin N. Griswold* (WLSU T.V. 1980, P.R. Baier Producer) (interview with former Solicitor General and Dean of the Harvard Law School).

121. Compare the remark of Frederick Pollock, in a letter to Holmes written in 1924: "Both from my own experience and from information I believe students' main trouble is to make out the connexion of the book-law they are examined in with the live business of the Courts." Frederick Pollock to Oliver Wendell Holmes, Feb. 11, 1924, in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 127 (M.D. Howe ed. 1946). Holmes answered Pollock's letter saying: "I quite understand the difficulties of connecting the books with life. I remember a chap who had just left the Law School writing to another that he had seen a real writ (or deed, I forget)." Oliver Wendell Holmes to Frederick Pollock, March 7, 1924, *id.* at 128.

122. A. Cox, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 134 (1968).

LIQUOR ADVERTISING AND THE FIRST AMENDMENT

Presumably Congress thought suppressing cigarette advertising would cut down on trips to the graveyard, so pursuant to the Public Health Cigarette Smoking Act of 1969,¹²³ Congress made the Marlboro Man a television outlaw. Broadcasters said the federal ban violated the first amendment, but the Supreme Court summarily affirmed a lower court ruling upholding the federal ban.¹²⁴ This was 1972, when it was still the rule that "purely commercial advertising"¹²⁵ enjoyed no first amendment protection, a view which has since "passed from the scene."¹²⁶

Liquor advertising reached the Fifth Circuit last term in *Lamar Outdoor Advertising*,¹²⁷ wherein the court, applying recent "commercial speech" developments, notably *Central Hudson Gas & Electric*,¹²⁸ struck down Mississippi's ban on intrastate liquor ads. The panel reasoned that "there is no 'hazardous product' exception to the First Amendment nor could there well be without destroying the commercial speech doctrine."¹²⁹ Judges Gee, Goldberg, and Higginbotham concluded that

Mississippi has introduced nothing in this case which convinces us that its intrastate advertising ban has any appreciable affect on liquor consumption in light of the state's saturation with ads from out-of-state sources. Accordingly, the ban has not been shown directly to advance public health and safety. Indeed, we think at best it provides "ineffective" and "remote" support for the state's purpose.¹³⁰

This sounds very much like the freewheeling judicial review of *Lochner v. New York*: "We do not believe in the soundness of the

123. Pub. L. No. 91-222, 84 Stat. 89 (codified at 15 U.S.C. § 1335 (1982)), which, in pertinent part provides: "After January 1, 1971, it shall be unlawful to advertise cigarettes . . . on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."

124. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd mem.*, 405 U.S. 1000 (1972).

125. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

126. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759 (1976).

127. *Lamar Outdoor Advertising v. Mississippi State Tax Comm'n*, 701 F.2d 314 (5th Cir. 1983).

128. *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

129. 701 F.2d at 324.

130. *Id.* at 333.

views which uphold this law.”¹³¹ Again: “In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman.”¹³² And more: “[I]t is apparent that the public health or welfare bears but the most remote relation to the law.”¹³³ Presumably Mississippi believes its advertising ban reduces liquor consumption within the state, but its marketing views were not shared by the advertisers’ expert, a sociologist specializing in alcoholism, who testified that liquor advertising only affects brand loyalty and market share, not consumption.¹³⁴ The district judge, believing plaintiffs’ expert, found as a fact that Mississippi “failed to produce concrete scientific evidence”¹³⁵ to substantiate its marketing position. In turn, as we have seen, the *Lamar Advertising* panel set itself up as a super-liquor control board for the State of Mississippi. Although recognizing that “our power to strike down state laws as unconstitutional is strong medicine,”¹³⁶ the panel administered its lethal dose straight away, saying “we are convinced that our decision, though difficult, is required by the Constitution and the law.”¹³⁷ Curiously, at the time the *Lamar* opinion was handed down, the Tenth Circuit had reached precisely the opposite conclusion regarding Oklahoma’s liquor laws.¹³⁸ Since the panel opinion initiated a conflict with another circuit, it was circulated to all active Fifth Circuit judges; an en banc poll was requested and the case was voted reheard en banc.¹³⁹ The panel opinion was vacated the same day it was

131. *Lochner v. New York*, 198 U.S. 45, 61 (1905).

132. *Id.* at 62. Mr. Justice Peckham added: “The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature.” *Id.*

133. *Id.* at 64.

134. 539 F. Supp. 817, 822 (S.D. Miss. 1982).

135. *Id.* at 829. The district court relied on plaintiff’s expert, Dr. David Pittman, chairman and professor of Sociology at Washington University, specializing in alcoholism and alcoholic abuse, who testified that “no credible scientific evidence exists to support Defendant’s theory that increased alcoholic beverage advertising leads to increased consumption.” *Id.* at 821-22.

136. 701 F.2d at 333.

137. *Id.*

138. *Oklahoma Telecasters Ass’n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev’d on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984).

139. Since initiating a conflict with another circuit is not to be undertaken lightly, the Fifth Circuit has a policy of circulating conflict-initiating opinions to the entire Court before their release, with the possibility of rehearing en banc being voted. This serves as a strategic checking device on any panel’s going overboard. For a citation of the policy, see the opening note to Judge Gee’s panel opinion in *Lamar Outdoor Advertising*, 701 F.2d at 316 (asterisk note). Rehearing en banc was ordered in *Lamar* on the court’s own motion, 701 F.2d 335

handed down—truly a hollow victory for the liquor interests. Mississippi was smiling.

The second time around Mississippi won its case, with a majority of the judges stating:

We conclude that the advertising ban is sufficiently justified to pass constitutional muster. We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors [W]e hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not "concrete scientific evidence" exists to that effect.¹⁴⁰

This, too, sounds like *Lochner*; the court is making up its own mind whether "the regulation directly advances the governmental interest asserted,"¹⁴¹ which is the crux of *Central Hudson's* four-part analysis as applied to this case. Nobody doubts Mississippi's substantial interest in outlawing liquor in its dry counties. And the majority is willing to assume "that liquor advertising in Mississippi should be treated at the outset as protected commercial speech."¹⁴² Rather, the judges are divided on the question whether legislative means fit legislative ends.

In considering whether Mississippi's advertising ban "directly" reduced consumption, the majority judges, relying on what they know as men, took a bold stance: "It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results Money talks: it talks to the young and the old about what counts in the marketplace of our society, and it talks here in support of Mississippi's concerns."¹⁴³ Judge Reavley's discussion in his en banc majority opinion of the degree to which an appellate court should defer to the "fact" findings of the trial judge as to the latest truths in the social sciences is deeply perceptive:

(1983) (per curiam).

140. *Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738, 750 (5th Cir. 1983) (en banc). The *Dunagin* case and *Lamar Outdoor Advertising* were argued and decided together on rehearing en banc. They involved the same first amendment question, and the district courts below had reached opposite conclusions regarding the constitutionality of Mississippi's ban on liquor advertising. *Dunagin v. City of Oxford*, 489 F. Supp. 763 (N.D. Miss. 1980) (upholding); *Lamar Outdoor Advertising, Inc.*, 539 F. Supp. at 817 (invalidating).

141. 447 U.S. at 566.

142. 718 F.2d at 747.

143. *Id.* at 749.

[T]he issue of whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question. It is . . . a question of social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning That reasoning is the responsibility of legislators and judges, assisted by scholars as well as social scientists. The specific issue here was undoubtedly considered by the Mississippi Legislature when local option and the curtailment of liquor consumption were being studied. . . . If the legislative decision is not binding at this stage, at least it carries great weight. Certainly it cannot be thrust aside by two experts and a judicial trier of fact.¹⁴⁴

Judge Reavley's fine-print deserves wider attention than I fear it will receive.¹⁴⁵ His footnote 8, both in form and substance, echoes

144. *Id.* at 748 n.8.

145. Footnote 8 fills four columns of 7½-point type, and it is set out here, edited only slightly, for the benefit of law students, constitutional theorists, and others who may read these pages:

The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court. *E.g.*, *Barefoot v. Estelle* (validity of predictions of violent behavior); *New York v. Ferber* (the effect upon the child used as a subject for pornographic materials); *Ballew v. Georgia* (effect of the size of jury upon deliberation and verdict); *Gregg v. Georgia* (the deterrent effect of capital punishment); *Paris Adult Theater I v. Slayton* (the relation between obscenity and socially deleterious behavior); *Brown v. Board of Education of Topeka* (the effect of segregation upon minority children).

Furthermore, the decision on whether a regulation of commercial speech directly advances the state's interest, for example, is an exercise of constitutional adjudication wherein appellate courts play a special role. Applying the legal tests that have evolved in constitutional law invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests. The Supreme Court has often warned that each First Amendment case must be analyzed separately, based on the particular method of communication involved, and the values and dangers implicated. "The protection available for particular commercial expression turns on the nature both of the expression and of the government interests served by its regulation." *Central Hudson Gas*. The questions raised in such cases involve mixed questions of law and fact

There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. A similar situation actually occurred here. Should identical conduct be constitutionally protected in one jurisdiction and illegal in another? Should the fundamental principles of equal protection delivered in *Brown v. Board of Education of Topeka* be questioned if the sociological studies regarding racial segregation set out in the opinion's footnote 11 are shown to be methodologically flawed? Should the constitutionality of the property tax as a means of financing public education, resolved in *San Antonio Independent School District v.*

the artistry and judicial sensibility of Mr. Justice Brandeis, who also stressed the limited role of courts in second-guessing state legislatures on questions of breadbaking or alcoholics.¹⁴⁶ I can't help

Rodriguez, depend on the prevailing views of educators and sociologists as to the existence of a cost-quality relationship in education? Does capital punishment become cruel and unusual when the latest regression models demonstrate a lack of deterrence? The social sciences play an important role in many fields, including the law, but other unscientific values, interests and beliefs are transcendent.

Perhaps for these reasons, the Supreme Court's recent commercial speech and other relevant speech cases indicate that appellate courts have considerable leeway in deciding whether restrictions on speech are justified. In none of them did the Court rely heavily on fact findings of the trial court.

Id. at 748-49 n.8 (citations omitted).

146. On breadbaking, see Justice Brandeis's classic dissent in *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 519-20, 533-34 (1924):

The determination of these questions involves an [e]nquiry into facts. Unless we know the facts on which the legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious. Knowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold. But, in this case, we have merely to acquaint ourselves with the art of breadmaking and the usages of the trade

Much [of the] evidence referred to by me is not in the record. Nor could it have been included. It is the history of the experience gained under similar legislation Of such events in our history, . . . the Court should acquire knowledge, and must, in my opinion, take judicial notice, whenever required to perform the delicate judicial task here involved The evidence contained in the record in this case is, however, ample to sustain the validity of the statute. There is in the record some evidence in conflict with it. The legislature and the lower courts have, doubtless, considered that. But with this conflicting evidence we have no concern. It is not our province to weigh evidence. Put at its highest, our function is to determine, in the light of all facts which may enrich our knowledge and enlarge our understanding, whether the measure, enacted in the exercise of an unquestioned police power and of a character inherently unobjectionable, transcends the bounds of reason

To decide, as a fact, that the prohibition of excess weights "is not necessary for the protection of the purchasers against imposition and fraud by short weights"; that it "is not calculated to effectuate that purpose"; and that it "subjects bakers and sellers of bread" to heavy burdens, is, in my opinion, an exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review.

On alcoholics, see Justice Brandeis's opinion, painstakingly footnoted, in *Jacob Ruppert v. Caffey*, 251 U.S. 264, 299 (1920):

The police power of a State over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors supported by a separate implied power to prohibit kindred non-intoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors.

The footnotes in *Jacob Ruppert*, from note (a) to (n) are really quite amazing, and all law clerks, as a condition of employment, should be required by their judges to marvel at the annotation artistry evident in the work of Brandeis and his legal secretary, Dean Acheson, who was Brandeis's law clerk at the time. As recollected by Mr. Acheson:

He wrote the opinion; I wrote the footnotes.

believing that Louis Brandeis, who valued free speech above beer, would have scoffed at the idea that outlawing Budweiser commercials violates the first amendment. The trouble is that the current Court has extended the first amendment beyond Justice Brandeis's ascetic vision of "freedom of expression,"¹⁴⁷ and empty beer cans are everywhere.

Judge Williams's special concurrence objected to the majority's reliance on the twenty-first amendment: "I view the doctrine as mischievous and insidious."¹⁴⁸ The purpose of that amendment, he said, has "nothing whatsoever to do with encroachment upon the individual liberties protected in the Constitution,"¹⁴⁹ although in fairness to the majority, Judge Williams conceded that the Supreme Court has intimated the contrary.¹⁵⁰ The concurrence pre-

My footnotes up to that time were the Mount Everest of footnotes. Today, Justices of the Supreme Court write textbooks as marginal annotations of their opinions, but up to that time I had written the greatest footnotes, fifteen pages of footnotes.

And what were we trying to do? We were collecting all the legislation and all the decisions of the forty-eight states and the Territories of the United States as to what was an intoxicating beverage. The purpose of this, of course, was to show that when the Congress said "one half of one per cent of alcohol by volume is intoxicating," that that was reasonable, because all the states had said everything in the world beside that. And compared to the confusion of the states, this was Reason Incarnate. So I went to work on the opinion.

Acheson, *Recollections of Service with the Federal Supreme Court*, 18 ALA. LAW. 355, 364-65 (1957).

There is one more Brandeis opinion on alcoholics that should be noted here, by way of capturing his attitude toward liquor vis-à-vis Congress:

High medical authority being in conflict as to the medicinal value of spiritous and vinous liquors taken as a beverage, it would, indeed, be strange if Congress lacked the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions, as by keeping the quantity that may be prescribed within limits which will minimize the temptation to resort to prescriptions as pretexts for obtaining liquor for beverages uses.

Lambert v. Yellowley, 272 U.S. 581, 597 (1926).

147. Justice Brandeis' concurring opinion in *Whitney v. California*, 274 U.S. 357, 372 (1927), the locus classicus of Brandeis's vision of the first amendment, says nothing about advertising; rather, it speaks of the first amendment as a means to the discovery of political truth:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . .

Id. at 375.

148. 718 F.2d at 754 (Williams, J., concurring).

149. *Id.*

150. See, e.g., *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972).

fers to peg state control of liquor advertising squarely on the police power. "It does not depend to any degree upon the Twenty-first amendment."¹⁵¹ However, in recognizing the special problems related to liquor regulation, Judge Williams had no difficulty agreeing that Mississippi's ban of liquor advertising does not violate the first amendment. "To hold otherwise exalts commercialism above the genuine concerns the State of Mississippi has a right to feel for its citizens, and the problems that liquor creates in our society."¹⁵² Judge Williams added a word about the "battle of experts" below: "What this battle of the experts was actually asking us to do was to engage in the now outmoded substantive economic due process analysis. The fact that there was a battle of the experts on this issue proved that the issue was one of legislative policy."¹⁵³ If Mississippi believes liquor advertising increases consumption, "that is a legislative judgment that it has a right to make."¹⁵⁴

Judge Gee's graceful dissent quietly stuck to his panel opinion.¹⁵⁵ Judge Higginbotham also abided by the panel decision, but he threw out a thunderbolt worthy of consideration in the next constitutional law seminar:

The immediate turn of this case in the long view of constitutional principle has little significance. The case may be little more than how judges view whiskey, or how judges apply their own notions of what is a good and what is a bad law. This intended exaggeration is a sufficiently accurate description of this type of judicial review that we are hesitant to cheerfully admit engaging in. The point is that the balancing of interests exercise of *Virginia Board of Pharmacy* and its younger companions reduces the exaggeration to an uncomfortable level.

. . . .

Nevertheless, the cases instruct that we are to so review and I am reluctant to express my own doubts, which go to the very notion of commercial speech, by applying those cases in a less than faithful

151. 718 F.2d at 754.

152. *Id.*

153. *Id.*

154. *Id.*

155. The Gee dissent is short and gentlemanly:

Judge Reavley's opinion for a majority of the court—workmanlike and thorough as always—takes a view of the Mississippi arrangement regulating liquor advertising with which it is hard to disagree violently. Even so, I believe that the better one is expressed in our panel opinions, reported at 701 F.2d 314 and 335. Since it is there set out in great detail, I see no occasion to write further.
Id. at 755 (Gee, J., dissenting).

way. Doing so substitutes one brand of activism for another. . . . Of course we are *Lochner*izing and intruding into the affairs of a state. I suggest that distaste for the intrusion has created a reluctance in actual application to give full sway to the commercial speech doctrine as developed by the Supreme Court, and was an unidentified hand on the weighing scale of the majority; that it was this added weight which separated the majority and dissenting opinions.

It is hard for me to see that Mississippi has "won" this case. It can ban the advertising of whiskey, true enough, but only because federal judges answerable to no voters have decided that they "agree" with the Mississippi legislature. In the long haul this is no win at all. That seems to me to be a predictable, if not inevitable, consequence of the doctrine itself. This exaggerates, but it is sufficiently accurate that we ought to be troubled. I am.¹⁵⁶

It is tempting, from the point of view of theory, to discourse at length on this liquor-speech case. A professor might want to explain Mississippi's success to his students on some basis other than how judges view whiskey ads. But this is not the place to trace the encrustation of commercial speech on the Constitution generally, or to propose a clean scrapping. It is enough here to sample the Fifth Circuit's yeoman service, and to point out that the Supreme Court denied certiorari without a higher word.¹⁵⁷

VOTING RIGHTS, CONGRESS, AND THE COURTS

The interplay between Congress and the courts on the matter of protecting voting rights is an old theme. *South Carolina v. Katzenbach*¹⁵⁸ comes to mind. In that case, a younger Charles Clark, Esq., playing the lawyer's part, submitted on the briefs that "Congress exceeded the limits of the Constitution in enacting the Voting Rights Act of 1965."¹⁵⁹ During his oral argument as amicus curiae for Mississippi, Clark told Chief Justice Warren and the other members of the Supreme Court:

156. *Id.* (Higginbotham, J., concurring in the dissenting opinion).

157. *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*, 104 S. Ct. 3554 (1984).

158. 383 U.S. 301 (1966).

159. Brief for the State of Mississippi, Amicus Curiae at 6, *South Carolina v. Katzenbach*, 383 U.S. at 301, reprinted in 62 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 587, 601 (P. Kurland & G. Casper eds. 1975) [hereinafter cited as LANDMARK BRIEFS AND ARGUMENTS].

This is not to say that the entire Act must go out, and certainly not, Your Honor, Mr. Justice Black, it's not to say that Congress can't enforce the Fifteenth Amendment. But it is to demand that that enforcement be appropriate legislation, and it cannot be appropriate if it doesn't square with the document And if Congress can ride roughshod over you, there's no need to have this Court That's not what Article III established this Court for. It is established it to give you the opportunity to call any department of the Government to account if it left the bounds of the document we all swore to uphold and support and defend.¹⁶⁰

Chief Justice Warren, we know, sustained the constitutionality of the Voting Rights Act of 1965.¹⁶¹ Charles Clark, like the rest of us, knew defeat as a lawyer.¹⁶² "As against the reserved powers of the States," Chief Justice Warren said in *South Carolina v. Katzenbach*, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."¹⁶³ Fifteen years later, in *Mobile v. Bolden*,¹⁶⁴ the fifteenth amendment was read to prohibit only purposeful, invidious discriminatory denials of voting rights on account of race. Discriminatory effects alone were not enough to violate section 1 of the fifteenth amendment; nor had Congress intended, said the Court, to outlaw voting practices that produced discriminatory results without regard to invidious purpose. Congress reacted swiftly to the Court's statutory construction, amending the Voting Rights Act so as to

160. Oral Argument of Charles Clark, Esq., on Behalf of the State of Mississippi as Amicus Curiae Supporting Plaintiff, *South Carolina v. Katzenbach*, reprinted in 62 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 159, at 741, 742-43. The writer has listened to the sound recordings of the oral arguments in *South Carolina v. Katzenbach*, which are preserved on tape, as are all Supreme Court oral arguments, at the National Archives, Washington, D.C. There is conviction and sincerity in the younger Clark's voice.

161. Chief Justice Warren wound up his opinion for the Court, 383 U.S. at 337, with a holding and a hope:

We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

162. He also knows a high compliment from the bench: "Without exception, despite the emotional overtones of the proceeding, the briefs and oral arguments were temperate, lawyerlike and constructive." *South Carolina v. Katzenbach*, 383 U.S. at 308 (per Warren, C.J.).

163. *Id.* at 324.

164. 446 U.S. 55 (1980), *rev'g* *Bolden v. City of Mobile, Alabama*, 571 F.2d 238 (5th Cir. 1978).

outlaw any voting practice that “results in” a denial or abridgment of the right to vote on the account of race or color.¹⁶⁵ In *Jordan v. City of Greenwood, Mississippi*,¹⁶⁶ the first case to reach the court under the Voting Rights Act amendments of 1982, the Fifth Circuit noted this term that “[t]his change from purpose to effect represents a significant legislative departure from the theory on which *Bolden* was decided.”¹⁶⁷ The district court, applying *Mobile v. Bolden*, searched for and found no forbidden discriminatory animus behind the city’s at-large commission form of government. The primary issue on appeal was the intervention of the new voting rights amendments. Greenwood, Mississippi, urged the Fifth Circuit to hold that Congress had exceeded its enforcement power under section 2 of the fifteenth amendment since “a law that proscribes unintentional denial of voting rights is neither necessary nor appropriate to effectuate constitutional provisions that proscribe only intentional discrimination.”¹⁶⁸ A cold reading of sections 1 and 2 of the fifteenth amendment indicates a certain surface logic to this argument. On the other hand, plaintiffs and the United States, as amicus curiae, urged the court to uphold the new voting rights law as a valid exercise of Congress’ extensive power to enforce the Civil War amendments. Here, plainly, was an opportunity for article III judges to call Congress to account “if it left the bounds of the document we all swore to uphold and support and defend.”¹⁶⁹

This time, not as lawyer but as Chief Judge of the Fifth Circuit, Charles Clark declined the opportunity to call Congress to account: “[W]e take a path not urged by anyone. We decline to reach the question whether new section 2 is constitutional, vacate the judgment of the district court, and remand for further proceedings.”¹⁷⁰ Chief Judge Clark’s opinion shows remarkable—indeed classical—restraint. More active judges, I suspect, might have jumped at the chance to flex article III muscle. But the panel stayed its hand because “[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality

165. 42 U.S.C.A. § 1973(a) (West Supp. 1984).

166. 711 F.2d 667 (5th Cir. 1983).

167. *Id.* at 669.

168. *Id.*

169. Oral Argument of Charles Clark, Esq., *supra* note 160.

170. 711 F.2d at 669.

. . . unless such adjudication is unavoidable."¹⁷¹ Here, again, is evidence of Justice Brandeis's continuing influence, this time with respect to his *Ashwander* counsel of restraint.¹⁷² Since this voting case could go off on remand on statutory grounds, that is, "should the district court find that Greenwood's scheme does not violate new section 2, the constitutional issue would become moot. If this occurs, our restraint will have avoided the needless resolution of an important constitutional question."¹⁷³ Doubtless, Charles Clark's sensitivity to "the important question of constitutional law presented by this appeal"¹⁷⁴ was forged earlier in life, in another courtroom, in another role.

Later in the term, in *Jones v. City of Lubbock*,¹⁷⁵ another panel of the court was asked to call Congress to account, and this time decision was unavoidable. The challenge to Lubbock's at-large system of election to city council turned on discriminatory results rather than invidious purpose. The case arose after passage of the voting rights amendments; the constitutionality of new section 2 of the Voting Rights Act was squarely presented, and squarely decided. Outlawing voting practices that produce discriminatory results, even in the absence of proof of discriminatory intent, fits within Congress' power "to enforce this article by appropriate legislation."¹⁷⁶ Judge Randall's opinion is characteristically thorough and, on the constitutional question presented, tight as a closed vise. She dispatched the city's argument that Congress usurped the judicial province forthwith:

Section 2 does not purport to usurp the judicial role of defining the substantive scope of the fourteenth amendment or the fifteenth amendment. Instead, Congress seeks to protect the core values of these amendments through a remedial scheme that invalidates election systems that, although constitutionally permissible, might debase the amendments' guarantees. Congressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth amendments is unquestioned [citing, *inter alia*, *South Carolina v. Katzenbach*]. So long as Congress adopts lawfull and ra-

171. *Id.* (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944) (per Frankfurter, J.)).

172. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

173. 711 F.2d at 669.

174. *Id.* at 670.

175. 727 F.2d 364 (5th Cir. 1984).

176. U.S. CONST. amend. XV, § 2.

tional means to enforce the constitution, the separation of powers doctrine requires that the judiciary, rather than Congress, must defer.¹⁷⁷

The basic test to be applied in cases requiring judges to review Congress's exercises of its enforcement powers "is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."¹⁷⁸ The *locus classicus*, of course, is Chief Justice Marshall's formulation, laid down fifty years before the fifteenth amendment was ratified, in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."¹⁷⁹ Judge Randall rehearsed the legislative history behind the voting rights amendments. Congress heard extensive testimony showing that minority voting rights still suffered from the effects of past discriminatory electoral systems. Congress knew that proving discriminatory "intent" is a tricky thing; there was ample documentation of the failure of the intent test to remedy past abuses; Congress perceived the need for ameliorating the statutory burden of proof. "Acting on this record, Congress, in our view, could appropriately determine that a 'results' test was necessary to enforce the fourteenth and fifteenth amendments. Assigning a non-intent standard to an enforcement measure does not pose a serious constitutional obstacle."¹⁸⁰

Judge Randall next canvassed the transformation of voting rights law during the seven years *Jones v. City of Lubbock* was in the courts. Her opinion is a small treatise of large learning, a first-rate *vade mecum* on judicial construction—and re-construction—of section 2 of the Voting Rights Act.

As amended, the test is one of "results." Proof of violation is established under the new subsection (b)

if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that

177. 727 F.2d at 373-74 (citations omitted).

178. 383 U.S. at 326.

179. 17 U.S. (4 Wheat); 316, 421 (1819).

180. 727 F.2d at 375.

its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered. *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.¹⁸¹

Just what this language means when read as a whole is cloudy. Senator Mathias said the goal was "to give all citizens equal access to vote, run, or otherwise participate in the process."¹⁸² Senator Hatch asked "What does 'equal access' mean?"¹⁸³

SENATOR HATCH: Is [it] the most fair and just means to achieve access—if 55 percent of Baltimore is black then 55 percent ought to be black majority districts?

. . . .
SENATOR MATHIAS: You look at the totality of circumstances; that is what we have been doing.

. . . .
SENATOR HATCH: I do not understand what the question is that the Court asks itself in evaluating the totality of the circumstances under the results test. What precisely does the Court ask itself after it has looked at the totality of circumstances? What is the standard for evaluation under the results test?

SENATOR MATHIAS: Look at the results.

SENATOR HATCH: That is all? You are saying that if there was absolutely no intent to discriminate, as the Court found in the *Mobile* case, yet the results were the election of disproportionately few minority candidates, that a case would be established? How would this effect a case such as that raised in Baltimore?¹⁸⁴

Notably, this Senatorial exchange took place before the Dole disclaimer of proportional representation was added to the bill.¹⁸⁵ Quite obviously, Congress straddled the fence here, politically compromising a burning issue and leaving it up to the federal courts to

181. 42 U.S.C.A. § 1973(b) (West Supp. 1984).

182. *Hearings on the Voting Rights Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary*, 97th Cong., 2d Sess. 201 (1982).

183. *Id.*

184. *Id.*

185. "The Dole proposal effectively supplied a political resolution to misgivings about section 2. It did not, however, put to rest the considerable confusion over what the compromise ultimately was intended to mean." Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1416 (1983).

say what it is that Congress intended in the heat of June 1982.¹⁸⁶

One thing is clear. The Fifth Circuit has come down on Lubbock, affirming the district court's finding that Lubbock's at-large election for city council violates section 2 of the Voting Rights Act as amended.

The panel in "constru[ing] the statute so as to give it meaning"¹⁸⁷ has itself walked a tightrope:

Section 2 of the Voting Rights Act requires that we give effect to two commands. On one hand, we cannot uphold the Lubbock election scheme if it inflicts a discriminatory result so severe that the plaintiffs have lost equal access to the political process. On the other hand, the factors demonstrating a discriminatory result must amount to more than mere judicial enforcement of proportional representation.¹⁸⁸

Everybody votes in Lubbock, but no minority candidate has ever been elected to the city council. "Without a breakdown in the pattern of polarized voting, no minority candidate is ever likely to serve on an at-large city council,"¹⁸⁹ said the panel, giving special weight to the factor of polarized voting, which was found by the district court to have pervaded Lubbock's election processes. Although there was evidence of responsiveness to minority interests on Lubbock's part, "the absence of unresponsiveness does not negate [the] other inferences that flow from polarization."¹⁹⁰ Lubbock's at-large system "does not become unlawful merely because

186. Messrs. Boyd and Markman, who were "on the Hill" when the 1982 amendments were adopted, wind up their painstaking rehearsal of the legislative history, *supra* note 185, at 1428, this way:

As so often happens in complex legislative matters, particularly where highly charged emotional issues are involved, the federal judiciary will ultimately have to tell Congress what it intended to achieve in its 1982 Amendments to sections 2 and 5. Indeed, the very constitutionality of these provisions will be the subject of considerable debate in the courts in the years ahead. While some compromises promote stability of the law, others merely postpone difficult policy decisions. The undeniably substantial controversies involved in the Voting Rights Act debate must finally be resolved; when they are, they will contribute in great measure toward a definition of the objectives of civil rights policy in the United States for the next generation.

Query whether Congress' pitching this hot political potato to the courts is consistent with separation of powers?

187. 727 F.2d at 373. But compare Mr. Justice Jackson's comment, dissenting in *United States v. Harris*, 347 U.S. 612, 635 (1954): "Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction."

188. 727 F.2d at 384.

189. *Id.* at 383.

190. *Id.* at 381.

it disadvantages a discrete and insular minority,"¹⁹¹ the panel acknowledged. "Even where an at-large system interacts with a racially or ethnically polarized electorate to the disadvantage of the minority, the 'result' is not necessarily a denial of political access."¹⁹² The crucial inquiry under the amended act is "whether the electoral system, in light of its present effects and historical context, treats minorities so unfairly that they effectively lose access to the political processes."¹⁹³ Objective factors, "flexibly"¹⁹⁴ weighed, "will distinguish an unlawful electoral system in which considerations of race and ethnicity pervade politics to the serious detriment of the minority, from a permissible electoral system in which the racial and ethnic composition of the elected body does not mirror that of the constituency."¹⁹⁵ Lubbock's system fell on the unlawful side of the line because it "incorporates every feature that courts have identified as aggravating the impact of an at-large system. Indirectly, these features 'inescapably' act as formal obstacles to effective minority participation."¹⁹⁶ Additionally, "the district court found a continuity in effects between the history of discrimination in Lubbock and the present levels of minority participation."¹⁹⁷ The present political system, noted the panel, "preserves a past lack of access."¹⁹⁸ Therefore Lubbock loses: "On the strength of these factors, we find sufficient support to uphold the district court's ultimate finding."¹⁹⁹

And what of the remedy? On the same day the district court condemned Lubbock's at-large system on the merits, it decreed its remedy: The court-ordered plan called for a six member council elected from single-member districts, and as in the past, a mayor elected at large. The panel affirmed the remedy without much trouble.²⁰⁰

191. *Id.* at 384.

192. *Id.*

193. *Id.* at 384-85.

194. "Rather than emphasizing any particular factors, Congress has now directed the courts to apply the objective factor test flexibly." *Id.* at 384.

195. *Id.* at 385.

196. *Id.* (quoting *Washington v. Finlay*, 664 F.2d 913, 920 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982)).

197. 727 F.2d at 385.

198. *Id.*

199. *Id.* at 386.

200. The panel, *sua sponte*, noted "shortcomings in the proceedings below that have not been made the subject of this appeal," *viz.*, the failure of the district court to conduct an evidentiary hearing on the court-imposed remedy. *Id.* at 387. "[T]he procedures, if challenged, would have required that we vacate this order," said the court. *Id.* at 387. Judge

Lubbock's suggestion for rehearing en banc was denied a month after it was filed, with Judge Higginbotham expressing lingering doubts about the strength of plaintiffs' proof of polarized voting. "The evidence here is suspect and presents a substantial risk of being wrong. It is unfortunate that a change in a city's form of government ultimately rests on such an uncertain footing."²⁰¹ Judge Higginbotham's attack on Dr. Brischetto's statistics and on the doctor's methodology was devastating.²⁰² Yet the judgment stands. Lubbock, it strikes me, has got itself caught in a web of political ambiguity judicially construed.²⁰³

CIVILIANS UNDER MILITARY LAW

It is the general rule that military jurisdiction extends to the soldier but not to the civilian.²⁰⁴ On more than one occasion, how-

Randall added:

For us to pass on the propriety of the district court's action, we must have either specific fact findings or, at least, a record sufficient to allow review. Without hearings, and without findings addressed to the government body's plan, we would not be in a position to determine whether the district court properly exercised its discretion in rejecting the City's plan.

Id. The court nevertheless affirmed because: "Fortunately, in this case, the sole challenge by appellant focuses on the racial fairness of the court's plan, and the record in this case is adequate to review the plan's fairness." *Id.*

201. *Jones v. City of Lubbock*, 730 F.2d 233, 236 (5th Cir. 1984) (on suggestion for rehearing en banc) (Higginbotham, J., concurring specially).

202. The most striking aspect of Dr. Brischetto's study is that no other variables than race or ethnicity were tested. In other words, Dr. Brischetto did not test for other explanatory factors than race or ethnicity as intuitively obvious as campaign expenditure, party identification, income, media use measured by cost, religion, name identification, or distance that a candidate lived from any particular precinct Significantly, the inference of bloc voting from this model builds on an assumption that race or national origin is the only explanation for the correspondence. It ignores the reality that race or national origin may mask a host of other explanatory variables.

Id. at 235.

203. Judge Higginbotham ultimately concurred because:

[G]iven that there is no evidence to rebut plaintiff's proof other than the City's criticism of Dr. Brischetto's study and its attempt to show responsiveness, I agree with Judge Randall that the record is not so barren as to render clearly erroneous the finding by the district court that bloc voting was established.

Id. at 236. But query, who has the burden of proof, measured by what quantum?

204. W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 89 (2d ed. 1896, 1920 reprint): [T]he general rule is that *military persons*—officers and enlisted men—are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recognized legal modes of separation from the service, they cease to be military and become *civil persons*, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army, or than it can over any other members of the civil community.

ever, Congress has passed statutes—some quite old, some new—sweeping civilians under military jurisdiction. This, of course, means trial by court-martial, not trial by jury. For instance, Article of War 60²⁰⁵ mandated military trial for ex-soldiers alleged to have committed fraud against the United States while still in the service. The constitutionality of such recapture mechanisms was questioned quite early by Colonel William Winthrop—"the Blackstone of military law, a man of superb reasoning power"²⁰⁶—in his monumental *Military Law and Precedents*,²⁰⁷ which was published in 1896 in a now classic second edition and reprinted "for the information of the service" in 1920.²⁰⁸ In a section of his treatise entitled "General Principle of Non-Amenability of Civilians to the Military Jurisdiction in Time of Peace," Winthrop wrote "[t]hat a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law."²⁰⁹ After a lengthy discussion of the "Constitutionality of the Statutes" to the contrary, Winthrop concluded with the italicized observation that "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"²¹⁰

Unlike Congress, the Supreme Court followed Colonel Winthrop, holding in *Toth v. Quarles*²¹¹ that Congress lacked constitutional power to subject former members of the armed forces to military jurisdiction for trials of serious criminal offenses allegedly committed while still in the military, and that article 3(a) of the Uniform Code of Military Justice (UCMJ)²¹² establishing such jurisdiction was accordingly unconstitutional.²¹³ Under *Toth*, the

205. Ch. 227, 41 Stat. 759, 800 (1920), *superceded by* THE UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801-940 (1982).

206. The characterization is General E.H. Crowder's, Judge Advocate General of the United States Army, in *Establishment of Military Justice, Hearings on S. 64, Before a Subcommittee of the Senate Committee on Military Affairs*, 66th Cong., 1st Sess. 1171, (1919), *quoted in* F.B. WIENER, CIVILIANS UNDER MILITARY JUSTICE 229 (1967).

207. W. WINTHROP, *supra* note 204.

208. By Order of the Secretary of War, Feb. 9, 1920, per P.C. March, General, Chief of Staff. WINTHROP, *Id.* at 3.

209. *Id.* at 105.

210. *Id.* at 107.

211. 350 U.S. 11 (1955).

212. 10 U.S.C. § 804 (1982).

213. 350 U.S. at 11-12. The recapture provision of the Uniform Code, art. 3(a), 10 U.S.C. § 803(a) (1982), had been expressly enacted by Congress in order to overcome the holding in the *Hirshberg* case (*United States ex. rel. Hirshberg v. Cooke*, 336 U.S. 210

power granted to Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," pursuant to art. I, § 8, cl. 14, "would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces," said Hugo Black's opinion for the Supreme Court majority.²¹⁴

Enter Wendy Wickham, whose case is, quite frankly, dizzying in its effects. Without question *Wickham v. Hall*²¹⁵ is the Gordian knot of the term, an "insoluble conundrum"²¹⁶ that first divided the Court of Military Appeals in Washington²¹⁷ and then split the

(1949)) that the fact of discharge terminated military jurisdiction. See H.R. REP. No. 491, 81st Cong., 1st Sess. 11 (1949); S. REP. No. 486, 81st Cong., 1st Sess. 8 (1949). The *Toth* case seesawed back and forth as it was fought out through the several stages of the judicial hierarchy. The district court first ordered Toth returned to Washington from Korea, whence he had been brought for court-martial shortly after his apprehension by military police in the United States. *Toth v. Talbott*, 113 F. Supp. 330 (D.D.C. 1953). Next, after a hearing the district court issued the writ of habeas corpus and ordered Toth released. *Toth v. Talbott*, 114 F. Supp. 468 (D.D.C. 1953). On the Government's appeal, the district court's judgment was reversed, *Talbott v. United States*, 215 F.2d 22 (D.C. Cir. 1954), after which the Supreme Court granted certiorari and, after two arguments (see 349 U.S. 949 for the order directing reargument), the court of appeals judgment was reversed and Toth was authoritatively held, per Black, J. for the Court, outside military jurisdiction. The *Toth* case came as a shock to military authorities, and a surprise to Congress, although in the view of Colonel Frederick Bernays Wiener, a military lawyer of pre-eminent capacity, "[t]here can be no doubt, however, that the result finally reached was correct." F.B. WIENER, *supra* note 206, at 308.

One lower-eschelon military figure who was on the scene in Korea, Assistant Staff Judge Advocate Warren Mengis, now an esteemed colleague at the LSU Law Center, told the writer that his first reaction to the *Toth* case was that: "I didn't see any way that the military could go to the United States and pick up the boy because he had been discharged." But when this lowly advice—prescient though it was—reached a higher link in the chain of command, it was disregarded with the comment that: "The Lieutenant Colonel isn't interested in being told he can't do it, just tell him how to do it." Whereupon Air Force military police were dispatched to Pittsburg, Pennsylvania, to pick up Toth and fly him back to Korea. *Ex rel.* Professor Warren Mengis to Paul R. Baier, at the Law Center, Louisiana State University (Aug. 28, 1984).

214. 350 U.S. at 15. Justice Black added:

There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more conditional safeguards than in military tribunals.

215. 706 F.2d 713 (5th Cir. 1983).

216. *Id.* at 720 (Thornberry, J., dissenting).

217. *Wickham v. Hall*, 12 M.J. 145 (1981). The civilian judges of the highest military court divided 1-1-1, with Judge Cook reaching the merits and sustaining the constitutionality of article 3(b) of the Uniform Code, 10 U.S.C. § 803(b) (1982), which authorizes recapture of ex-soldiers alleged to have procured their discharge from the military by fraud and also authorizes trial by court-martial on the fraud charge. Judge Fletcher concurred in the result on jurisdictional grounds, without reaching the merits of the constitutional question presented. Chief Judge Everett dissented, thus abiding a view he first espoused as a former Commissioner of the Court of Military Appeals, in his treatise *MILITARY JUSTICE IN THE*

Fifth Circuit (2-1) in New Orleans. The question was Ms. Wickham's amenability to court-martial for alleged fraud in the procurement of her pregnancy discharge from the military. The Army said she submitted a false urine sample, therefore she was still a soldier subject to court-martial under the recapture mechanism of article 3(b) of the UCMJ: "Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is . . . subject to trial by court-martial on that charge" ²¹⁸ Wickham, of course, said she was pregnant in fact, therefore the discharge was valid and she is a civilian. Her lawyer, citing *Toth*, claimed the Army lacked constitutional power to try citizen Wickham by court-martial. At this point, my mind, and perhaps the reader's too, is spinning like a top.

"According to Wickham, this is the rub. Who should decide whether she fraudulently procured her discharge, a civil or a military court?" ²¹⁹ Here is how Chief Judge Clark described the constitutional whirligig of *Wickham v. Hall*:

She contends she is a civilian until her discharge is proven to be fraudulently procured. To allow the military court to assert jurisdiction over the claim that her discharge was fraudulently procured so that the military court can determine whether there was fraud in its procurement presumes she is still in the service. It is just as circular, however, to presume the discharge is valid and thereby confer upon a civil court jurisdiction to decide the issue of validity. ²²⁰

ARMED FORCES OF THE UNITED STATES 36 (1965): "In the light of the *Toth* case, it is clear that [article 3(b)] is unconstitutional insofar as it authorizes court-martial of an ex-service-man for getting a fraudulent discharge." That Chief Judge Everett was only following himself on the bench is the writer's observation, not the unseemly boast of Robinson O. Everett, C.J., dissenting. Every branch of the Armed Services was invited to participate as amici curiae in the Court of Military Appeals when it heard Wendy Wickham's case, and the oral arguments lasted an entire day, unusual procedures for what was plainly recognized as a knotty constitutional case.

218. 10 U.S.C. § 803(b) (1982). While article 3(b) is the section that confers jurisdiction, the provision that makes the act criminal is article 83, 10 U.S.C. § 883 (1982), which provides:

Any person who—

(1) procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for that enlistment or appointment and receives pay or allowances thereunder; or

(2) procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation; shall be punished as a court-martial may direct.

219. 706 F.2d at 717.

220. *Id.* (footnote omitted).

The court held, per Clark, C.J., that "[a]rticle 3(b) of the UCMJ is, on its face, a constitutional assignment of military court jurisdiction."²²¹

The Fifth Circuit majority distinguished *Toth*: "A soldier may not by fraud cut short his military status before his service obligation is complete."²²² The majority invoked the reasoning power of Colonel Winthrop: "[D]ischarge is only effective if it is validly procured. It must be 'due and legal, not fraudulent.'"²²³ Chief Judge Clark recited from the legislative history of article 3(b); we are told that "Congress was reacting to cases arising after World War II in which servicemen had fraudulently procured discharges . . . [and] then used their fraudulently obtained discharges to block military court action."²²⁴ Just how many cases Congress had in mind, or their details, does not appear. The majority said further that: "Recognizing the seriousness of the problem, Congress gave military tribunals the authority to deal with an offense that would strike at the very heart of the individual's military commitment."²²⁵ Moreover, the majority judges were unwilling to presume that anything but a fair resolution of the fraud issue awaits Ms. Wickham before the military tribunal. "[M]ilitary courts are not Kafkaesque Star Chambers,"²²⁶ said Chief Judge Clark, although his opinion conceded that, "[G]rand jury presentment and trial by petit jury are not parts of the system, and there is no right to bail"²²⁷ At any rate, whether Wickham's discharge was validly or fraudulently procured "depends in large part upon army regulations and procedures. Such matters fall within the special expertise of the military courts. We should defer to them in these

221. *Id.* at 718.

222. *Id.* at 716-17.

223. *Id.* at 717 (quoting W. WINTHROP, *supra* note 204, at 89 n.46).

224. *Id.* at 716.

225. *Id.*

226. *Id.* at 717.

227. *Id.* In *Toth*, 350 U.S. at 17, Justice Black commented on military trials vis-à-vis trial by jury in federal court:

[C]onceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

respects."²²⁸

Not so, according to Judge Thornberry's dissent, which is pitched heavily on the presumption of innocence: "In order to exercise jurisdiction over Wickham a court-martial must necessarily presume that she is a servicewoman. However, she would only be a servicewoman if she is guilty of the very offense for which it wishes to try her; fraudulent separation from the service."²²⁹ However, neither common law nor military law authorizes such a presumption of guilt. "Quite the contrary. The presumption of innocence is a fundamental tenet of both systems of justice."²³⁰ Thus, "[t]he Army finds itself in the uncomfortable position of having to presume her guilt. There is no way out of this catch-22; the Army wishes to try her to prove her guilt, but it cannot try her unless her guilt has already been proved."²³¹

Along with Chief Judge Everett of the Court of Military Appeals, Judge Thornberry pointed out that, "This is a case of first impression. The Armed Services have gotten along nicely for more than thirty years without having to invoke Article 3(b) against former servicemen or women."²³² The majority's loose talk about thinning the ranks of those ready to fight

through fraudulently obtained discharges is a chimera. I see no justification for expanding military jurisdiction to combat a problem that simply has not been shown to exist. As Justice Black noted in *Toth*: "It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians."²³³

Judge Thornberry's dissent, like the majority opinion, is not lacking in certitude. The reader is stoutly informed: "Article 3(b), like Article 3(a), is unquestionably unconstitutional."²³⁴ The dissent concluded: "I share the majority's concern that our nation continue to be defended by an effective fighting force However, I do not believe that our continued security can only be bought at the

228. 706 F.2d at 717-18.

229. *Id.* at 720 (Thornberry, J., dissenting).

230. *Id.*

231. *Id.* at 721.

232. *Id.* at 722.

233. *Id.* Judge Thornberry obviously is a greater admirer of Justice Black, whom he calls "one of the most eminent jurists of this century." *Id.* at 724 n.7.

234. *Id.* at 723 (quoting from Chief Judge Everett's treatise *MILITARY JUSTICE*, *supra* note 217).

price of unconstitutionally subjecting civilians to the jurisdiction of the courts-martial."²³⁵

Now for a few comments from the sidelines, presented in summary military fashion:

(1) It is very strange that the old case of *United States ex rel. Flannery v. Commanding General*²³⁶ should go unmentioned in either the majority or, especially, the dissenting opinions in Wickham's case. In *Flannery*, a case decided almost 40 years ago, the Federal District Court for the Southern District of New York declared the codal predecessor of article 3(b) unconstitutional in these jolting words:

The cancellation or recall of a discharge for fraud presents a justiciable issue that only a court may decide (Article 3), whether the fraud be such as to make the discharge void or such as to make it voidable. The very question whether it be void or voidable is an issue that only a court may decide. Any assertion of an arbitrary power to cancel or to recall it is made nugatory by the constitutional requirement of due process.²³⁷

(2) Nor is any mention made of a *Columbia Law Review* note on the subject of "The Amenability of the Veteran to Military Law," published in 1946, which, on cogent reasoning, concluded: "[T]he termination of military control inherent in a discharge should require a civil suit to cancel it for fraud."²³⁸ And more:

235. 706 F.2d at 725.

236. 69 F. Supp. 661 (S.D.N.Y. 1946), *vacated by stipulation*, Order No. 20235, slip op. (2d Cir. 1946) (unreported). No briefs were filed, and there was no record on appeal. See unpublished letter to N.Y.L.J. from attorney of record for relator in *Flannery*, Joseph Quittner, Esq., June 14, 1946:

It is most important to note that the Circuit Court of Appeals was not even in session on April 17 and April 18, 1946, the dates of stipulation and order of reversal There was no record on appeal. There were no papers on appeal. There were no briefs The reversal of the order on stipulation in view of the facts narrated above, does not and could not constitute a disagreement by the Circuit Court of Appeals with the reasons for the decision as expressed in the learned opinion of the District Court.

Quoted in Note, The Amenability of the Veteran to Military Law, 46 COLUM. L. REV. 977, 977 n.2 (1946).

237. 69 F. Supp. at 664.

238. Note, *supra* note 236, at 984 (footnote omitted). The Note relies on the analogy found in the revocation of naturalization certificates, patents, and land grants. "The proper procedure for cancelling such instruments conferring important rights under the authority of the United States has been suit by the Government in the civil courts." *Id.* The Note also relies on Mr. Justice Frankfurter's discussion of denaturalization proceedings in *Baumgartner v. United States*, 332 U.S. 665, 675 (1944), to the effect that since "[n]ew relations and

"[T]he provision of Section 10 [of the Manual for Courts-Martial, the predecessor of Article 3(b)] for cancellation of a discharge for fraud is without statutory or constitutional basis."²³⁹

(3) Tedious review of 742 pages of House hearings on the bill to establish the UCMJ, of 110 pages of House Report, of 334 pages of Senate hearings, and of 40 pages of Senate Report—some 1226 pages of legislative history in all²⁴⁰—shows that neither the *Flannery* case nor the *Columbia Law Review* note was ever brought to Congress's attention. On the contrary, the House and Senate were both left in the dark regarding these earlier judicial and academic discussions touching the constitutionality of article 3(b).²⁴¹ All

new interest flow" once citizenship has been granted, these "should not be undone unless the proof is compelling that that which was granted was obtained" by fraud. The *Columbia* commentator further reasons:

"New relations and new interests," which involve fundamental liberties, flow also from the granting of a discharge and should likewise demand compelling proof before cancellation for fraud. If the courts are the only tribunals appropriate to adjudicate the *property* rights involved in fraudulently obtained patents and land grants, judicial action should be required to pass upon the "compelling" proof necessary to protect the human rights involved in cancellation of a discharge.

46 COLUM. L. REV. at 985 (footnote omitted; emphasis in original).

239. 46 COLUM. L. REV. at 985. No mention is made of this *Columbia Law Review* note in any of the briefs filed in the Fifth Circuit in *Wickham v. Hall*, a shortcoming evident from the writer's personal inspection of the appellate filings in this case.

240. Fortunately bound and indexed by the Judge Advocate General of the United States Navy, INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE (U.S.G.P.O. 1950), a volume unlikely kept on any Fifth Circuit judge's shelf, and certainly not found in the Court's Library in New Orleans. *Ex rel.* Maxwell Dodson, Fifth Circuit Librarian. This volume was put in my hands after about an hour's search by Mrs. Helen Nelson, herself an expert on the whereabouts of government documents located in the LSU Law Library.

241. It has happened before, apropos art. 2(11), Uniform Code of Military Justice, 10 U.S.C. § 802(11) (1982), which the Supreme Court finally knocked down, after reversing itself on rehearing, in *Reid v. Covert*, 354 U.S. 1 (1957) (again per Black, J.). Of article 2(11), Colonel Wiener told the Court: "But nowhere in all the voluminous legislative history of the Uniform Code of Military Justice is there a single expression, from any source, that reflects so much as a glimmering awareness of any constitutional problem." Brief for Appellee at 57, *Reid v. Covert*, 351 U.S. 487 (1956), reprinted in 52 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 159, at 159, 215. During reargument, the following colloquy between Court and counsel occurred:

MR. JUSTICE DOUGLAS: Was there any indication by the committee that was considering the bill as to their purpose in drafting this provision of the Code?

MR. WIENER: Yes. Their purpose was to carry forward what had been Article of War 2(d) since 1916. Nobody sensed a constitutional issue. In the language which the draftsman of the committee once used in a classroom in my hearing, they didn't even know enough to be confused.

. . . .

MR. JUSTICE DOUGLAS: Was Professor Morgan [of the Harvard Law School] one of the draftsman?

that Felix Larkin, the Secretary of Defense's lawyer, said by implication about the *Flannery* case at the hearings was: "I might point out in connection with [Article 3](b) that it is new and while it has been a regulation we did not have much confidence in the stability of a regulation of this character."²⁴² Perhaps Mr. Larkin had Judge Clancy's constitutional ruling in mind. One cannot tell reading the printed record.

(4) The comments of Mr. Larkin, on which Chief Judge Clark hangs the majority's legislative history, plainly show a man full of constitutional doubt about the recapture provisions of article 3:

MR. LARKIN. There is one concern that I would have—and I do not know the answer, frankly—which has to do with the third type, if you will, and that is the person who serves, is discharged and who neither joins the Reserves or does not reenlist and becomes for all purposes a civilian.

The question I have in connection with it—actually I think if it were possible you ought to be consistent across the boards in those types of cases—is the constitutionality of attempting to retain a continuing jurisdiction over that person since now he clearly is not in the land or naval forces even though while he was in them he did commit an offense which would have made him subject to its jurisdiction if tried at that time.

Now perhaps my concern is exaggerated but I think there is a difficult legal problem in that one type at least.²⁴³

MR. WIENER: He was the draftsman.

MR. JUSTICE DOUGLAS: He knew quite a little bit about constitutional law, didn't he?

MR. WIENER: Not in this field, Mr. Justice, not in this field . . .

The quotation is from the sound recording of the reargument, No. 701, Oct. Term 1955, *Reid v. Covert*, reargued on Feb. 27, 1957, reprinted in 52 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 159, at 841. The author uses excerpts from the actual oral arguments in *Reid v. Covert*, including Mr. Justice Douglas's questions, in teaching constitutional law at the LSU Law School. For details, see Baier, *What Is the Use of a Law Book Without Pictures or Conversations?*, 34 J. LEGAL EDUC. 619 (1984) (forthcoming).

Lest it be thought that Colonel Wiener's assault on Professor Morgan was too strong, it should be noted that the Court ultimately agreed with the Colonel, not the Professor, and that Justice Douglas himself publicly described Colonel Wiener as "our foremost military law authority." Douglas, Book Review, 35 U. CHI. L. REV. 568 (1968) (reviewing F.B. WIENER, *CIVILIANS UNDER MILITARY JUSTICE* (1967)).

242. *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 885 (1949) (statement of Felix Larkin, March 18, 1949).

243. *Id.* at 881. That Mr. Larkin had doubts about the constitutionality of the law did not escape Mr. Justice Black's eagle eye. See *Toth v. Quarles*, 350 U.S. at 21 n.19.

The Supreme Court, as we know, elevated Mr. Larkin's doubt into a constitutional holding in *Toth v. Quarles*. As for article 3(b), Mr. Larkin told House Subcommittee members that "(b) is part of a similar philosophy, let us say."²⁴⁴ He further told the Congressmen: "Although most of the comments against this article were that we were trying to encroach and enlarge our jurisdiction, we would be happy with the restrictions of a statute of limitations, and not having jurisdiction over what is triable in the civil courts."²⁴⁵

(5) Both Chief Judge Everett of the Court of Military Appeals and Judge Thornberry in his dissent noted, citing Winthrop's treatise, that "the Army has several adequate alternative remedies available to it, none of which raises the constitutional issue before us."²⁴⁶ They pointed out that Wickham could be prosecuted either civilly or criminally for fraud against the Government in federal court.²⁴⁷

(6) Major General Thomas H. Green, The Judge Advocate General of the Army, told Senator Kefauver and his colleagues on the Senate Armed Services Subcommittee that "[t]he code has many defects."²⁴⁸ General Green especially objected to "[t]he sweeping extension of military jurisdiction over civilians (arts. 2, 3)," explaining:

It has been my experience that no matter how just and fair the system of military justice may be, if it reaches out to the civilian community, every conceivable emotional attack is concentrated on the system. This is as it should be. The framers of the Constitution recognized that civilians should be tried by civilian courts and they established a military system of courts for the Army and Navy.²⁴⁹

244. *Supra* note 242 at 885. Contrast the bald assertion in the Government's brief to the Fifth Circuit: "[T]he constitutionality of prosecuting soldiers by courts-martial for fraudulently procured separations has never been in doubt." Brief for Alvin O. Hall, Colonel, U.S. Army, and United States of America at 26 n.4, *Wickham v. Hall*, *supra* note 215. No mention is made in the Government's brief of the contrary holding of *Flannery v. Commanding General*, discussed *supra* 236 in text accompanying nn. 237.

245. *Supra* note 242, at 884.

246. 706 F.2d at 722-23.

247. Wickham could be prosecuted for fraud in federal district court under 18 U.S.C. § 287 (1982), or 18 U.S.C. § 1001 (1982). "Alternatively, the Army could bring a civil suit for fraud against Wickham, seeking to prove by a mere preponderance of the evidence that her discharge was fraudulently obtained." 706 F.2d at 723.

248. *Uniform Code of Military Justice, Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. 256 (1949) (statement of Maj. Gen. Thomas H. Green, May 9, 1949).

249. *Id.*

All of which leaves this side-liner with the gnawing conviction that *Wickham v. Hall* was inadequately aired, if not wrongly decided, in New Orleans.

What, for example, is the relevance of the necessary and proper clause to Ms. Wickham's case? Mr. Justice Frankfurter asked Colonel Frederick Bernays Wiener, whose intellect and spirit are lineal to Winthrop's, a similar question in Mrs. Covert's case:

MR. JUSTICE FRANKFURTER: I would like to ask you whether, assuming everything you say is so, that these haven't the status, they're not part of the Armed Forces, what of the doctrine that is often resorted to—or one of the considerations in constitutional construction—that you may sweep into an exercise of power some penumbral situations which are not explicitly within the grant of power, in order to give effectiveness to the grant of power?

MR. WIENER: I will give a short answer now and then discuss it at length under the necessary and proper clause. The answer is, you cannot sweep beyond the 1789 boundary of jury trial. On that I am on common ground with the Solicitor General.²⁵⁰

These thorny problems were never addressed by the Fifth Circuit in Wendy Wickham's case; they are not even raised. More is required, it seems to me, to get a good grip on this whirligig of a case.

For the benefit of curious readers, not to mention future judges, I should add there can be little doubt that Colonel Winthrop and other superbly-minded military lawyers would stoutly maintain the constitutionality of article 3(b), and on very logical grounds.²⁵¹ But I have no doubt myself that "Captain Hugo Black

250. The quotation is from the sound recording of the reargument, No. 701, Oct. Term 1955, *Reid v. Covert*, reargued on Feb. 27, 1957, reprinted in 52 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 159, at 840-41. Again, this high voltage exchange between court and counsel is well worth playing and commenting upon in our constitutional law classes. See *supra* note 241.

251. Of fraudulent enlistment, Colonel Winthrop says the offense, absent receipt of pay or allowance thereunder, is logically not triable by court-martial, for the reason that the fraudulent representations must have been preliminary and made as an inducement to the enlistment "while therefore the individual was still a *civilian* and not constitutionally amenable to such trial." W. WINTHROP, *supra* note 204, at 733-34 (emphasis in original). A *contrario*, where a discharge is procured by fraud, the soldier remains a soldier, subject to trial by court-martial, or so Colonel Winthrop might reason. Chief Judge Clark's opinion in *Wickham v. Hall*, 706 F.2d at 717 n.3, cites W. WINTHROP, *supra* note 204, at 550, for the proposition that a discharge obtained by falsehood or fraud may be revoked. But Colonel Winthrop's treatise says nothing expressly on the matter of who tries the fraud issue. That Colonel Winthrop would support the result in *Wickham v. Hall* is left to implication between the pages.

of the Field Artillery"²⁵² would just as steadfastly strike it down were it his judicial duty to do so.

And what of Wendy Wickham? Was she pregnant in fact, or merely a soldier disguised in maternity clothes? The matter, I'm afraid, will never be tried. As soon as the Army won its case in the Fifth Circuit, it dangled over Ms. Wickham's head a full release from the military, without fear of court-martial or jail, in exchange for a signed confession of guilt!²⁵³ Having had quite enough of the U.S. Army, Wickham signed on the dotted line. Naturally, this left her lawyer, who thought he had a triable case before the court-martial and a cert-worthy case before the Supreme Court, hanging in legal limbo.

OF THE FEE

We reach pleasurable ground: "The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client."²⁵⁴

Note well ye lawyers: Judge Tuttle has laid it down as the law of our Circuit that an attorney litigant proceeding pro se is entitled to an award of attorney's fees under the federal Freedom of Information Act.²⁵⁵ It was so held this term in *Cazalas v. United States Department of Justice*,²⁵⁶ and practical lawyers everywhere will doubtless approve of this one. Judge Tuttle rejected the usual facile arguments against allowing a successful pro se lawyer to take a statutory fee, as well as a judgment, against the defendant. "We find little evidence to support appellees' assertion that the purpose of the fee provision is to insure *objective* representation by an attorney. On the contrary, the fee provision is designed to promote *vigorous advocacy* on behalf of citizens seeking government infor-

252. From the title of chapter 10 of Justice Black's memoirs, H. BLACK & E. BLACK, *THE MAGNIFICENT REBEL: A PERSONAL MEMOIR*, (P. Baier ed.; forthcoming from Random House).

253. *Ex. rel.* Stewart J. Alexander, Esq., San Antonio, Tex., Ms. Wickham's counsel.

254. The words are those of Abraham Lincoln, in notes for a law lecture, quoted in F.T. HILL, *LINCOLN THE LAWYER* 241 (1906). Lincoln also had the right idea on matters of substance: "He never surrendered his conscience to a code; his sense of justice was never cowed by the tyranny of 'leading cases' and the decision of the highest court in the world never succeeded in convincing him that wrong was right." *Id.* at 43.

255. 5 U.S.C. § 552(a)(4)(E) (1982).

256. 709 F.2d 1051 (5th Cir. 1983).

mation²⁵⁷ Judge Tuttle brushed aside the notion that pro se lawyers, as distinguished from pro bono lawyers, should work for free: "Appellant amply demonstrated the costs she incurred, both from other work foregone and in terms of personal energy, due to her *pro se* work."²⁵⁸ Ms. Cazalas sought documents relating to alleged sexual discrimination she suffered as an Assistant United States Attorney. "Surely it is in the 'public interest' to discover, if true, that the Department of Justice is less than entirely just in its dealings," said Judge Tuttle.²⁵⁹ Surely he is right. "The public, as the beneficiary and the ultimate client of the Department of Justice's efforts to insure compliance with federal laws, needs to know the type of information sought by appellant in order to maintain effective oversight of its elected and appointed officials."²⁶⁰ The arguments mounted by the Government against allowing Ms. Cazalas to take her fee, said the court, "are inadequate to overcome the strong national policy of open government and the crucial role that attorney fees play in protecting this interest."²⁶¹

The result in *Cazalas* is "good news," according to one civil rights warrior I questioned.²⁶² And the reasoning of Judge Tuttle's opinion, which will doubtless carry great weight with his former colleagues on the old Fifth, augurs well for a similar holding in the future allowing pro se lawyers who lick the government to take a fee under the Civil Rights Attorney's Fees Awards Act.²⁶³ This, I'm sure, would be a welcome development among the Fifth Circuit's civil liberties lawyers—"Lilburne's Bastards," as they used to call us in seventeenth century England.²⁶⁴

257. *Id.* at 1056.

258. *Id.*

259. *Id.* at 1053.

260. *Id.* at 1054.

261. *Id.* at 1057.

262. *Ex rel. J. Minos Simon, Esq., Lafayette, Louisiana*, "an able lawyer" (per Tate, J., *Simon v. United States*, 644 F.2d 490, 495 (5th Cir. 1981)), who hung on like a bulldog for 10 years fighting a false arrest, eventually taking \$25,000 by way of settlement on the dawn of a long-awaited trial. Simon spent his birthday, Feb. 27, 1973, in the Fulton County Jail in Atlanta, where he was "placed in isolation, and subject to a strip search." *Id.* at 493. "If this could happen to me, a lawyer, imagine what could happen to a layman," Simon told the reporters. See *10-Year Old Suit Settled by Attorney for \$25,000*, Morning Advocate [Baton Rouge], Aug. 21, 1984, § B at 2, cols. 2 & 3.

263. 42 U.S.C. § 1988 (1982). The question whether an attorney proceeding pro se is entitled to such fees is, as Judge Tuttle noted, an open one in the Fifth Circuit. 709 F.2d at 1055 n.8 (citing *Cofield v. City of Atlanta*, 648 F.2d 986, 987 (5th Cir. 1981)).

264. J. FRANK, *THE LEVELLERS: A HISTORY OF THE WRITINGS OF THREE SEVENTEENTH-CENTURY SOCIAL DEMOCRATS: JOHN LILBURNE, RICHARD OVERTON, WILLIAM WALWYN* 87 (1955). When Overton was asked whether he was one of "Lilburne's Bastards," he merely

One more pointer on fees. If the defendant caves in on you, giving you what you want, be sure to collect your statutory attorney's fee. "Victory by judgment or an opponent's concession is not essential to identification of the 'prevailing party' entitled to recovery of an attorney's fee" ²⁶⁵ Often when cornered in court "a defendant may unilaterally undertake action that moots the suit." ²⁶⁶ In such a case, "plaintiff may still recover attorney's fees if he can show both a causal connection between the filing of the suit and the defendant's action and that the defendant's conduct was required by law, *i.e.*, not a wholly gratuitous response to an action that in itself was frivolous or groundless." ²⁶⁷ Of course, sometimes it's difficult to determine what prompted the defendant to change course. Judge Sam Johnson put it well in *Posada v. Lamb County, Texas*: "At bottom, the inquiry is an intensely factual, pragmatic one. Clues to the provocative effects of the plaintiffs' legal efforts are often best gleaned from the chronology of events: defendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to mend their ways." ²⁶⁸

EPILOGUE: OF JUNKED MOTOR VEHICLES AND THE EXCLUSIONARY RULE

Hughes said of Brandeis that he was "master of both microscope and telescope." ²⁶⁹ I had better lay aside the microscope and switch to a final, telescopic view of the Fifth Circuit's universe. My concluding remarks are necessarily impressionistic and somewhat personal. Gazing out from Mt. Olympus is haunting duty. I hear Holmes's voice—"not the least godlike of man's activities is the large survey of causes" ²⁷⁰—whispering in my ear.

First a word about an early legal acquaintance of mine—"revised," as the saying goes. *Price v. City of Junction, Texas* ²⁷¹ makes me smile. In that one, the court sustained the constitutionality of a "junk car" ordinance. Tourists used to call the

replied he was "free-born." *Id.*

265. *Williams v. Leatherbury*, 672 F.2d 549, 550 (5th Cir. 1982).

266. *Id.* at 551.

267. *Id.*

268. 716 F.2d 1066, 1072, (5th Cir. 1983).

269. Hughes, *Mr. Justice Brandeis*, in *MR. JUSTICE BRANDEIS* 3 (F. Frankfurter ed. 1932).

270. O.W. HOLMES, JR., *The Profession of the Law* in *SPEECHES* 22 (1891).

271. 711 F.2d 582 (5th Cir. 1983).

place "Junky Junction," but not anymore.²⁷² The police power is broad enough to save the ordinance substantively, and I'm glad to read that "aesthetics should not be ignored."²⁷³ There was plenty of due process built into the ordinance: ten days' notice and a public hearing before execution of the law by tow truck. Of course, government must move cautiously in this area. It could not, for example, condemn my '64 Comet and order it removed to Black's Auto Salvage in Brusly. I admire the thoroughness and clean constitutionality of the ordinance in question. As a younger man I had to write a junk car law for Cambridge, Massachusetts. I was a mere 3-L at the time, with a needed summer job in the City Solicitor's office. For old times' sake I keep a decoupage newspaper printing of the ordinance hanging on the wall. I shudder to think what a federal court would do to Cambridge's ordinance.²⁷⁴

This brings us to the exclusionary rule, which, in light of recent rulings, is also the talk of the town. In closing, we come full circle to the voice of the past, and to the influence of judicial heroes in giving shape to our law.

The Fifth Circuit was first in the Nation, among the federal circuits, to carve a "good faith" exception out of *Mapp v. Ohio*.²⁷⁵ Some say *United States v. Williams*²⁷⁶ is a proud boast. It was eagerly followed this term by three new Fifth Circuit utility balancers,²⁷⁷ and it is the fact that the Supreme Court of the United States has lately come round to our Circuit's view.²⁷⁸ I should have preferred to see the Supreme Court lead the Fifth Circuit, not follow it, by enforcing the Bill of Rights.

272. The stipulated record in the case indicated that the city was concerned about "junk cars being a fire hazard and a hinderance in the fighting of fires, an attractive nuisance to children; an obstacle in the luring of professional persons to locate in a city known as "Junky Junction," a liability in encouraging tourist trade, and an eyesore." 711 F.2d at 588.

273. *Id.* at 588-89.

274. Cambridge, Mass., Ordinance No. 773 (Sept. 16, 1968) (first Publication in Cambridge Chronicle-Sun, Aug. 22, 1968). The author is informed through the good offices of Mr. Paul E. Healy, Cambridge City Clerk, that old No. 733 is still on the books, that licenses to store junk cars in Cambridge are issued about twice a year under the Ordinance, and that, thank goodness, it "has not been questioned as to its constitutionality." Letter from Paul E. Healy to Paul R. Baier (Sept. 14, 1984) (copy on file with the Loyola Law Review).

275. 367 U.S. 643 (1961).

276. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

277. *United States v. Mahoney*, 712 F.2d 956 (5th Cir. 1983) (per Higginbotham, J., joined by Ingraham and Williams, JJ.).

278. *United States v. Leon*, 104 S. Ct. 3405, 3416 n.11 (1984).

Justice Brennan in his *Leon* dissent speaks of "the teaching of those Justices who first formulated the exclusionary rule,"²⁷⁹ and my mind drifts back to what Justice Tom Clark told my students about *Mapp v. Ohio* one month before he died. We were a small seminar—the Justice and a bus load of young people, with their teacher, on a field trip to the Court. I treasure the voice of that humble Texan's teaching:

I couldn't understand why *Wolf v. Colorado* said that the Fourth Amendment applied to the states, but it just didn't seem to go all the way—in fact it was just an empty gesture, sort of like what Chief Justice Hughes used to say: No use to have a Constitution—it's pretty, got all sorts of nice fringes around it, but it doesn't mean anything, just a piece of paper—unless you really live by it and enforce it. And so that's true with *Mapp* and the Fourth Amendment.²⁸⁰

279. 104 S. Ct. 3430, 3433 (Brennan, J., dissenting).

280. Interview with Tom C. Clark, Associate Justice of the Supreme Court of the United States, Retired, East Conference Room, Supreme Court of the United States, Washington, D.C. (May 3, 1977) (recorded with the permission of Justice Clark). Obviously, Tom Clark had his heroes who shaped his views, and perhaps the students who heard Justice Clark were influenced in turn by his teaching. See generally P. THOMPSON, *THE VOICE OF THE PAST: ORAL HISTORY* 225-26 (1978):

[T]he real justification of history is not in giving an immortality to a few of the old. It is part of the way in which the living understand their place and part in the world [H]istory can help people to see how they stand, and where they should go And in giving a past, it also helps them towards a future of their own making. And consider, in this connection, what Archibald Cox had to say when he wound up his review (91 HARV. L. REV. 1170, 1182-83 (1979)) of Joel Seligman's *THE HIGH CITADEL: THE INFLUENCE OF THE HARVARD LAW SCHOOL* (1978):

In the end, young men and women do not set their compasses solely—or even chiefly—by courses of formal instruction Much used to be done by portraying great figures in Anglo-American Law: Coke, Erskine, Marshall, Story, Evarts, Rufus Choate, Clarence Darrow, Holmes and Brandeis. The list goes on and on. Today one would add Robert H. Jackson, Hugo Black, Earl Warren, Felix Frankfurter, Thurgood Marshall, and many others. I cannot speak for my colleagues, but I have failed to present the examples that my classmates and I admired as Austin Scott, Felix Frankfurter, and Edmund Morgan presented them to us. The mood has seemed against it. History and heroes seemed to command little attention from the "now" generation. I would like to have the opportunity back.