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Constitutional Law; I. Equal Protection

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CONSTITUTIONAL LAW

*Paul R. Baier**

I. EQUAL PROTECTION

Judge Irving Goldberg's opinion in *Cleburne Living Center, Inc. v. City of Cleburne, Texas*,¹ which addresses mental retardation and equal protection, reflects the heroism of a hundred years ago and the same rock-like sense of justice that makes a judge great. All who labor in the Fifth Circuit, bench and bar alike, can be proud of this one.

The Fifth Circuit, in *Cleburne Living Center*, held that classifications based on mental retardation are "quasi-suspect."² "Discrimination against the mentally retarded is likely to reflect deep-seated prejudice. They have been subjected to a history of unfair and often grotesque mistreatment,"³ said Judge Goldberg. Mentally handicapped people have been segregated in remote, stigmatizing institutions; they possess relatively little political power; their condition is immutable; popular fears and uncertainty about them abound.⁴ Indeed, the Third Circuit has opined that "[t]he mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise

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The author wishes to thank Mr. Gerald Walton, Assistant Vice Chancellor for Academic Affairs, the University of Mississippi, for his historical diggings on the antifraternity agitation during Chancellor Kincannon's administration at Ole Miss. And, as always, the author is deeply indebted to Charlotte Melius, Madeline Hebert, and Isabel Wingerter, all excellent law librarians, for their friendship and help with the books.

1. 726 F.2d 191 (5th Cir. 1984), *aff'd in part, vacated in part*, 105 S. Ct. 3249 (1985).

2. [W]e hold that mental retardates constitute a "quasi-suspect" class; and, therefore, we test the ordinance according to the "intermediate" level of scrutiny established by the Supreme Court. Because the city has failed to prove that the ordinance substantially furthers a significant governmental interest, we hold that the ordinance violates the Equal Protection Clause.

726 F.2d at 193.

3. *Id.* at 197.

4. *Id.* at 197-98.

special solicitude."⁵ The reference, of course, is to *Carolene Products'* footnote four,⁶ which has achieved a measured following over the years as documented in last year's *Symposium*.⁷ What all this means is that the combination of historical prejudice, political powerlessness, and immutability "calls for heightened scrutiny of classifications discriminating against the mentally retarded."⁸ Heightened scrutiny is neither the strictest, generally lethal standard of review, nor the mildest standard, the test of "mere rationality."⁹ Instead, it is an intermediate level established by the Supreme Court and employed by the Fifth Circuit to test the Texas City ordinance.

At this point I'm sure the usual formulae of equal protection review are rolling around in the reader's head. Formulaic analysis, however, sometimes gets you into trouble, as we shall see in a moment.

And what was the disadvantaging classification? The city of Cleburne required a special use permit before the mentally retarded could live together in a group home. However, the city did not require such permits for other groups, such as fraternities. The panel responded accordingly to this restriction: "Because the city has failed to prove that the ordinance substantially furthers a significant governmental interest, we hold that the ordinance violates the Equal Protection Clause."¹⁰ None of the city's asserted goals, such as avoiding traffic congestion, was substantially served by the ordinance. As a result, the ordinance was deemed unconstitutional on its face and as applied.¹¹ Moreover, the "standardless requirement" of a special permit was "both vastly overbroad and vastly underinclusive,"¹² a damning facial flaw according to the court. In addition, nothing in the record indicated that mentally retarded

5. *Romeo v. Youngberg*, 644 F.2d 147, 163 n.35 (3d Cir. 1980) (en banc), *vacated and remanded*, 457 U.S. 307 (1982).

6. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), especially the third paragraph of the note, which speaks of "prejudice against discrete and insular minorities" as a "special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

7. See Baier, *Fifth Circuit Symposium: Constitutional Law*, 30 LOY. L. REV. 619, 621-22 (1984).

8. *Cleburne Living Center*, 726 F.2d at 198.

9. *Id.* at 193.

10. *Id.*

11. *Id.* at 200.

12. *Id.*

persons living in group homes are more disruptive or dangerous than other people. Cleburne's ordinance was bad on its face:

There is too great a potential for blanket discrimination, fueled by the very fears and prejudices that drove neighbors in this case to petition the City Council against the Featherston Home. We cannot sanction such unbridled discretion in dealing with a class that has suffered a history of mistreatment and political impotence.¹³

This is a bold stroke from a court whose canvassing of equality under the law has made it noble. This is high praise to be sure. But the court deserves it. Where else can these victims of public prejudice take refuge if not under the aegis of judges like Irving Goldberg?

Testing Cleburne's ordinance under intermediate scrutiny, the panel also condemned the ordinance "as applied," thereby overruling the City Council's administrative decision to deny a permit in this specific instance. After reviewing each of the factors involved in the Council's decision, Judge Goldberg concluded that "none of the proffered reasons for denying the Featherston permit substantially served an important government interest."¹⁴ For example, the City argued that the residents of the Featherston Home would be too crowded. But what about fraternity brothers squeezing together? "The City never justifies its apparent view that other people can live under such 'crowded' conditions when mentally retarded persons cannot."¹⁵ And Cleburne's argument "that the [Featherston] Home would be in a 500 year flood plain seems somewhat strained."¹⁶ With commendable restraint, the panel noted that "[t]hough the safety of the residents is important, the danger of a flood every five hundred years is not particularly great."¹⁷ As to the negative attitudes of adjacent property owners, Judge Goldberg responded bluntly: "The prejudices and fears of neighbors are not in themselves legitimate bases for discrimination."¹⁸ Otherwise, "prejudice becomes its own excuse."¹⁹

Cleburne Living Center is a courageous opinion from a protective panel of judges. It reflects the shielding role of courts under

13. *Id.* at 201.

14. *Id.* at 202.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

our constitutional system. It recalls the efforts of earlier judicial heroes who, by virtue of their judicial commission, sought to protect weak and helpless human beings against prejudice and public excitement.

Rehearing en banc was denied by the full Fifth Circuit, but only by the thinnest of margins, eight to seven.²⁰ Judge Garwood thought the *Cleburne* panel had gone too far, and he said so in his straight-forward fashion: "The mentally retarded present a wholly distinct situation. They *are* materially different from the rest of society, and are so as a result of their class-defining characteristics."²¹ As a result, Judge Garwood thought ill-advised the panel's novel rule that classification based on mental retardation is "quasi suspect." State regulations inevitably distinguish between the retarded and others. To strike them down on the basis of the same test used to judge distinctions based on gender "constitutes . . . a major and unwarranted extension of federal judicial power, to the substantial prejudice both of the judicial function and the principles of federalism."²² Judge Garwood's conclusion was a flag to the Supreme Court: "The unprecedented rule announced by the panel tells us, I fear, significantly more about the institutional powers of the federal judiciary than it does about the proper state treatment of the retarded."²³

It is probable that Judge Garwood's cautionary remark influenced the Supreme Court to grant certiorari. Justice White, writing for six justices, rejected the panel's holding that mental retardation is a quasi-suspect classification.²⁴ The majority's reasoning mirrors Judge Garwood's thinking. The mentally retarded are different; they have "distinguishing characteristics relevant to interests the state has the authority to implement."²⁵ Furthermore, Justice White urged caution, not judicial innovation:

How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legisla-

20. 735 F.2d 832 (5th Cir. 1984).

21. *Id.* at 833 (emphasis in original) (footnote omitted).

22. *Id.* at 834.

23. *Id.*

24. *City of Cleburne, Texas v. Cleburne Living Center*, 105 S. Ct. 3249 (1985), *aff'g in part and vacating in part*, 726 F.2d 191 (5th Cir. 1984): "We conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation." 105 S. Ct. at 3255-56.

25. 105 S. Ct. at 3255.

tors guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.²⁶

Moreover, national and state legislative efforts to aid the mentally retarded "negate[] any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers."²⁷ The Court dismissed the panel's conclusion of facial unconstitutionality because the Court would not "presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate."²⁸ The Court held that the proper way to remedy invidious discrimination against the retarded did not lie in creating a "new quasi-suspect classification and subject[ing] all governmental action based on that classification to more searching evaluation."²⁹ Rather, it suffices to apply the rational basis test of old: "To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose."³⁰

From this point forward, the Supreme Court followed the

26. *Id.* at 3256.

27. *Id.* at 3257.

28. *Id.* at 3258.

Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both state and federal governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

Id.

29. *Id.*

30. *Id.* "This standard," said the Supreme Court's majority opinion, "affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner." *Id.* The Court cautioned, however, that refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination:

The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as "a bare . . . desire to harm a politically unpopular group"—are not legitimate state interests. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.

Id. (citations omitted).

Fifth Circuit, agreeing with the panel's conclusion that the Cleburne ordinance was unconstitutional as applied: "Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case."³¹ This was at least a half-victory for the panel.

Some students of equal protection may find it strange that the Cleburne ordinance failed the mere rationality test. They would say the scrutiny applied by the Supreme Court in fact seems stricter than that usually associated with the "champagne promise"³² of rationality review. Doubtless there is some truth to the allegation. But this is not the place to discourse at length on the right test to apply to classifications disadvantaging the mentally retarded. Formulae are important, to be sure, if we are to have equal justice *under law*. Nevertheless, a court's sense of justice may have a good deal more to do with constitutional adjudication than is customarily acknowledged in the reports. *Cleburne Living Center* proves that magic formulae are not good substitutes for judicial judgment, especially when it comes to guaranteeing equal protection of the laws. This is a lesson that too few students, I'm afraid, ever grasp.

31. *Id.* at 3259.

32. "Old equal protection, it is fair to say, was no protection at all; the rational basis test was a mere champagne promise." Baier, *Fifth Circuit Symposium: Constitutional Law*, 30 Loy. L. Rev. 619 (1984). Dissenting in the *Cleburne* case, Justice Marshall, joined by Justices Brennan and Blackmun, thought the majority's "rational basis" rationale puzzling: "The Court holds the ordinance invalid on rational basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational basis test applicable to economic and commercial regulation." 105 S. Ct. at 3263 (Marshall, J., concurring in part, dissenting in part). Most second-year law students who have studied the law of equal protection would probably agree with Justice Marshall's observation:

Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny. To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called "second order" rational basis review rather than "heightened scrutiny." But however labelled, the rational basis test invoked today is most assuredly not the rational basis test of *Williamson v. Lee Optical* . . . and [its] progeny.

Id. at 3264 (citations omitted).

II. FREEDOM OF SPEECH

A. Public Employment

Ardith McPherson, like so many public employees of late, owes her continued government employment to the sensitivity of the Fifth Circuit and to Judge Tate, who reversed a summary judgment against her. *McPherson v. Rankin*³³ is one of many public employee lawsuits requiring judges to apply the burgeoning law addressing the free speech of public employees, in particular, the "*Pickering* balancing test":³⁴ "To arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer in promoting the efficiency of the public services it performs through its employees."³⁵

McPherson was fired from her job as a deputy constable for a remark she made after hearing of the attempted assassination of President Reagan. "[I]f they go for him again, I hope they get him,"³⁶ she told a co-worker at lunch. The remark capped what McPherson thought was a private tête-à-tête expressing opposition to the President's policies on welfare and unemployment. The trial court thought McPherson's remark unprotected as a matter of law, but the appeals panel identified several issues of material fact precluding summary judgment.

For example, a dispute focused on whether McPherson intended her remark to be taken seriously. Constable Rankin thought she was serious; McPherson testified, "I didn't mean anything by it."³⁷ Obviously, a crucial fact is in dispute here and summary judgment is not appropriate. As the panel points out, "[t]he issue of McPherson's intent is relevant to the present inquiry because it is imperative that a court's characterization of speech as political expression, for purposes of First Amendment protection,

33. 736 F.2d 175 (5th Cir. 1984).

34. *Pickering v. Board of Education*, 391 U.S. 563 (1968). 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 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 speech of the citizenry in general." *Id.* at 568. Judge Higginbotham's keen dissection of the *Pickering* balance in *Gonzales v. Benavides*, 712 F.2d 142 (5th Cir. 1983) is required reading on this subject in the Fifth Circuit.

35. 391 U.S. at 568.

36. 736 F.2d at 177.

37. *Id.* n.3.

be predicated upon consideration of its 'content, form, and context.'"³⁸ The context of the speech—including an employee's motive in making it—is especially material when public employees speak privately on the job.³⁹ If McPherson truly meant her remark as a form of political hyperbole, not as advocacy of harm to the President, then the *Pickering* balance would seem to weigh in her favor. But first, as Judge Tate makes abundantly clear, the true facts must be determined after trial on the merits. Summary judgment is simply too blunt an instrument in these public employee, free speech cases. Balancing the competing interests requires a razor, not a meat axe, even in the face of a public employee's blunt tongue.

By way of contrast, the trial court in *Solis v. Rio Grande City Independent School*⁴⁰ allowed the jury to decide whether the political activities of Amanda Solis and three other school teachers—their support for opposition school board candidates—was a substantial and motivating factor in the refusal of the school board to give these teachers their usual summer jobs. The jury answered "Yes" to special interrogatories and awarded plaintiffs \$5,900 for lost wages and \$100,000 for "humiliation, embarrassment and concern" flowing from the violation of their constitutional rights. Of course the first amendment protects public employees' campaigning activities as a form of protected speech, although the precise scope of the protection—the *McBee* balance in the Fifth Circuit—remains cloudy.⁴¹

Solis v. Rio Grande City Independent School turns on the second prong of the *Mt. Healthy* two-part test; that is, "whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to [plaintiffs'] reemploy-

38. *Id.* at 178-79 (quoting *Connick v. Meyers*, 461 U.S. 138, 147-48 (1983)).

39. On this point, Judge Tate refers the reader to *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009, 1013 (5th Cir. 1984) (en banc) (balancing factors include employee's motives in voicing the expressions at issue and their context). 736 F.2d at 179.

40. 734 F.2d 243 (5th Cir. (1984).

41. See *McBee* discussed in Baier, *Fifth Circuit Symposium: Constitutional Law*, 30 Loy. L. Rev. 619, 630-39 (1984). For criticism of the *McBee* balancing act, from the pen of a perceptive student, see Note, *McBee v. Jim Hogg County: On Balance A Risky Business*, 45 La. L. Rev. 1095 (1985). The Eighth Circuit's approach differs from the law of the Fifth Circuit: "The *Pickering* balancing test need not be used in determining whether the first amendment protects political affiliation." *Barnes v. Bosley*, 745 F.2d 501, 506 (8th Cir. 1984), cert. denied, 105 S. Ct. 2022 (1985). Undoubtedly, given the conflicting approaches among the federal circuits, the Supreme Court will eventually have to return to this murky area of the law.

ment even in the absence of the protected conduct.”⁴² As the Fifth Circuit has said, “[the *Mt. Healthy* charge] is succinct and clear.”⁴³ And yet the trial court “submitted no special question [to the jury] which under any reading could encompass the second inquiry of *Mt. Healthy* or permit a definitive answer on that question by the jury.”⁴⁴ The defendants requested an interrogatory on this point, thereby preserving their objection to the trial court’s failure to charge on the second prong.

Judge Brown had no alternative but to reverse, notwithstanding that “this Court is particularly chary of disturbing a jury verdict rendered after a full trial.”⁴⁵ The opinion is a loud admonition to the trial bench. A proper *Mt. Healthy* charge is simple. “It should be given,”⁴⁶ no if’s, and’s, or but’s about it. And Judge Brown’s opinion also sounds a cautionary note to the trial bar who litigate these political retaliation cases: labor over your proposed instructions carefully, lest an appellate court rob you of a \$100,000 jury verdict.

Remanding the case for a new trial, the panel announced that “because factors [1] and [2] of *Mt. Healthy* are inseparably intertwined, both should be retried.”⁴⁷ The court also hinted that the jury’s quantum may have been too great: “Of course, damages may be awarded for embarrassment or mental distress resulting from a deprivation of constitutional rights. Absent proof of actual injury, however, only nominal damages may be awarded for violation of constitutional rights.”⁴⁸ Although plaintiffs testified to varying degrees of depression, feeling “letdown” and “very, very sad,” the panel emphasized that “[n]o proof of any physical manifestations of plaintiffs’ asserted depression and embarrassment was given at trial.”⁴⁹ Since the court reached out to discuss the issue of “Excessive Damages,” one suspects that the reviewing judges were un-

42. 734 F.2d at 246 (quoting *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). The first prong requires plaintiff to prove “that his conduct was constitutionally protected, and that ‘this conduct was a “substantial factor” or, to put it in other words, that it was a “motivating factor” in the Board’s decision not to rehire him.’ ” 734 F.2d at 246 (quoting *Mt. Healthy*, 429 U.S. at 287) (footnote omitted by Fifth Circuit).

43. *Bueno v. City of Donna*, 714 F.2d 484, 497 (5th Cir. 1983) (Rubin, J., specially concurring).

44. 734 F.2d at 249.

45. *Id.* at 245.

46. *Id.* at 250.

47. *Id.* (footnote omitted).

48. *Id.* (citations omitted).

49. *Id.* at 251.

happy with the jury's generosity.⁵⁰

The jury was properly charged on both prongs of the *Mt. Healthy* test in *Wells v. Hico Independent School District*,⁵¹ another school teacher, refusal-to-rehire case. The jury returned a verdict on first amendment grounds in plaintiff's favor and the appellate court affirmed, finding "at least *some* evidence that a material portion of [the teacher's] speech pertained to matters of public concern, and did not relate only to matters of exclusively personal interest, within the rule of *Connick*."⁵² The teachers involved had spoken out in favor of the federally funded "Right to Read" program, a subject of debate in the community.

Defendants' failure to move for a directed verdict in the district court left the appellate court with only the narrowest responsibility: "Because appellants wholly failed to in *any* manner preserve the issue of sufficiency of the evidence to support plaintiffs' First Amendment claims, we must affirm the jury verdict in this respect if there is *any* evidence to support it."⁵³ Applying this "distinctly limited standard of review,"⁵⁴ the court found "at least *some* evidence that this protected speech of plaintiffs was a motivating factor in their nonrenewal. Nor does the evidence conclusively show that nonrenewal would have occurred absent such protected speech."⁵⁵ The teachers were ordered reinstated with back pay, although the award of punitive damages against individual Board members was reversed since "there is absolutely no evidence that the individual Board members acted with malice or with a 'reckless or callous disregard' for plaintiffs' [first amendment] rights in this connection."⁵⁶

B. Medical Staff Privileges

*Daly v. Sprague*⁵⁷ returned to the Fifth Circuit this term. A

50. *Id.* at 250. The issue of "Excessive Damages" was separately stated and separately considered at the conclusion of Judge Brown's opinion.

51. 736 F.2d 243 (5th Cir. 1984), *cert. dismissed*, 106 S. Ct. 111 (1985).

52. 736 F.2d at 249 (emphasis in original) (citing *Connick*, 461 U.S. 138 (1983)).

53. 736 F.2d at 249 (emphasis in original).

54. *Id.* at 250.

55. *Id.* at 249.

56. *Id.* at 259, applying the rule of *Smith v. Wade*, 461 U.S. 30, 51 (1983), that only a "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages."

57. 742 F.2d 896 (5th Cir. 1984). For the first round, see *Daly v. Sprague*, 675 F.2d 716

state-operated teaching hospital suspended Dr. Daly's clinical staff privileges and denied him communication with his hospital patients. On appeal a second time, the court curtly rejected the doctor's first amendment challenge stating that "[i]t is beyond dispute that a state operated hospital has the right, and the duty, to regulate the conduct of its physicians. Limitations on professional conduct necessarily affect the use of language and association; accordingly, reasonable restraints on the practice of medicine and professional actions cannot be defeated by pointing to the fact that communication is involved."⁵⁸ A doctor's intention to speak and associate with his hospital patients "is clearly subsumed within and subservient to the regulation of medical practitioners in state hospitals."⁵⁹ Dr. Daly was not forced to relinquish his first amendment rights as a private citizen, "[o]nly those state clinical privileges extended to him as a physician-employee of the medical center."⁶⁰ In rejecting the physician's claim, the court indicated that there are "substantial limits"⁶¹ placed on the extent to which a public hospital's decisions may be restrained on first amendment grounds. In a cautious remark, the Fifth Circuit noted that "courts should not intervene in the resolution of conflicts which arise in the daily operation of [public hospital systems] unless basic constitutional values are directly and sharply implicated."⁶²

And in another case involving a suspended physician, *Davis v. West Community Hospital*,⁶³ the Fifth Circuit held that the speech in question was unprotected as a matter of law, because it concerned only personal grievances outside the coverage of the first amendment. The *Davis* panel adopted the Ninth Circuit's formulation of the *Connick v. Meyers*⁶⁴ inquiry as follows:

Speech by public employees may be characterized as not of "public

(5th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983), discussed in Baier, *Fifth Circuit Symposium: Constitutional Law*, 29 LOY. L. REV. 647, 674-76 (1983).

58. 742 F.2d at 898.

59. *Id.* at 899.

60. *Id.* (footnote omitted).

61. *Id.* n.5 (citing *Board of Educ. v. Pico*, 457 U.S. 853, 863-64 (1982)).

62. 742 F.2d at 899 n.5.

Pico further illustrates that courts should not intervene in the resolution of conflicts which arise in the daily operation of school systems unless basic constitutional values are directly and sharply implicated. The same considerations appear to apply to the university medical center in view of the state's extensive authority to regulate the practice of medicine.

63. 755 F.2d 455 (5th Cir. 1985).

64. 461 U.S. 138 (1983).

concern" when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies. On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government merits the highest degree of first amendment protection.⁶⁵

Dr. Davis's in-house complaints about his co-workers and hospital administrators, "[c]onsidered in their entire context,"⁶⁶ did not "fall under the rubric of matters of public concern but, instead, falls under the banner of matters of pure personal interest."⁶⁷ Hence a jury verdict for Dr. Davis on his first amendment claim was reversed as a matter of law.

III. PUBLIC EMPLOYMENT AND SUBSTANTIVE DUE PROCESS

Public employment implicates two constitutionally protected substantive interests: "property" defined by reference to state law,⁶⁸ and "liberty" defined by the federal judiciary.⁶⁹ *Wells v.*

65. 755 F.2d at 461 (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)) (citations omitted by Fifth Circuit).

66. 755 F.2d at 461.

67. *Id.*

68. Per Stewart, J., for the Court in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972):

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Some commentators question the idea that constitutional "property" should be determined exclusively by reference to state law. See Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 434-39 (1977). Regardless of what one thinks of the idea that property interests are not created by the Constitution, certainly the Fifth Circuit is obliged to follow the law—however well or poorly the Supreme Court declares it. And the Fifth Circuit has fallen in line on this matter of constitutional property: "[W]e look to state law for the existence of a property interest." *Daly v. Sprague*, 675 F.2d 716, 727 (5th Cir. 1982) (citing *Moore v. Otero*, 557 F.2d 435, 437 (5th Cir. 1977)), *cert. denied* 460 U.S. 1047 (1983).

69. The *locus classicus*, of course, is Mr. Justice McReynolds's *ex cathedra* declaration in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citation omitted):

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own

*Hico Independent School District*⁷⁰ is a good example of public employee claims of abridgment of property and liberty interests. The school teachers involved worked under one-year contracts of employment which were not renewed. The jury found that plaintiffs' property interests had been violated since the school district had failed to follow its own grievance procedures in refusing to renew plaintiffs' contracts.

Plaintiffs claimed that the District's grievance policies "created an expectation of continued employment amounting to a property right," relying on the Supreme Court's recognition that state institutions through their own internal employment policies may "give rise to a state law implied contractual right based on 'mutually explicit understandings.'"⁷¹ This is a fine legal theory which captured the jury's fancy. However, in due course, the appellate court rescued the School District, holding that the facts simply did not fit any property interest theory of the case. According to the panel, the School District's grievance policies relate solely to processing employee grievances; they do not limit the District in its relations with its employees. "This policy says *nothing* about either discharge or nonrenewal of any employee."⁷² Hence, "it is plain, we believe, that the School District's *grievance* policy could not and did not implicate a property interest on the part of Mrs. Braune and Mrs. Wells."⁷³

Furthermore, under Texas law, which the *Hico* panel followed as controlling, the School District operated under fixed term contracts for its teachers, not continuing contract provisions that create tenure for those Texas school districts which opt for it. The Fifth Circuit has ruled that school districts not adopting Texas' continuing contract law cannot create an implied contractual right to reemployment by their internal policies and practices.⁷⁴ Said Judge Garwood on appeal, "it is wholly unreasonable to read entirely by implication into these policies . . . a purportedly binding restriction on the otherwise plenary power of the School Board to elect not to renew plaintiffs' contracts at the expiration of their

conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

70. 736 F.2d 243 (5th Cir. 1984).

71. *Id.* at 252 & n.12 (quoting *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)).

72. 736 F.2d at 254 (emphasis in original).

73. *Id.* (emphasis in original).

74. *Burris v. Willis Indep. School Dist.*, 713 F.2d 1087, 1090-91 (5th Cir. 1983).

terms.”⁷⁵ As a matter of law, therefore, the district court erred in submitting the property interest theory to the jury. Judge Garwood’s decision on this aspect of the case is as sound as it is straightforward, although plaintiffs’ counsel should be commended for what was a good try below.

Focusing on the liberty aspect of *Hico* reveals a strange affair indeed. The jury, obviously sympathetic to the teachers involved, also found that plaintiffs’ liberty interests were abridged, although they were never told “what is *necessary* in order for that to be so.”⁷⁶ It is possible that the jury may have thought that nonrenewal alone was enough to invoke a liberty interest. Judge Garwood’s restrained reaction on appeal—his quiet correction of glaring error—is commendable. Doubtless he is right to say that “there is a general public commonsense perception that the loss of one’s job can be stigmatizing in itself.”⁷⁷ However, this result is insufficient to raise a protected liberty interest. “[T]he law requires more than mere nonrenewal to find a liberty deprivation”⁷⁸ Because the common sense of the public is not the law of the Constitution, at least not in this area of public employee “liberty,” Judge Garwood’s opinion cautions the trial bench to instruct the jury carefully on the legal elements of a liberty deprivation. If not, reversal is mandated.

And what are the necessary elements of a liberty claim? Judge Garwood’s recitation is a tight compendium of controlling law that lawyers and law students would do well to heed. First, the employee must show that his employer has brought false charges against him that “might seriously damage his standing and associations in his community.”⁷⁹ Nonrenewal alone “is not such a blight upon his good name, reputation, honor, or integrity as to constitute a deprivation of liberty.”⁸⁰ The required stigma—be-

75. 736 F.2d at 255. The court continued:

Our *Burris* decision controls. Neither the referenced policies nor any other evidence justifies the conclusion that plaintiffs had, under Texas law, any property interest in their teaching positions extending beyond the one-year terms of their contracts with this School District which operated under the statutory nontenure system. Because there was insufficient evidence of a property interest, the district court erred in submitting the property interest theory to the jury.

Id.

76. *Id.* at 258 (emphasis in original).

77. *Id.*

78. *Id.*

79. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

80. *Dennis v. S & S Consol. Rural High School Dist.*, 577 F.2d 338, 340 (5th Cir. 1978).

yond nonrenewal—"must be imposed by the state in connection with its denial of a right or status previously recognized by state law,"⁸¹ although "loss of a property interest (such as tenured employment) is not required."⁸² The specific kinds of state rights or status the court demands is not exactly clear. The required stigmatization must be "in or as a result of the discharge process."⁸³ The aggrieved employee must show that the governmental agency has made or is likely to make its charges public "in any official or intentional manner, other than in connection with the defense of [related legal] action."⁸⁴ Also, "the employee must not have received a meaningful hearing to clear his name."⁸⁵ And finally, "[t]he charges must be false."⁸⁶

Nothing in the evidence in *Hico* linked the Board to any stigmatizing charges against plaintiffs. "There is no evidence that the Board members or the District administration did anything in this regard other than listen to the grievance of the other teachers; nothing purporting to constitute Board or District administration action on this grievance is shown to have occurred."⁸⁷ Furthermore, the jury was not instructed, as it should have been, that any stigmatizing "charges" against the plaintiffs "must have been made or approved by the defendants and made (or likely to be made) public by them."⁸⁸ These errors required a reversal and remand for a new trial on the liberty interest claims.

Judge Jolly would have reversed outright, finding no evidence at all supporting plaintiffs' liberty theory of the case.⁸⁹ It appeared to Judge Jolly "a manifest miscarriage of justice to require the defendants to submit to a second trial of a claim in support of which the plaintiffs produced no evidence at the first trial."⁹⁰ There is

81. *Wells v. Hico Indep. School Dist.*, 736 F.2d at 256.

82. *Id.*

83. *Wells v. Doland*, 711 F.2d 670, 676 (5th Cir. 1983) (citing *S & S Consol. Rural High School Dist.*, 577 F.2d at 341).

84. *Kaprelian v. Texas Woman's Univ.*, 509 F.2d 133, 139 (5th Cir. 1975).

85. *Wells v. Hico Indep. School Dist.*, 736 F.2d at 256 (footnote omitted). The remedy for a deprivation of liberty, it should be noted, is a name-clearing hearing before the governing body. *White v. Thomas*, 660 F.2d 680, 685 (5th Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982). It is not necessary that the hearing occur prior to publication of the stigmatizing charges. *In re Selcraig*, 705 F.2d 789, 796 (5th Cir. 1983).

86. *Wells v. Hico Indep. School Dist.*, 736 F.2d at 256 (citing *Codd v. Velger*, 429 U.S. 624, 628 (1977)).

87. 736 F.2d at 257.

88. *Id.* at 258.

89. *Id.* at 260 (Jolly, J., dissenting in part).

90. *Id.* at 261.

much sense in Judge Jolly's thinking, but procedure is procedure. As seen in the majority's opinion, the defendants' failure to question the sufficiency of the evidence at trial by a motion for directed verdict or motion for new trial foreclosed the point on appeal.⁹¹

In the words of Judge Gee's reversing opinion, *Campos v. Guillot*⁹² also involved a trial conducted under a "serious misapprehension of the law" as it relates to the liberty interest.⁹³ After an investigation of alleged improper police surveillance by Chief of Police Campos for his own private purposes, the city council of Missouri City, Texas, asked for Campos' resignation. The city manager and council wanted to keep the matter private and did nothing to publicize their confidential findings. However, Chief Campos insisted on and was granted a public hearing. In due course, the Chief's handling of his department was thrown open to public scrutiny. As a result, the council voted to fire him.

Suit followed and the jury returned a verdict for the Chief, a verdict the appellate court swiftly set aside: "[n]owhere in the court's instructions to the jury is it advised that unless the stigmatizing matter is made public by the employer in connection with the discharge no 'name-clearing' proceeding is required."⁹⁴ Therefore, the jury was left to believe that even unpublicized charges could give rise to a right to a name-clearing hearing. As Judge Gee concluded, "[t]hat is not the law."⁹⁵ Without publication of the charges, Campos "accrued no right to a name-clearing proceeding."⁹⁶ Moreover, Campos' insistence to publicize the charges against him removed the activity from a protected procedural process.

Only where the public employee is publicly defamed in connection with his discharge is he entitled to an opportunity to respond to the charges in public. Nothing of that sort occurred here, since Campos's employer strenuously sought to prevent the charges against him from becoming public. "It thus appears that Mr. Campos himself, rather than the city, was the cause of whatever public airing the charges against him and his discharge

91. *Id.* at 259 n.24 (majority opinion).

92. 743 F.2d 1123 (5th Cir. 1984).

93. *Id.* at 1126.

94. *Id.*

95. *Id.*

96. *Id.*

received.”⁹⁷ Because the trial court failed to charge the jury regarding the necessary “publication” element of a liberty abridgment, the jury may well have returned a verdict against the defendants “based on charges that they had sought to keep confidential and never published—until the plaintiff demanded it. This was reversible error.”⁹⁸

The reader may wonder what an employee is supposed to do to save his job in the face of *false* accusations strenuously kept secret by his governmental employer. Unfortunately, the Supreme Court’s decision in *Bishop v. Wood*⁹⁹ holds, perhaps wrongly, that “[t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.”¹⁰⁰ Such an employee is entitled to no name-clearing hearing, although he “remains as free as before to seek another [job].”¹⁰¹ This may well strike an ordinary man as unfair, especially one who owes his daily bread to governmental employment.

Three other cases involving public employees’ substantive due process claims merit brief mention. *Russell v. Harrison*¹⁰² affirms a summary judgment against former university professors who sued when their contracts of employment were cancelled in mid-year for fiscal reasons. Although the professors’ complaint was sufficient to state a constitutional claim, the defendant Board of Trustees’ evidence revealed a genuine financial emergency necessitating termination of the plaintiffs’ contracts. The evidence showed that the dismissals were based “on an analysis of the most efficient staffing per full-time student” and “uniform criteria bearing a reasonable relationship to the universities’ financial problem.”¹⁰³ These findings satisfied the due process requirement. The court focused on the defendant Board’s actions and determined that “at the least the actions were not arbitrary and capricious, or racially moti-

97. *Id.*

98. *Id.*

99. 426 U.S. 341 (1976).

100. *Id.* at 350. For an egregious example of how *Bishop v. Wood* has been applied in the Fifth Circuit, see *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir.), *cert. denied*, 464 U.S. 965 (1983) (Brennan, Marshall, and Blackmun, JJ., dissenting from denial of *cert.*). For the author’s reaction to *Shawgo v. Spradlin*, see Baier, *Fifth Circuit Symposium: Constitutional Law*, 29 Loy. L. Rev. 647, 669 (1983) (“But the net result in this case strikes me as perilously wrong.”).

101. *Board of Regents v. Roth*, 408 U.S. 564, 575 (1972).

102. 736 F.2d 283 (5th Cir. 1984).

103. *Id.* at 288.

vated.”¹⁰⁴ Since the professors failed to adduce evidence showing the existence of a genuine issue of material fact regarding the constitutionality of their dismissal, summary judgment against them was proper.

*Everhart v. Jefferson Parish Hospital District No. 2*¹⁰⁵ reaffirms the Fifth Circuit’s general unwillingness to involve itself in the internal affairs of public hospitals in the name of due process. The court upheld a requirement that an applicant for admission to the medical staff of a public hospital must establish his “ability to work with others”¹⁰⁶ to the satisfaction of the hospital’s governing body. According to Judge Hill’s opinion, the board’s consideration of Everhart’s interpersonal relationships at the hospital was “reasonably related to the provision of adequate medical care.”¹⁰⁷ As a result, the board’s denial of staff membership to Everhart was “neither arbitrary nor capricious and did not deprive him of substantive due process.”¹⁰⁸ The Fifth Circuit requires only that “the procedures employed by the hospital are fair, that the standards set by the hospital are reasonable, and that they have been applied without arbitrariness and capriciousness.”¹⁰⁹ The court also rejected Everhart’s claim that the potential effects of poor interpersonal relationships are not a matter of medical expertise. While the character of a man is, in essence, a question of human nature, “when that character becomes embroiled in the confines of a hospital environment, his character and his ability to work effectively in such an environment is a question uniquely suited to the hospital board.”¹¹⁰ Lastly, given the court’s “obvious lack of medical expertise,”¹¹¹ the majority opinion demonstrated great deference to the governing board’s decision in the grant or denial of staff privileges.

Finally, *Hatton v. Wicks*¹¹² is a hard case on its facts. However, the reviewing court was quite unwilling to rescue Ethel Hatton from a firing for insubordination, although she had taught the sixth grade at the same school for ten years. In this case, the court

104. *Id.*

105. 757 F.2d 1567 (5th Cir. 1985).

106. *Id.* at 1572.

107. *Id.*

108. *Id.*

109. *Id.* at 1573 (citing *Laje v. R.E. Thomason Gen. Hosp.*, 564 F.2d 1159, 1162 (5th Cir. 1977), *cert. denied*, 437 U.S. 905 (1978)).

110. 757 F.2d at 1573.

111. *Id.* at 1572 (citing *Laje*, 564 F.2d at 1162).

112. 744 F.2d 501 (5th Cir. 1984) (summary calendar).

found that Mississippi law was not controlling: "Mississippi cannot by defining 'insubordination' or other grounds for discharge of teachers create or eliminate federal constitutional rights. The federal rights are independent of the state law."¹¹³

No question was raised concerning the motive for Hatton's discharge. She was fired for twice failing to accept a "disciplinary problem" into her class when ordered to do so by the principal. Although the particular pupil was unruly, "he did not constitute such a serious problem that he could not attend regular school classes with other students."¹¹⁴ On these facts there was no violation of substantive due process. The principal had the right to make the challenged assignment; the teacher had no right to refuse.

Judge Williams bends over backwards to explain that "a teacher who refuses to carry out her or his obligations in this manner is 'interfering with the regular operation of the schools,' and is engaged in conduct which 'materially and substantially impedes the operation or effectiveness of the educational program.'" ¹¹⁵ Under these circumstances, Judge Williams concluded that the court would not interfere in the details of the school's administration; the majority found no constitutional violation in this case.¹¹⁶ Moreover, there was neither "the slightest hint of racial, religious, or gender discrimination, [n]or interference with her free speech or other personal rights."¹¹⁷ One senses that Judge Williams' opinion is aimed directly at appellant; he seeks to explain the law to a sixth-grade teacher, not to a lawyer versed in substantive due process, and to affirm only after a thorough public airing of the facts and the law.

On the other hand, Judge Jolly would have affirmed Ethel Hatton's firing without troubling over an appellate opinion. In his special concurrence, he quipped that "to dwell on cases like this trivializes the truly important values and rights protected by the Constitution of the United States of America."¹¹⁸ "That federal courts should be made to second-guess everyday, mundane, ordi-

113. *Id.* at 503.

114. *Id.* at 504.

115. *Id.* (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968) and *Brantley v. Surles*, 718 F.2d 1354, 1359 (5th Cir. 1983)).

116. 744 F.2d at 504.

117. *Id.*

118. *Id.* (Jolly, J., specially concurring).

nary, nonracial administrative decisions of the state school system demonstrates how pandering to the common cavils of public employees leads to the wasted time, expense, and inconvenience of all parties."¹¹⁹ These are harsh words, bluntly expressed and sincerely believed. However, Judge Williams' opinion, joined by Judge Hill, probably was aimed more at dispelling any lingering sense of unfairness among the public school teachers of Columbus, Mississippi, than at pandering to the cavils of one of their number.

IV. PUBLIC EMPLOYMENT AND PROCEDURAL DUE PROCESS

Judge Politz's prescient opinion in *Findeisen v. North East Independent School District*¹²⁰ protects all *tenured* public school teachers in the Fifth Circuit from discharge without notice of the reasons for the discharge and *pre*-termination opportunity to respond. The opinion lays down important black letter law: "Where the property interest is the employment of a tenured public school teacher the teacher must be provided timely notice and an opportunity to answer charges so as to minimize the likelihood of an erroneous discharge."¹²¹ The court carefully distinguishes *Parratt v. Taylor*¹²² which holds that *post*-deprivation state tort remedies are sufficient to generate "either the necessity of quick action by the State or the impracticability of providing any meaningful predeprivation process can . . . satisfy the requirements of procedural due process."¹²³ Unlike *Parratt*, the present action

affects Findeisen's professional standing and livelihood. The termination of a tenured public school teacher adversely impacts on the teacher's personal and professional standing in both the educational community and the greater societal community. Findeisen's claim is not for a few dollars worth of hobby goods which were negligently lost; it involves his career. . . . [T]here was no necessity for hasty action; no emergency existed [A]bsent the occasional emergency, a school board can easily hold a meaningful predeprivation hearing to properly consider whether to discharge a tenured teacher.¹²⁴

119. *Id.*

120. 749 F.2d 234 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 2657 (1985).

121. 749 F.2d at 239.

122. 451 U.S. 527 (1981).

123. 749 F.2d at 238 (footnote omitted) (citing *Parratt*, 451 U.S. at 539).

124. 749 F.2d at 239.

In the context of discharge of a tenured public school teacher, the court perceived "no *Parratt*-directed change in the essential teachings of *Roth*, *Sindermann* and their progeny."¹²⁵ Now here, certainly, is straight talk from the federal bench.¹²⁶ It is always gratifying to read law that fits reality.

On the other hand, Judge Garwood's concurring opinion in *Findeisen* questions why pre-termination process is constitutionally due when "wholly adequate and previously well established state procedures exist under which the School District's actions may be subsequently challenged '*de novo*' and full recovery had for any economic loss."¹²⁷ As Judge Garwood sees it, "[t]hat protection of this special, predeprivation kind is constitutionally required across the board for all state employees with any type of tenure or employment contract seems unrealistic and not in keeping with our traditional expectations and understandings."¹²⁸ Nevertheless, Judge Garwood agrees with the majority, noting that "[t]hese anomalies, however, appear sufficiently enmeshed in the current tangled web of the jurisprudence on this subject as to be beyond attempted amelioration by a panel of this Court."¹²⁹

It is to Judge Politz's credit that the tangled web is no more. Less than two months after *Findeisen* was handed down, the Supreme Court, in *Cleveland Board of Education v. Loudermill*,¹³⁰ reached the same result and used the same reasoning found in the carefully drafted opinion by Judge Politz. The parallels in thinking are striking. According to Justice White, "[t]he need for some form of pretermination hearing . . . is evident from a balancing of the competing interests at stake."¹³¹ Reflecting the thinking of our Cir-

125. *Id.* (footnote omitted) (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sincermann*, 408 U.S. 593 (1972)).

126. Judge Wisdom's companion opinions in *Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984) and *Thibodeaux v. Bordelon*, 740 F.2d 329 (5th Cir. 1984) are also perceptive judicial canvasses that distinguish *Parratt v. Taylor* and hold it inapplicable "if the plaintiff alleges a violation of a substantive right protected by the Constitution against infringement by state governments." *Augustine v. Doe*, 740 F.2d at 327. And in the context of procedural due process, "*Parratt* applies only when the nature of the challenged conduct is such that the provision of predeprivation procedural safeguards is impracticable or infeasible." *Id.* at 329. In other words, "*Parratt v. Taylor* is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air," said Judge Wisdom, another straight-shooter from the bench. *Id.*

127. 749 F.2d at 240 (Garwood, J., concurring).

128. *Id.* at 240-41 (footnote omitted).

129. *Id.* at 241.

130. 105 S. Ct. 1487 (1985).

131. *Id.* at 1494.

cuit Justice and Judge Politz, the Court held that "the significance of the private interest in retaining employment cannot be gain said."¹³² Furthermore, the Court found that an opportunity for the employee to respond to an imminent discharge is essential to an accurate court decision.¹³³ Both Justice White and Judge Politz agreed that neither a governmental interest in immediate termination nor an administrative burden or delay would outweigh the interest in affording an employee a predetermination hearing.¹³⁴

Thus, it is now the sensible law of the Constitution that all tenured public employees are vested with a property right in continued employment. According to *Loudermill*,

[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.¹³⁵

Notice that this gives a public employee a chance to save his job before he is let go; he is entitled to present his side of the story before the axe falls. The rationale behind this protection is the belief that talk between an employee and his public employer may dispel differences between them, saving a job now and then.

Before noting a few technical pointers touching procedural due process and public employment, it is worth observing that the same Dr. Davis who lost his free speech verdict to Judges Hill, Rubin, and Tate in *Davis v. West Community Hospital*¹³⁶ succeeded in convincing the panel to affirm on due process grounds. As a result, the decision reinstated Dr. Davis to the medical staff and upheld a \$10,000 jury verdict for due process damages.

Turning to the technical points of the case, first, because there existed a factual dispute as to the sufficiency of the hearing procedures resulting in Davis's suspension, "the due process issue was properly presented to the jury."¹³⁷ In other words, lawyers who try these due process cases for plaintiffs would do well to probe the

132. *Id.*

133. *Id.*

134. *Id.* at 1495.

135. *Id.* at 1495 (citation omitted).

136. 755 F.2d 455 (5th Cir. 1985). See *supra* note 63 and accompanying text.

137. 755 F.2d at 464.

decision making of their opponent. For example, in this case, the hospital board allowed Dr. Davis to present evidence during the suspension hearings. However, it appears that the actual decision-making body did not consider such evidence in its final determination. Thus, it is to counsel's credit that he unearthed such damning data during the discovery phase. One never knows what one will find by deep digging into the enemy's files.

Second, even though Dr. Davis suffered no resulting loss of income—indeed he earned more money at other hospitals—he still took \$10,000 in due process “actual damages.”¹³⁸ Just what these actual damages are is not self-evident, although there is talk in another case of “damages for mental or emotional distress *flowing from the loss of* [plaintiff's] *procedural rights*.”¹³⁹ Denial of due process, it seems, can be a costly thing.

Ad Damnum

Related to the issue of damages is the back pay principle of *Wheeler v. Mental Health and Mental Retardation Authority*.¹⁴⁰ Ms. Wheeler was lawfully terminated on September 27 for stealing Tranxene, a drug, from her workplace. Judge Jolly quite properly held Wheeler was unconstitutionally fired on August 4 because her initial discharge did not meet the stringent demands of due process. Interestingly enough, all this procedural deficiency was later cured by a procedurally flawless hearing on September 27. The question then became whether Ms. Wheeler should take back pay from August 4 to September 27. The court held on this issue as follows:

If, however, the defendants fail to prove that Wheeler would have been dismissed on August 4 absent procedural defects, Wheeler will be entitled to back pay from August 4 until September 27. In that case, the procedural due process violation could properly be viewed as the cause of the initial discharge and the award of back pay would constitute compensation to Wheeler rather than a windfall.¹⁴¹

The justice of the *Wheeler* rule is likely to escape lay perception,

138. *Id.* at 468.

139. *Wheeler v. Mental Health & Mental Retardation Auth.*, 752 F.2d 1063, 1072 (5th Cir. 1985) (emphasis in original). “Those damages, however, must be proved; they will not be presumed.” *Id.* (citing *Russell v. Harrison*, 736 F.2d 283, 291 n.17 (5th Cir. 1984); *Carey v. Phipps*, 435 U.S. 247, 262 (1978)).

140. *Wheeler*, 752 F.2d 1063.

141. *Id.* at 1071-72.

although most assuredly it is a sound prophylactic against sloppy discharges. The court emphasizes that even absent a denial of liberty or of property, "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed."¹⁴²

As mentioned earlier, Wheeler may recover damages for "mental or emotional distress *flowing from the loss of her procedural rights*,"¹⁴³ regardless of defendants' success in proving an August 4 discharge absent procedural defects. However, these damages must be proved; they will not be presumed.¹⁴⁴ Another panel of Fifth Circuit judges confronting the same kind of problem opined that "[w]here no substantive violation of rights can be shown, it is difficult to envision what actual damages plaintiff might prove."¹⁴⁵ The Fifth Circuit has expressed skepticism as to whether actual damages resulting solely from denial of due process ever can be proven, although our circuit has afforded plaintiffs an opportunity to prove such damages.¹⁴⁶

V. HOMOSEXUALITY IN THE SCHOOLS

The ruling of the Fifth Circuit in *Gay Student Services v. Texas A & M University*¹⁴⁷ requires Texas A & M to recognize a gay student group notwithstanding the Board of Regents' solemn declaration that

[s]o-called "gay" activities run diabolically [sic-diametrically?] counter to the traditions and standards of Texas A & M University, and the Board of Regents is determined to defend the suit filed against it by three students seeking "gay" recognition and, if necessary, to proceed in every legal way to prohibit any group with such goals from organizing or operating on this or any other campus for which this Board is responsible.¹⁴⁸

The Regents lost.

142. *Carey v. Phipps*, 435 U.S. at 266, *quoted in Russell*, 736 F.2d at 291 (5th Cir. 1984).

143. 752 F.2d at 1072 (emphasis in original) (citation omitted).

144. *Id.*

145. *Russell*, 736 F.2d at 291 n.17.

146. *See Wilson v. Taylor*, 658 F.2d 1021, 1032 (5th Cir. 1981).

147. 737 F.2d 1317 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1860 (1985).

148. 737 F.2d at 1322 (correction suggested by the Fifth Circuit).

Within three days of this decision, in *Naragon v. Wharton*,¹⁴⁹ the Fifth Circuit held that Louisiana State University could legally remove Kristine Naragon, an avowed lesbian, from her classroom in Baton Rouge.

What follow are a few comments that seek to expose inconsistencies in the law of colleges and courts as it has evolved over the past seventy years. Consideration of these two cases in tandem sharpens the legal mind and uncovers troublesome issues of law and fact lurking beneath the surface of what the judges tell us in their opinions.

A. Background

First we must go back in time some seventy years to Oxford, Mississippi, to the days of Chancellor Kincannon's administration at the University of Mississippi. According to local history, "the troublesome issue of the anti-fraternity agitation"¹⁵⁰ occupied everyone's mind in those early days. It seems a fellow named Lee Russell was snubbed by one of the Greek fraternities on campus; he never forgot nor forgave the snubbing. Later, Lee became Governor Russell, a keen supporter of a bill in the Mississippi Legislature outlawing Greek-letter fraternities on the campus of Ole Miss. The following account of the struggle suggests the flavor of the fight:

Lee M. Russell, who as a student led the fight against the fraternities, was now active in state politics and once more led the fight. The matter was discussed favorably and unfavorably in the public press and ultimately reached the floor of the state legislature. Some of the arguments used to discredit the Greek-letter societies were that they encouraged dissipation, they led to waste of money, that they discouraged study and scholarship, that they interfered with the work of the literary societies, that they destroyed "college spirit" by fostering cliques. But the crowning criticism was that they had been the cause of social ostracism of the non-fraternity students by the people of Oxford. Whether these charges were true or not, the legislature saw fit in 1912 to prohibit secret societies in the state's schools by passing a law which remained on the statute books for fourteen years.¹⁵¹

149. 737 F.2d 1403 (5th Cir. 1984).

150. A. CABANISS, *THE UNIVERSITY OF MISSISSIPPI: ITS FIRST HUNDRED YEARS* 126 (2d ed. 1971).

151. *Id.* at 127. Today, of course, the campus at Ole Miss is full of fraternities: "Be-

Now, as far as lawyers are concerned, the next stop is to ask whether such a college regulation would hold up in court. Indeed it did, despite a Kappa Sigma's argument that the statute abridged the fourteenth amendment because it "'without reason deprives the complainant of his property and property right, liberty and his harmless pursuit of happiness, and denies to the complainant the equal protection of the law of the state of Mississippi.'" ¹⁵²

Notice this says nothing about freedom to associate, and yet the allegations come close to those in the *Gay Student Services* case, as we shall see in a moment. Further, note that the Oxford, Mississippi, fraternity boys of 1912 claimed only the "harmless pursuit of happiness." Whether an association of homosexual students at College Station, Texas, is similarly harmless today is a point over which colleges and courts have sharply divided. Certainly these cases of "Greeks" and "Gays"¹⁵³ offer an intriguing comparison.

The Oxford charge was accentuated "by the allegation that the society of which the complainant [was] a member 'has for its paramount purpose the promotion and enforcement of good morals, the highest possible attainment and standing in the classes, and good order and discipline in the student bodies of the different colleges with which it is connected.'" ¹⁵⁴ Here is how Justice Joseph McKenna, speaking for a unanimous Supreme Court including such minds as Oliver Wendell Holmes and Charles Evans Hughes, responded in *Waugh v. Board of Trustees*.¹⁵⁵ Although well-nigh forgotten, this case still remains controlling authority:

It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the state of Mississippi to determine. It is to be remembered that the University was established by the state, and is under the control of the

cause University of Mississippi students have had to fight for their fraternities, they idealize them." *Id.* at 188 n.49. Upon inquiry, *ex rel.* Morris Marx, Vice Chancellor for Academic Affairs, the University of Mississippi, Jan. 22, 1986, the writer learned that no gay students group has demanded recognition from the authorities at Ole Miss, not to date at least, although the law of the Fifth Circuit binds Mississippi as well as Texas.

152. *Waugh v. Board of Trustees*, 237 U.S. 589, 593 (1915).

153. "I shall, in most cases, use the term 'gay' to describe both men and women whose sexual orientation is toward persons of the same sex. Gay is the preferred word." Rivera, *Queer* Law: Sexual Orientation Law in the Mid-Eighties, Part I*, 10 U. DAYTON L. REV. 459, 463 (1985) [hereinafter cited as Rivera].

154. *Waugh*, 237 U.S. at 593.

155. 237 U.S. 589.

state, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students, and distracted from that singleness of purpose which the state desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the state, and annul its regulations upon disputable considerations of their wisdom or necessity.¹⁵⁶

So far as I can tell, the Fifth Circuit has followed *Waugh* only once, citing it in support of a rule requiring haircuts in the public schools.¹⁵⁷

B. *Gay Student Services v. Texas A & M University*

Judges Brown, Reavley, and Williams quite boldly held clearly erroneous the district court's finding of fact that Gay Student Services is just like a Greek fraternity subject to Texas A & M's traditional ban on fraternal organizations on campus.¹⁵⁸ For over 100 years, Texas A & M has chosen not to include Greek fraternities and sororities as an official part of its educational program. As the administration explained, "[t]he University has supported the premise that its social character was developed in the concept of togetherness in that all students were Aggies and that a social caste system would detract from this most important concept which welded together the students that attended Texas A & M."¹⁵⁹

Without questioning Texas A & M's exclusion of Greeks from its educational program—an exclusion legally linked to *Waugh*—the appellate court did state that the district court's

156. *Id.* at 596-97.

157. *Ferrell v. Dallas Indep. School Dist.*, 392 F.2d 697, 702 (5th Cir.), *cert denied*, 393 U.S. 856 (1968). For the end of the hair story in the Fifth Circuit, see the 8 to 7 en banc split in *Karr v. Schmidt*, 460 F.2d 609 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972) (likewise upholding hair cuts in the public schools). In his dissent, Judge Wisdom pointed his finger at Justice Black, whose views carried majority weight in the Fifth Circuit:

The Court apparently takes its cue from the late Mr. Justice Black's suggestion that the only "serious" aspect of a "long hair case" is "the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear."

460 F.2d at 619 (Wisdom, J., dissenting). Certiorari was denied by the Supreme court.

158. "[W]e conclude that the District Court's factual findings with regard to the nature of GSS were clearly erroneous. We think it clear from the facts that TAMU refused officially to recognize GSS based upon the homosexual content of the group's ideas—which it sought to convey through implementing its stated goals and purposes."

Gay Student Servs., 737 F.2d at 1324.

159. *Id.* at 1321-22.

analogizing Gay Student Services (GSS) to Greek fraternities is "utterly at odds with the asserted purposes of GSS, which sought recognition to provide services and information regarding gay issues to gay persons and to the general public."¹⁶⁰ What GSS wanted to do was to provide the Texas A & M community with "information concerning the structures and realities of gay life" and to "provide a forum for the interchange of ideas and constructive solutions to gay people's problems."¹⁶¹ Surely these goals surpass mere socializing. Furthermore, the University's asserted reasons for denying recognition were based on the belief "that the organization *would* attempt to convey ideas about homosexuality."¹⁶² In short, the refusal to recognize the group was clearly "tied to the homosexual nature of the group."¹⁶³ For this reason, the defense did not center on the fraternal nature of the GSS. Instead, as Judge Brown tells us in his opinion, "[t]he evidence presented at trial consisted almost solely of medical testimony from specialists in human sexuality regarding the effect the presence of a homosexual student group might have on a university campus."¹⁶⁴

Plainly, the panel was correct to reject the facile equation of Gay Student Services to Sigma Phi Epsilon. As for the law, Judge Brown explained that the Supreme Court's standards enunciated in *Healy v. James*¹⁶⁵ are controlling: The reader will recall that *Healy* reversed and remanded a denial of college recognition to a local student chapter of Students for a Democratic Society. *Healy* rests upon the first amendment "right of individuals to associate to further their personal beliefs."¹⁶⁶ The rationale of the holding is that "[t]here can be no doubt that denial of official recognition, *without justification*, to college organizations burdens or abridges that associational right."¹⁶⁷

Of course, one crucial step beyond "questions of affiliation and philosophy"¹⁶⁸ lie questions directed at SDS's activities, not its philosophy. In other words, advocacy of ideas is one thing; advo-

160. *Id.* at 1322.

161. *Id.* at 1320.

162. *Id.* at 1322 (emphasis in original).

163. *Id.* (footnote omitted).

164. *Id.* at 1321.

165. 408 U.S. 169 (1972).

166. *Id.* at 181.

167. *Id.* (emphasis added).

168. *Id.* at 188.

cacy of "imminent lawless action"¹⁶⁹ is quite another. But the record in *Healy* as recited by the Supreme Court disclosed "no substantial basis"¹⁷⁰ for the University's fear that recognition of the local chapter of SDS would pose a threat of imminent lawless action or of "actions which 'materially and substantially disrupt the work and discipline of the school.'"¹⁷¹ Denial of recognition on this unsubstantiated factual basis was therefore unconstitutional.¹⁷²

By parity of reasoning, our circuit court rejects the claim that recognition of Gay Student Services at College Station would likely "incite, promote, and result"¹⁷³ in homosexual acts. The court added that there exists evidence neither that any illegal activity has occurred as a result of GSS's existence in the past, nor that proscribed homosexual activity will result from this organization in the future. The court emphasized that "while Texas law may prohibit certain homosexual practices, no Texas law makes it a crime to be a homosexual."¹⁷⁴ Consistent with *Healy*, our circuit judges could not conclude that the "'critical line . . . between advocacy and action' has been violated in this case."¹⁷⁵

At trial, Texas A & M also asserted that "recognition of GSS would encourage more homosexual conduct, resulting in an increase in the number of persons with the psychological and physiological problems TAMU's experts claimed were more prevalent among homosexuals than among heterosexuals."¹⁷⁶ Moreover, the University asserted that denial of recognition was justifiable as an appropriate measure in protecting public health. Whether this is true or not seems to be a medical question upon which experts differ. However, the district court did say that "[t]he Court finds the testimony that male homosexuals pose a significant public

169. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (unanimous per curiam opinion). "[T]he critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." *Healy*, 408 U.S. at 192.

170. *Healy*, 408 U.S. at 190.

171. *Id.* at 189. The test of "material and substantial" disruption originated in the law of the Fifth Circuit, see *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966), and was picked up by the Supreme Court in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 509, 513 (1969) and carried over into *Healy*, 408 U.S. at 189.

172. 408 U.S. at 191. "[I]nsofar as nonrecognition flowed from such fears, it constituted little more than the sort of 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.' " *Id.* (quoting *Tinker*, 393 U.S. at 508).

173. 737 F.2d at 1328.

174. *Id.* (emphasis in original).

175. *Id.*

176. *Id.* at 1330.

health problem because they have greater incidence of venereal disease to be credible."¹⁷⁷

Our appellate court was not impressed:

This asserted [health] justification must fail for the same reasons the others did: TAMU has simply not proven that recognition will indeed imminently result in such dire consequences. The speculative evidence offered by the defendants' experts "for which no historical or empirical basis is disclosed," cannot justify TAMU's content-based refusal to recognize GSS.¹⁷⁸

The reference to speculative medical testimony "for which no historical or empirical basis is disclosed" is a borrowed phrase from an Eighth Circuit decision, *Gay Lib v. University of Missouri*.¹⁷⁹ In this case, a divided panel of judges held that the University's refusal to recognize Gay Lib as a campus organization denied plaintiffs their first amendment rights. The First and Fourth Circuits have reached the same conclusion.¹⁸⁰ The Eighth Circuit's *Gay Lib* opinion drops a cautionary footnote that may strike the reader as strange: "[R]ecognition of Gay Lib is not determinative of whether its members will be allowed to meet or associate, but only of whether the group may use school facilities and become eligible for student activities funds."¹⁸¹ Judge Brown's opinion for our Fifth Circuit certainly suggests that formal recognition carries with it a

177. *Id.* at 1328 n.17.

178. *Id.* at 1330.

179. 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

180. *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974). In the former case, Chief Judge Markey of the Court of Customs and Patent Appeals, sitting by designation, pointed out in his concurring opinion that these cases show "the futility of the association-registering process at state-supported institutions of higher education." 544 F.2d at 167 (Markey, C.J., concurring). Judge Markey continued: "Thus, associations devoted to peaceful advocacy of decriminalization or social acceptance of sadism, euthanasia, masochism, murder, genocide, segregation, master-race theories, gambling, voodoo, and the abolishment of all higher education, to list a few, must be granted registration" *Id.* Recognition is required by the first amendment, according to Judge Markey, notwithstanding the imprimatur effect:

That registration and recognition of an organization do not imply approval of its aims is, in my view, a fiction. The impression that the aims of registered and recognized associations are at least unobjectionable to university authorities is, of course, one of the reasons plaintiff seeks registration and is the fundamental rationale of defendants in refusing it. I think it clear that registration and recognition confer a status not enjoyed by unregistered and unrecognized associations.

Id. at 168.

181. 558 F.2d at 854 n.11.

right to meet on campus.¹⁸²

It is worth noting that Justice Holmes would not have approved our circuit's applying the law of "clear and present danger" to the situation of Gay Student Services at College Station.¹⁸³ And most assuredly, Holmes as a judge would not so freely discount the competing views of medical experts on the homosexual question. Based on Judge Brown's own recitation of the expert medical testimony in the *Gay Student Services* case—testimony which the district court found "credible"—one might conclude that the Regents' argument was not without substance. A close reading of the opinion yields the acknowledgment that "[t]he defense in particular centered on statistics and opinions documenting increased crime rates and severe emotional problems found within the homosexual community."¹⁸⁴ This evidence is arguably more than mere speculation "for which no historical or empirical basis is disclosed."¹⁸⁵ With all due respect, it is unlikely that the record is as naked as the panel describes it to be. Such is the danger of borrowing a neat phrase from the law of the Eighth Circuit and applying it to a Fifth Circuit record.

The dissenting judge along with an evenly divided court in the *Missouri Gay Lib* case also thought that the University's expert medical testimony was neither "skimpy [nor] speculative."¹⁸⁶ Here

182. One of the advantages of official recognition, as pointed out by Judge Brown, is "[a]uthorization to hold meetings and functions on campus," together with "free use of university meeting rooms and facilities." 737 F.2d at 1319 n.3.

183. "It does an ill-service to the author of the most quoted judicial phrases regarding freedom of speech, to make him the victim of a tendency which he fought all his life, whereby phrases are made to do service for critical analysis by being turned into dogma." *Pennekamp v. Florida*, 328 U.S. 331, 352 (1946) (Frankfurter, J., concurring). "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Holmes, J., dissenting, in *Hyde v. United States*, 225 U.S. 347, 391 (1912). "'Clear and present danger' was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context." *Pennekamp*, 328 U.S. at 352-53 (1946) (Frankfurter, J., concurring).

A little later, the Supreme Court repeated the point that "neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case." *Dennis v. United States*, 341 U.S. 494, 508 (1951). There are plenty of cases in the Fifth Circuit that recognize the supremacy of context over catch phrase. See, e.g., *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966).

184. 737 F.2d at 1321.

185. *Id.* at 1330 (quoting *Gay Lib v. University of Missouri*, 558 F.2d 848, 854 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978)).

186. *Gay Lib*, 558 F.2d at 858 (Regan, J., dissenting) (brackets in the original).

is what Chief Judge Gibson had to say: "Lacking training in the psychiatric discipline, appellate judges are ill-prepared to conclude that these expert psychiatric opinions lack an historical or empirical basis."¹⁸⁷ Justice Rehnquist's dissent from a denial of certiorari in the *Gay Lib* case also demonstrates a sharp split among judges addressing the issues central to this dispute.

Expert psychological testimony below established the fact that the meeting together of individuals who consider themselves homosexual in an officially recognized university organization can have a distinctly different effect from the mere advocacy of repeal of the State's sodomy statute. As the University has recognized, this danger may be particularly acute in the university setting where many students are still coping with the sexual problems which accompany late adolescence and early adulthood.¹⁸⁸

Whether the reader agrees with Justice Rehnquist, or with Judge Brown for that matter, is not my concern here. I focus only on the exposure of competing views, although I will venture to say that whatever else one thinks of the jurisprudence of William Rehnquist, there can be no doubt that he has a stinging legal mind. Here is how Rehnquist the lawyer analyzes the *Gay Lib*'s demand for campus recognition:

From the point of view of the [*Gay Lib*], the question is little different from whether university recognition of a college Democratic club in fairness also requires recognition of a college Republican club. From the point of view of the University, however, the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined. The very act of assemblage under these circumstances undercuts a significant interest of the State which a plea for the repeal of the law would in no wise do. Where between these two polar characterizations of the issue the truth lies is not as important as whether a federal appellate court is free to reject the University's characterization, particularly when it is supported by the findings of the District Court.¹⁸⁹

187. 558 F.2d at 860 (Gibson, C.J., joined by Henley, J., dissenting from denial of rehearing en banc).

188. 434 U.S. 1080, 1083 (1978) (Rehnquist, J., joined by Blackmun, J., dissenting from denial of certiorari).

189. *Id.* at 1084.

As I have said, the district court in the *Gay Student Services* case found Texas A & M's expert medical testimony "credible." Yet on appeal, the panel rushes to its own independent judgment on the facts and the law, quite contrary to Federal Rule of Civil Procedure 52(a) and to the confining strictures of *Pullman-Standard v. Swint*.¹⁹⁰ Again the Supreme Court has recently reminded us that "[t]his standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."¹⁹¹ Justice White writing for the majority further added that "[t]he reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court."¹⁹²

But quite apart from this procedural nicety, the latest developments of substance suggest that we have not heard the last word on the homosexual question, including the first amendment claim of gay students and teachers who want to assemble and talk in the public schools. The Supreme Court has called upward the Eleventh Circuit's ruling in *Hardwick v. Bowers*¹⁹³ to determine whether Georgia's sodomy statute is unconstitutional. Judge Reavley's en banc opinion in *Baker v. Wade*¹⁹⁴ holds quite the contrary in the Fifth Circuit where sodomy remains a crime in Dallas. Doubtless, Judge Reavley knows that *Baker v. Wade* is no imminent threat to the *Gay Student Services* opinion which he joined. Sodomy is one thing, talk is another. Yet as last Term's four-to-four split in the *National Gay Task Force*¹⁹⁵ case shows, the distinction between advocacy and action in the context of homosexuality in the public schools is not as clear a guide to judicial judgment as might first appear on the surface of legal analysis.

There is afoot among judges the rival view that, although the first amendment protects political expression and association,

[t]he advocacy of a practice as universally condemned as the crime of sodomy hardly qualifies as such. There is no need to establish that such advocacy will interfere, substantially or otherwise, in normal school activities. It is sufficient that such advocacy is advanced

190. 456 U.S. 273 (1982).

191. *Anderson v. City of Bessemer City, N.C.*, 105 S. Ct. 1504, 1511 (1985).

192. *Id.*

193. 760 F.2d 1202 (11th Cir. 1985), *cert. granted sub nom.* *Bowers v. Hardwick*, 106 S. Ct. 342 (1985).

194. 769 F.2d 289 (5th Cir. 1985) (en banc).

195. *Board of Educ., Okla. v. National Gay Task Force*, 105 S. Ct. 1858 (1985), *aff'g per curiam by an equally divided court*, 729 F.2d 1270 (10th Cir. 1984).

in a manner that creates a substantial risk that such conduct will encourage school children to commit the abominable crime against nature. This finds solid support in *Tinker [v. Des Moines Independent Community School District]*, where the Court said "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case."¹⁹⁶

Four current Supreme Court justices apparently agree with this view.¹⁹⁷

Incidentally, the judge who first brought the *Waugh* fraternity boys case to my attention was Mr. Justice Black, a fierce defender of first amendment freedoms. For Justice Black, *Waugh* was a first amendment case, just as *Gay Student Services* is a first amendment case. In his dissent in *Tinker*, Justice Black recalled that "[t]he State had [in *Waugh*] passed a law barring students from peaceably assembling in Greek letter fraternities and providing that students who joined them could be expelled from school. This law would appear on the surface to run afoul of the First Amendment's freedom of assembly clause."¹⁹⁸ Yet as those familiar with Justice Black's opinions know, the Judge sided with the school officials, not the students, in the *Tinker* black armband school case.¹⁹⁹ Here is how Elizabeth Black, who was sitting in the wives' section at Court, describes the moment in her diary:

Monday, February 24, 1969 Abe Fortas delivered the opinion in the *Tinker* Mourning Band School case and Hugo, as the television said, delivered a blistering dissent. His dissent, so said the paper, was twenty-five minutes long. I was on the edge of my chair, hands and feet like ice, and the brethren in various stages of shock.²⁰⁰

196. *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1277 (10th Cir. 1984) (Barrett, J., dissenting) (quoting in part *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)).

197. 105 S. Ct. 1858 (1985), where the Court's enigmatic silence on this issue is preserved in its per curiam decision. An affirmance by an equally divided Court without an opinion, of course, leaves the reader guessing as to the competing judicial views. "Legal scuttlebutt has Stevens, Blackmun, Marshall, and Brennan affirming the decision and Burger, O'Connor, White, and Rehnquist dissenting Both gay advocates and the Oklahoma City Board of Education publically claimed victory. However, most gay rights litigators breathed a sigh of relief that another decision survived the Supreme Court." Rivera, *supra* note 153, at 533 (footnote omitted).

198. *Tinker*, 393 U.S. at 522-23 (Black, J., dissenting).

199. *Id.* at 526.

200. H.L. BLACK & E. BLACK, MR. JUSTICE AND MRS. BLACK: The Memoirs of Hugo L. Black and Elizabeth Black 217 (P.R. Baier ed. 1986).

In no uncertain terms, Justice Black reminded his *Tinker* listeners of the “complete relevan[ce of *Waugh*’s reasoning] for us today”:²⁰¹

[T]he enactment of the statute may have been induced by the opinion that *membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions*. It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity.²⁰²

Based upon this argument, Justice Black relates that the *Waugh* Court upheld “the power of Mississippi to curtail the First Amendment’s right of peaceable assembly.”²⁰³

A little later a schoolboy sued in federal court challenging a rule requiring schoolboys’ hair not to hang over their ears. Again Justice Black sided with the school principal, not the sixteen-year-old.²⁰⁴ And when the Supreme Court was urged to recognize the disease of chronic alcoholism as a defense to drunkenness in the street (or on campus), Justice Black refused “to plunge . . . into the murky problems raised by the insistence that chronic alcoholics cannot be punished for public drunkenness, problems that no person, whether layman or expert, can claim to understand, and with consequences that no one can safely predict.”²⁰⁵

C. *Naragon v. Wharton*

The question of homosexual teachers in the classroom, espe-

201. *Tinker*, 393 U.S. at 523 (Black, J., dissenting).

202. *Id.* (quoting *Waugh*, 237 U.S. at 596-97) (emphasis added by Black).

203. 393 U.S. at 523 (Black, J., dissenting).

204. *Karr v. Schmidt*, 401 U.S. 1201, 1202-03 (1971) (Chambers Opinion, Black, J.) (denial of a motion to vacate a stay of injunction pending appeal):

The motion in this case is presented to me in a record of more than 50 pages, not counting a number of exhibits. The words used throughout the record such as “Emergency Motion” and “harassment” and “irreparable damages” are calculated to leave the impression that this case over the length of hair has created or is about to create a great national “crisis.” I confess my inability to understand how anyone would thus classify this hair length case. The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear.

A majority of the Fifth Circuit agreed with Justice Black. See *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972) (en banc), discussed in note 157 *supra*.

205. *Powell v. Texas*, 392 U.S. 514, 548 (1968) (Black, J., joined by Harlan, J., concurring).

cially in the primary and secondary grades, has "swirled nationwide for many years."²⁰⁶ Whether teachers—male or female—may lawfully be expelled from the classroom merely because they are gay depends on the educational level in question and on the law of the forum state. In one high school case an English teacher named Gish was ordered to undergo a psychiatric examination after he assumed the presidency of the New Jersey Gay Activists Alliance.²⁰⁷ School officials claimed Gish's actions displayed "deviation from normal mental health which may affect his ability to teach, discipline and associate with the students."²⁰⁸

The appellate court affirmed: "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live,"²⁰⁹ said the New Jersey judges, borrowing from Mr. Justice Minton's opinion in *Adler v. Board of Education*.²¹⁰ Moreover, "[t]hat the school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."²¹¹ Off to the psychiatrist went Mr. Gish. Candor compels me to say that this was 1976, before the "celebration"²¹² of gay rights in this country, and *Adler*, of course, was a case involving the purge of Communists, not homosexuals, from the classroom.²¹³

In the *Morrison*²¹⁴ case, the California Supreme Court rejected the view, found in some decisions, that homosexuality equals unfitness to teach: "The private conduct of a man, who is also a

206. *Rowland v. Mad River Local School Dist.*, Montgomery County, Ohio, 105 S. Ct. 1373, 1375 (1985) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari) (quoting *Rowland v. Mad River Local School Dist.*, Montgomery County, Ohio, 730 F.2d 444, 453 (6th Cir. 1984) (Edwards, J., dissenting)).

207. *Gish v. Board of Educ.*, 145 N.J. Super. 96, 366 A.2d 1337 (App. Div. 1976), *cert. denied*, 434 U.S. 879 (1977).

208. 366 A.2d at 1341-42.

209. *Id.* at 1342 (quoting *Adler v. Board of Educ.*, 342 U.S. 485, 493 (1951)).

210. 342 U.S. 485 (1952).

211. 366 A.2d at 1342 (quoting *Adler*, 342 U.S. at 493).

212. "Though homosexuals are not 'celebrating' in the United States, it remains the case that, in the judgment of many, homosexuality is the worst fate that could befall a person." Slovenko, *Foreword: The Homosexual and Society: A Historical Perspective*, 10 U. DAYTON L. REV. 445, 456-57 (1985).

213. This is not to say, however, that the hysteria of the '50's did not touch homosexuals: "In 1950 the senate produced a report on the *Employment of Homosexuals and Other Sex Perverts in Government*." Slovenko, *supra* note 212, at 448.

214. *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

teacher, is a proper concern to those who employ him only to the extent it mars him as a teacher,"²¹⁵ said Justice Tobriner in an opinion heralded as a landmark by gay rights enthusiasts. "Where [a teacher's] professional achievement is unaffected, where the school community is placed in no jeopardy, his private acts are his own business and may not be the basis of discipline." ²¹⁶ By way of contrast, the law in Washington State is less liberal. There, a homosexual high school teacher named Gaylord was held lawfully fired upon findings that

[a]fter Gaylord's homosexual status became publicly known, it would and did impair his teaching efficiency. A teacher's efficiency is determined by his relationship with his students, their parents, the school administration and fellow teachers. If Gaylord had not been discharged after he became known as a homosexual, the result would be fear, confusion, suspicion, parental concern and pressure on the administration by students, parents and other teachers.²¹⁷

Undoubtedly, Professor Rivera is right to say, in her encyclopedic series of articles,²¹⁸ that "[e]mployment of gay persons as teachers in elementary schools and high schools is still a very controversial issue."²¹⁹

As far as I can determine, experts seem to be divided on the question of the effect of a known homosexual on elementary and secondary students, and the reported decisions reflect this battle. One federal district court, after thoroughly rehearsing the conflicting expert testimony, did state that "instruction of an eighth-grade earth science class by a known homosexual poses sensitive problems, both for relationships among students and between students and parents."²²⁰ To date, the Supreme Court has cautiously avoided getting caught in this swirl, most recently by denying cer-

215. 461 P.2d at 382, 82 Cal. Rptr. at 182 (quoting *Jarvella v. Willoughby-Eastlake City School Dist.*, 12 Ohio Misc. 288, 233 N.E.2d 143, 146 (C.P. 1967)).

216. 461 P.2d at 382, 82 Cal. Rptr. at 182.

217. *Gaylord v. Tacoma School Dist.* No. 10, 88 Wash. 2d 286, 559 P.2d 1340, 1342 (en banc), cert. denied, 434 U.S. 879 (1977).

218. Rivera, *supra* note 153, at 459. Professor Rivera's asterisk following the word "Queer*" directs us to the dictionary: *"1. Deviating from the expected or normal; strange. 2. Odd or unconventional in behavior; eccentric. 3. Arousing suspicion. 4. *Slang*. Homosexual." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1070 (W. Morris ed. 1976). See also Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

219. Rivera, *supra* note 153, at 514.

220. *Acanfora v. Board of Educ., Montgomery County*, 359 F. Supp. 843, 849 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974).

tiorari in *Gaylord v. Tacoma School District No. 10*,²²¹ and by refusing to review the Sixth Circuit's *Mad River* decision,²²² in which Marjorie Rowland was fired as a high school guidance counselor "because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason."²²³ Justice Brennan's dissent from denial of certiorari to the Sixth Circuit shows how far appellate judges sometimes wiggle the facts in order to avoid vexing constitutional issues. Said Justice Brennan: "[T]hese maneuvers suggest only a desire to evade the central question: may a State dismiss a public employee based on her bisexual status alone?"²²⁴

And what of homosexual instructors at the college level? According to the experts, they agree that "at least at the University level, it would not be harmful to students, either homosexual or heterosexual, to be exposed to a homosexual professor who competently performs his duties."²²⁵ I should think most people would remain unperturbed by the prospect of a homosexual lecturer in the theater department, although President Trabant of the University of Delaware was quite miffed when Richard Aumiller got his name in the papers: "I really don't care what Mr. Aumiller does in his bedroom, but I consider it an affront [sic] to the University and to me as an individual that he insists in making his bedroom activities public information and a point of evangelistic endeavor to recruit more gays to his supposed cause."²²⁶ The court held President Trabant civilly liable for \$10,000 in compensatory damages and for \$5,000 punitive damages for violation of lecturer Aumiller's constitutional right of freedom of expression guaranteed by the first amendment.²²⁷

Of course, freedom of speech is one thing, free association on campus, quite another. A few years ago the proposed marriage of two adult male homosexuals, one a university librarian, the other a law student, created quite a stir on the campus of the University of Minnesota. The Eighth Circuit upheld the Board of Regents' re-

221. 434 U.S. 879 (1977).

222. *Rowland v. Mad River Local School Dist.*, Montgomery County, Ohio, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1373 (1985).

223. *Rowland v. Mad River Local School Dist.*, Montgomery County, Ohio, 105 S. Ct. 1373, 1373 (1985) (quoting 730 F.2d 444, 454 (6th Cir. 1984) (Edwards, J., dissenting)).

224. 105 S. Ct. at 1375.

225. *Aumiller v. University of Del.*, 434 F. Supp. 1273, 1291 n.53 (D. Del. 1977).

226. *Id.* at 1283.

227. *Id.* at 1311-12.

fusal to approve an employment contract with the librarian on the ground that his "personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."²²⁸ The scope of review was narrow; the appellate judges were quite unwilling to overrule a determination "falling within the considerable discretion entrusted those charged with the heavy responsibility of supervising the administration of this nation's colleges and universities."²²⁹ This is the language of judicial deference, not judicial activism, although the Eighth Circuit did caution that "this is not a case involving mere homosexual propensities on the part of a prospective employee."²³⁰ In other words, personal status is one thing, personal conduct quite another.

With this nutshell behind us, we are ready for *Naragon v. Wharton*.²³¹ In this case, a constitutional contest arose between Kristine Naragon, an excellent teacher in the Music School at LSU—to judge from her record—and Chancellor James Wharton, who removed Naragon from the classroom and put her into research when controversy arose after Naragon had an affair with an LSU freshman music student.

Naragon lost at trial. On appeal, Judge Reavley reacted succinctly: "Naragon persists. She argues that the real reason for her change of duties was that she is homosexual, and that denying her teaching duties for that reason is an Equal Protection violation and infringes her right to privacy as well as her First Amendment right of association."²³² The district court had found that Naragon's sexual preferences had nothing to do with the University's decision. But, as Judge Reavley responded, "[i]f that be the fact, we will be required to proceed no further."²³³

And what did the record show? Naragon was twenty-seven at the time the freshman music student moved into Naragon's home and became intimate with her teacher. The student's parents were quite upset by all this. Shouting matches ensued, and the matter unfortunately spilled over onto campus where university adminis-

228. *McConnell v. Anderson*, 451 F.2d 193, 194 (8th cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

229. *Id.* at 196.

230. *Id.*

231. 737 F.2d 1403 (5th Cir. 1984).

232. *Id.* at 1404 (footnote omitted).

233. *Id.* at 1405.

trators could hardly sit still. Vice Chancellor Hargrave testified that there may be (not that there *clearly* and *presently* is) an adverse effect upon the student, the University, and the effectiveness of the teacher when faculty have affairs with their students. Said Judge Reavley:

Teachers are role models, good or bad, for students. The Vice-Chancellor considered intimacy between a teacher and student a breach of professional ethics on the part of the teacher, and thought that it undermined the proper position and effectiveness of the teacher because of the perception of other students. Furthermore, if known, conduct of this nature between teacher and student would be damaging to relations with the public and parents, both present and prospective.²³⁴

The language of the court is restrained: "We would be very reluctant to reject the reasoning of these educators or to overrule their decision."²³⁵ Judge Reavley proceeded no further. "AFFIRMED."²³⁶

Two observations support the majority's view. First, even in California a college teacher can be fired for unzipping a student's capri pants after class in the back seat of a car, as *Stubblefield's*²³⁷

234. *Id.*

235. *Id.* at 1406.

236. *Id.*

237. *Board of Trustees v. Stubblefield*, 16 Cal. App. 3d 820, 823, 94 Cal. Rptr. 318, 320 (1971):

After teaching a class on the night of January 28, 1969, defendant drove a female student, and a member of that class, in his car to a location on a side street near Compton College and parked. The location is in an area of industrial construction and was not lighted.

At some time after defendant parked, a Los Angeles County Deputy Sheriff spotted defendant's car. The car appeared to the deputy to be abandoned and he went to investigate. When the deputy illuminated defendant's car with his headlights and searchlight, defendant then sat up. When the deputy approached defendant's car, illuminating the interior with his flashlight, he observed that defendant's pants were unzipped and lowered from the waist, exposing his penis. The student was nude from the waist up, and her capri pants were unzipped and open at the waist.

On these facts, the court ventured to suggest that "[i]t would seem that, as a minimum, responsible conduct upon the part of a teacher, even at the college level, excludes meretricious relationships with his students." *Id.* at 825, 94 Cal. Rptr. at 318. *Accord*, *Goldin v. Board of Educ. of Central School Dist. No. 1*, 35 N.Y.2d 534, 540, 324 N.E.2d 106, 108, 364 N.Y.S.2d 440, 443 (1974) (disciplinary proceedings sustained on charges that a teacher "slept with an 18-year old female, a member of the 1973 graduating class of said school district, and a student for whom . . . [the teacher] was a guidance counselor"). The New York Court of Appeals rejected the teacher's contention that the right of privacy recognized by *Griswold v. Connecticut*, 381 U.S. 479 (1965) precludes disciplinary proceedings against him on these charges. 35 N.Y.2d at 543, 324 N.E.2d at 110-11, 364 N.Y.S.2d at 446.

case shows. Second, the Louisiana State University's *Faculty Handbook* provides that faculty members are primarily scholars who strive to learn and teach. "They are counselors, models, tutors, guides, and defenders of reason and truth."²³⁸ There is not one word in the book prohibiting the faculty from having sex with students; however, it does say the faculty "must exercise wisdom and fairness in dealing with other people, particularly with students in their charge."²³⁹

Judge Goldberg is on the opposite side of the judicial fence: "Today's majority, like the trial court below, seemingly does not want to hear the clamoring of the difficult and extremely important legal issue raised by this case."²⁴⁰ The record, as Judge Goldberg reads it, points in only one direction: "The record contains uncontroverted evidence that the complaints of Ms. Doe's parents constituted a central factor in the University's decision to take action."²⁴¹ Moreover, the record clearly indicates that the parents opposed their daughter's relationship largely because of its homosexual aspect. Therefore, Judge Goldberg concludes: "The University's consideration of pressure from Mr. and Mrs. Doe unavoidably infects the school's action with the biases of the parents."²⁴² Such action is impermissible under the rule of *Palmore v. Sidoti*.²⁴³ In *Palmore* the majority held that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect."²⁴⁴ The *Naragon* dissent concludes:

A very simple objection underlies my dissent today. The majority has refused to acknowledge a legal question which I believe is plainly presented. The extent to which the Equal Protection Clause of the Fourteenth Amendment prohibits or circumscribes discrimination based upon an individual's sexual preference is a largely unresolved, yet immensely important legal issue of our day. But the obvious role of private biases in the University's action does not ring loudly enough in the majority's ears to attract their attention. I will not put a maxim silencer on the validated cries of discrimination and the calls to this Court for constitutional justice.²⁴⁵

238. FACULTY HANDBOOK 4 (Louisiana State University 1985).

239. *Id.*

240. 737 F.2d at 1406 (Goldberg, J., dissenting).

241. *Id.*

242. *Id.* at 1408.

243. 104 S. Ct. 1879 (1984).

244. *Id.* at 1882.

245. 737 F.2d at 1408 (Goldberg, J., dissenting).

Now this is fine writing from a sensitive judge who over the years has reached out, as in the *Cleburne Living Center*²⁴⁶ opinion, to protect nonconforming victims of prejudice and public excitement. I have always admired Irving Goldberg's courage as a judge. He alone wrote to condemn Texas's sodomy statute on the merits in *Baker v. Wade*: "If ever there was a constitutional right to privacy, Texas has violated it by blatantly intruding into the private sex lives of fully consenting adults."²⁴⁷ However, Jane Doe was a minor when she entered into her liaison with Ms. Naragon, and *Palmore* is a race case, not a case involving homosexual relations between faculty and student in the university context. In other words, one should not get swept away by cries for constitutional justice regardless of limiting circumstances. With all respect, Kristine Naragon's case is not "the perfect case with the perfect client, one whose behavior is so exemplary that bigots cannot successfully raise a pretext to justify discriminatory action."²⁴⁸ Nevertheless, others see homophobia in Judge Reavley's majority opinion.²⁴⁹

VI. THE ESTABLISHMENT CLAUSE AND "CREATION-SCIENCE"

Louisiana's "Balanced Treatment for Creation-Science and

246. *Cleburne Living Center, Inc. v. City of Cleburne, Tex.*, 726 F.2d 191 (5th Cir. 1984), *aff'd in part, vacated in part*, 105 S. Ct. 3249 (1985). See text accompanying notes 1-19 *supra*.

247. 769 F.2d at 293 (Goldberg, J., dissenting).

248. Rivera, *supra* note 153, at 526 (footnote omitted).

249. "The appellate decision should be read carefully to note how the choice of words indicates the underlying homophobia of the writer," says Professor Rhonda Rivera in her critique of the *Naragon* decision. Rivera, *supra* note 153, at 498. Professor Rivera sees homophobia behind several features of the court's decision, *viz.*:

For example, the Fifth Circuit referred to the "undue influence" that Naragon exercised over the student. The phrase is not found in the lower court opinion nor was any evidence presented that Naragon had any undue influence over the student in question. The influence could be that mere homosexuality was "undue influence." Do male teachers who live with and sleep with their female students exercise undue influence? Another interesting word used in the appellate opinion was that Naragon "controlled Doe's participation" in an interview with the dean of students. Apparently, Naragon irritated the court, which commented "Naragon persists" at the beginning of the paragraph which ends with the words: "none of the arguments about Naragon's constitutional rights need be discussed." Later the Fifth Circuit concluded, "it appeared that Doe was confused and not thinking independently, and the breach with her parents was a serious problem." Doe was living with Naragon during the whole trial and continued to do so afterwards. The use of the anonymous title Doe was not at the student's request, but at the request of her parents.

Id. (footnotes omitted).

Evolution-Science in Public School Instruction" is legally dead in the Fifth Circuit.²⁵⁰ The statute required the teaching of what is called "Creation-Science" in Louisiana's public schools whenever evolution is taught. The Act defines "Creation-Science" as "the scientific evidences for creation and inferences from those scientific evidences."²⁵¹ The district court struck down the Act holding that it lacked a legitimate secular purpose and would have the effect of promoting religion. The appellate court affirmed: "In truth," said Judges Brown, Politz, and Jolly, "this particular case is a simple one, subject to a simple disposal: the Act violates the establishment clause of the first amendment because the purpose of the statute is to promote a religious belief."²⁵²

Judge Jolly's panel opinion, which strikes me as a calm, lawyer-like job, rests upon the premise that "irrespective of whether it is fully supported by scientific evidence, the theory of creation is a religious belief."²⁵³ Thus, Louisiana's Act "establishes a religious belief,"²⁵⁴ that violated the first prong of *Lemon v. Kurtzman*.²⁵⁵

250. *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985).

251. LA. REV. STAT. ANN. § 17:286.3(2) (West 1982). The full text of the Act is set forth in an appendix to the opinion of the court in *Aguillard*, 765 F.2d at 1258-59. For a sympathetic discussion of "creationism," see Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515 (1978). According to Mr. Bird,

Leading advocates of the creationist perspective do not endeavor to proscribe discussion of the general theory of evolution, as did the law involved in the *Scopes* trial. Nor in most areas do they attempt to introduce biblical creation into public schools. Instead they support "scientific creationism," a theory of the origin of the earth and life that employs scientific argument and not a sacred text in its challenge to the general theory.

Id. at 517. (footnotes omitted). Mr. Bird proposes the neutralization of exclusive instruction in public schools of the general theory of evolution by offering alongside of Darwin instruction in scientific creationism:

Instruction in scientific creationism, however, would serve to neutralize a public school course that exclusively presents the general theory of evolution. Spokesmen for this perspective do not seek to ban Darwin's *Origin of Species* or to exclude the general theory from classrooms. Instead, their model of scientific creationism proposes special creation of matter and life, postulates stability of original plant and animal kinds, denies common ancestry of human beings with apes, and offers catastrophism, the view that unique and cataclysmic events occurred in the past, as the underlying principle of geologic history. This perspective suggests that the law of entropy, or change toward disorder, applies to the earth and living organisms, and that the world and life came into existence relatively recently. Textbooks presenting scientific creationism do not expound the Bible, but instead employ scientific discussion, and their authors are highly trained in science.

Id. at 554-55.

252. 765 F.2d at 1253.

253. *Id.*

254. *Id.* at 1256.

Notwithstanding Louisiana's solemn avowal of a secular purpose for the Act—"protecting academic freedom"²⁵⁶—the panel judges otherwise. "[T]he Act continues the battle William Jennings Bryan carried to his grave. The Act's intended effect is to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief. The statute therefore is a law respecting a particular religious belief."²⁵⁷ And the panel keeps its eyes open: "Our decision is not made in a vacuum, nor do we write on a clean slate. We must recognize that the theory of creation is a religious belief. We cannot divorce ourselves from the historical fact that the controversy between the proponents of evolution and creationism has religious overtones."²⁵⁸ According to the panel's perception, the statute teaches religion in the public schools, never mind the rubric "science," and therefore the Balanced Treatment Act is, on its face, "inconsistent with the idea of academic freedom as it is universally understood."²⁵⁹

Louisiana's suggestion for rehearing en banc was denied, but only by the thinnest margin possible, eight to seven.²⁶⁰ Judge Gee's dissent is stinging:

[T]he Louisiana statute requires no more than that neither theory about the origins of life and matter be misrepresented as fact, and that if scientific evidence supporting either view of how these things came about be presented in public schools, that supporting the other must be—so that within the reasonable limits of the curriculum, the subject of origins will be discussed in a balanced manner if it is discussed at all. I see nothing illiberal about such a requirement, nor can I imagine that Galileo or Einstein would have found fault with it. Indeed, so far as I am aware even Ms. O'Hair has never asked for more than equal time.²⁶¹

255. 403 U.S. 602, 612-13 (1971) presented the following tripartite test: (1) the statute in question must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) the statute must not foster "an excessive government entanglement with religion." The Fifth Circuit's decision is limited to the "purpose prong" of the *Lemon* test: "Our decision today requires only that we consider the purpose prong of the *Lemon* test, for as the Supreme Court recently expressed, '[N]o consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.'" 765 F.2d at 1255 (quoting *Wallace v. Jaffree*, 105 S. Ct. 2479, 2490 (1985)).

256. LA. REV. STAT. ANN. § 17:286.1 (West 1982) ("This Subpart is enacted for the purposes of protecting academic freedom.").

257. 765 F.2d at 1257.

258. *Id.* at 1256 (footnote omitted).

259. *Id.* at 1257.

260. 778 F.2d 225 (5th Cir. 1985).

261. *Id.* at 226-27 (Gee, J., dissenting from denial of rehearing en banc).

According to Judge Gee, the panel is all wrong to rely on its “visceral knowledge regarding what must have motivated the legislators. It sifts their hearts and minds, divines their motive for requiring that truth be taught, and strikes down the law that requires it. This approach effectually makes a farce of the judicial exercise of discerning legislative intent.”²⁶² Furthermore, the dissent objects to denying Louisiana a chance to defend its statute at trial since record affidavits from highly qualified scientists affirmed that evolution is not an established fact and that there is strong evidence that life and the universe came about in a different manner. “At the least, these affidavits make a fact issue that those propositions are true. For purposes of reviewing the summary judgment which our panel’s opinion affirms, then, the propositions stated must be taken as established: there *are* two bona fide views.”²⁶³ Judge Gee concludes: “I should have thought that requiring the truth to be taught on any subject displayed its own secular warrant, one at the heart of the scientific method itself.”²⁶⁴

It is probable that the approach of *Wallace v. Jaffree*²⁶⁵ to Alabama’s “Moment of Silence” law is enough to condemn Louisiana’s statute—if its purpose is what the panel says it is. Nevertheless, it is disturbing that Louisiana was denied an opportunity to go to trial over its law.²⁶⁶

Perhaps the majority believed that a trial on the merits would only make Louisiana look foolish. For the moment, Judge Jolly has had the last word:

First, as writer of the panel opinion, I offer my apologies to the majority of this court for aligning it with the forces of darkness and anti-truth. Second, I do not personally align myself with the dissenters in their commitment to the search for eternal truth through state edicts. Third, I commend to the dissenters a serious rereading of the majority opinion that they may recognize the hyperbole of the

262. *Id.* at 227.

263. *Id.* at 226 (emphasis by Judge Gee).

264. *Id.* at 228.

265. 105 S. Ct. 2479 (1985) (The Supreme Court affirmed the Eleventh Circuit’s finding that the one-minute period of silence in all public schools was unconstitutional.).

266. In the Arkansas case, *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982), *aff’d*, 723 F.2d 45 (8th Cir. 1983), Arkansas’s “Balanced Treatment for Creation-Science and Evolution-Science Act” was declared unconstitutional as violative of the establishment clause, but this ruling followed a trial on the merits; the State was not shut out of court on summary judgment. One wonders why Louisiana was denied its day in court when Arkansas got one.

opinion in which they join. And, finally, I respectfully submit, the panel opinion speaks for itself, modestly and moderately, if one will allow its words to be carefully heard.²⁶⁷

Louisiana's Attorney General will appeal to the Supreme Court.²⁶⁸ This decision means the Justices will have to read our Circuit's competing opinions with an eye to substance, that is, through the lens of the Establishment Clause.

VII. MISCELLANEOUS KNOTS

"[U]ntying little knots never seems drudgery,"²⁶⁹ Holmes wrote to Dr. Wu in one of their letters. The judges of the Fifth Circuit appear to enjoy untying the miscellaneous legal knots of the docket.

For example, Mr. Hill's case from Houston²⁷⁰ matches Judges Rubin and Higginbotham in an unravelling of the overbreadth doctrine of *Broadrick v. Oklahoma*.²⁷¹ Here is Houston's ordinance in question:

Sec. 34-11. *Assaulting or interfering with policemen.* (a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.²⁷²

267. *Aguillard*, 778 F.2d at 228 (Jolly, J., responding to dissent). Judge Jolly's insisting on the last word by publishing a response to Judge Gee's dissent is unusual, although not unprecedented in the reports. Compare Judge Bork's published response to his dissenting District of Columbia Circuit colleagues in *Dronenberg v. Zeck*, 746 F.2d 1579, 1582-84 (D.C. Cir. 1984) (denying rehearing en banc).

268. In his press release announcing the appeal, Attorney General William J. Guste, Jr., said that Judge Gee's dissent was the most forceful he had read in his tenure as Attorney General. He added that the dissent, joined in by seven judges, was a clear invitation to seek review of this controversial case by the Supreme Court of the United States. Office of the Attorney General, State of Louisiana, Department of Justice, Press Release, Dec. 23, 1985, at 1. "With the court divided eight to seven, I feel an obligation to bring this matter before the Supreme Court of the United States for its decision," Guste concluded. *Id.* at 5.

269. Oliver Wendell Holmes, Jr., to John C.H. Wu, Sept. 20, 1923, reproduced in *JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICE AND UNCOLLECTED LETTERS AND PAPERS*, Pt. 3, Chapter Heading *Recent Letters to Dr. Wu* 167 (H.C. Shriver ed. 1936). Dr. Wu (1899-1986) was formerly Judge of the Shanghai Provisional Court, Principal of the Comparative Law School of China, and Member of the Law Codification Commission. *Id.* at 151 n.1. The Holmes-Wu correspondence began in 1921 when Wu was a student at Michigan Law School and Holmes was on the Supreme Court in Washington. Their letters are a lost treasure on the shelf of the law library.

270. *Hill v. City of Houston, Tex.*, 764 F.2d 1156 (5th Cir. 1985).

271. 413 U.S. 601 (1973).

272. 764 F.2d at 1158.

At first glance this law may appear perfectly sensible. The ordinance states “or in any manner oppose,” a fairly broad meaning that obviously involves speech, possibly protected speech. Here is a sample of Judge Rubin’s thinking for the majority:

The conduct literally proscribed by the ordinance includes much that is completely lawful. The dictionary defines “oppose,” for example, to include, “to stand in the way of; hinder or obstruct,” “to have an adverse opinion concerning” or “to offer arguments against.” . . . Applying these definitions to the second clause of the ordinance, it is clear that the statute affects a broad range of protected activities. If a mother pleads with a policeman to “spare my baby” while the policeman arrests her son in front of their home, she has “opposed” the policeman in the execution of his duties

. . . .

In short, the second clause of Section 32-11(a) encompasses mere verbal as well as physical conduct The areas of protected conduct encompassed by the ordinance are more than mere “marginal applications in which the statute would infringe on First Amendment values.” They comprise a substantial range of protected speech and verbal communications that might be deterred by the present wording of the statute.²⁷³

Down went Houston’s ordinance, notwithstanding *Broadrick v. Oklahoma*’s admonition that the overbreadth doctrine is “manifestly strong medicine” which should be applied “sparingly” and “only as a last resort.”²⁷⁴

In his dissent, Judge Higginbotham would construe the ordinance “to proscribe only speech which is not made with a bona fide intention to exercise a constitutional right, but solely with the intention of interfering with police officers who are attempting to carry out lawful police functions, and which actually does create such interference.”²⁷⁵ The dissent would apply *Broadrick*’s requirement of substantial overbreadth more stringently: “The requirement of substantiality accommodates our constitutional devotion to the decision of concrete cases, as well as our devotion to separation of powers and federalism,”²⁷⁶ says Judge Higginbotham. “A diluted substantiality requirement expresses a perceived primacy of First Amendment values over Article III checks of judicial power and defined judicial roles, and in doing so, eschews what I

273. 764 F.2d at 1163-64 (footnotes omitted).

274. 413 U.S. at 613.

275. 764 F.2d at 1172 (Higginbotham, J., dissenting).

276. *Id.*

see to be a fundamental analytical tool of constitutional adjudication—that of structural inference, text and history.”²⁷⁷

Given *Colten v. Kentucky*,²⁷⁸ I should think Judge Higginbotham has the better of the argument, although the question is close. Doubtless the majority and dissenting opinions in *Hill v. City of Houston* would make fine reading in a first amendment seminar, and when the case is reargued en banc before the full Fifth Circuit, as it will be,²⁷⁹ the professor would do well to adjourn class to Camp Street where the books connect with life.²⁸⁰

*Stern v. Tarrant County Hospital District*²⁸¹ is our second miscellaneous knot. This one divides Judges Rubin and Goldberg, a challenging split, with Chief Judge Clark concurring in the middle. The case involves the old problem of discrimination against osteopathic physicians, in favor of allopathic healers, with a new Texas twist. Under current Texas law, state agencies are forbidden to differentiate among physicians solely on the basis of their academic medical degrees.²⁸² In earlier days, the Supreme Court sustained such discrimination, holding in *Hayman v. City of Galveston*²⁸³ that a hospital's decision to exclude osteopaths was neither arbitrary nor unreasonable because it was based on the necessity of choosing between competing modes of treatment. This was 1927, although as recently as 1979, in *Berman v. Florida Medical Center, Inc.*,²⁸⁴ the Fifth Circuit followed *Hayman* in dictum, opining that a public hospital may deny staff privileges to a physician simply because he is an osteopathic doctor.

277. *Id.*

278. 407 U.S. 104 (1972).

279. *Rehearing en banc granted*, 764 F.2d 1156 (5th Cir. 1985).

280. The challenge of connecting the books with life is perennial in legal education. Long ago Frederick Pollock said of his classes in a letter to Holmes, “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, Jr., 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. 1941). 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, Jr., to Frederick Pollock, March 7, 1924, in 2 HOLMES-POLLOCK LETTERS at 128.

281. 755 F.2d 430 (5th Cir. 1985). Different results were reached on rehearing en banc. 778 F.2d 1052 (5th Cir. 1985).

282. Texas Medical Practice Act, TEX. REV. CIV. STAT. ANN. art. 4495b, Subchapter A, § 1.02(9) (Vernon Supp. 1984).

283. 273 U.S. 414 (1927).

284. 600 F.2d 466 (5th Cir. 1979).

Given these rulings, one would not expect Dr. Stern to win his constitutional case in federal court, but win he did—and on state statutory grounds judicially elevated into a federal equal protection violation. According to Judge Rubin: “state agency’s discriminatory action when state law commands equality is a patent denial of [federal] equal protection to those denied equality.”²⁸⁵

Now this holding is perplexing. State statutory protection is one thing; federal equal protection is another. It is important to keep these theoretical canvasses hanging separately. As Judge Goldberg points out in dissent:

[T]his is a novel theory of equal protection, without support in our precedents. Previously, I had thought that a violation of state law was a violation of state law; I had not realized that it could also give rise to a violation of federal equal protection. Although I believe that I have always been a stout and ardent defender of equal protection, I fail to see how state law can provide the basis of a federal equal protection claim.²⁸⁶

A majority of the judges in active service have voted in favor of granting a rehearing en banc²⁸⁷ so that the full Fifth Circuit will

285. 755 F.2d at 432.

286. *Id.* at 437 (Goldberg, J., dissenting). Judge Goldberg continued:

While I have little sympathy with efforts to restrict a litigant’s access to federal courts where *federal* rights are involved, I believe, in contrast to the majority, that infringements on rights created by state law are best left to state courts. This conclusion is far more compatible than the majority’s with the principles of federalism that underlie many of our basic constitutional doctrines, including the doctrines that state court determinations of state law are final, and that federal courts should refrain from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs Although the majority’s theory could be defended in terms of “keeping the states honest,” I believe that the enforcement of state law is a matter primarily of concern to the states. Ultimately, I believe that the majority’s theory trivializes equal protection by shifting attention away from its primary function: imposing substantive restrictions on the ways in which government can govern.

Id. at 440-41 (footnotes omitted; emphasis in original).

287. 755 F.2d 442 (5th Cir. 1985), *reh’g en banc granted*. *Editor’s note:* On rehearing en banc, the full Fifth Circuit, by a vote of 10 to 5, rejected the panel’s per se equal protection analysis and reversed the district court’s conclusion of unconstitutionality. Judge Higginbotham’s majority opinion noted:

The guarantees of the fourteenth amendment, its requirement that state laws be applied in the same way to those entitled to equal treatment and its promise of protection from arbitrary or irrational state action, are guarantees that turn on federal constitutional standards of equality and rationality rather than on state standards. Converting alleged violations of state law into federal equal protection and due process claims improperly bootstraps state law into the Constitution. In doing so, this novel approach would expand the scope of the fourteenth amendment, would render its meaning less certain, and would serve no legitimate policy.

have to untie this knot as well. Regardless of the outcome, here are judges plainly enjoying their work.

VIII. A CENTENNIAL FAREWELL: *WHAT IS A LAWYER, WHY BE ONE?*

I want to conclude with a centennial word from Justice Black directed to lawyers who read these pages.

Hugo Black loved his copy of *Tacitus*²⁸⁸ just as he loved "that little book of the Constitution" he always carried in his pocket.²⁸⁹ The Judge made his own index by writing notes to himself on the back pages of the book. "What is a lawyer, why be one?—394" is one such entry, and if you turn to page 394 you find what Tacitus, the Roman lawyer and historian, said about our profession 2,000 years ago. The passage caught Hugo Black's eye:

Can we possibly be employed to better purpose, than in the exercise of an art which enables a man, upon all occasions, to support the interest of his friend, to protect the rights of the stranger, to defend the cause of the injured, to strike with terror and dismay his open and secret adversaries, himself secure the while, and guarded, as it

Stern v. Tarrant County Hosp. Dist., 778 F.2d 1052, 1056 (5th Cir. 1985) (en banc). Judge Rubin, joined by Chief Judge Clark, and Judges Politz, Tate, and Johnson, dissented: "I suggest that it is *per se* not only unlawful, but arbitrary and capricious, hence not rational, for a state agency intentionally to create a discriminatory classification forbidden by a valid state law." *Id.* at 1065. Judge Rubin's dissent concluded:

The fourteenth amendment forbids the state and its agencies to discriminate against any class of persons. It is a bulwark against prejudice, against state action that condemns without rational basis. The clause was adopted to assure not only that states enact nondiscriminatory laws but also that they administer state law equally and fairly. The majority opinion refuses to apply the literal mandate of the Constitution and ignores the history that led to its enactment. It condones the bigotry of an allopathic-dominated state hospital district that refuses to be bothered by either the state law, the federal constitution, or the facts.

Id. at 1067.

288. II *THE WORKS OF TACITUS* (Oxford Trans., rev., New York 1869).

289. During his 1968 CBS television interview, *Justice Black and the Bill of Rights*, the first ever with a sitting Justice, the Justice was asked why he always carried "that little book of the Constitution" in his pocket. According to Mrs. Black, who witnessed the interview being made,

[t]he question lighted up Hugo's face with another of those smiles that endeared him to just about everyone. Hugo had a confession to make and he didn't mind making it before millions: "Because I don't know it by heart. I can't—my memory is not that good. When I say something about it, I want to quote it precisely. And so I usually carry it in my pocket."

E. Black, *Hugo Black: A Memorial Portrait*, 1982 Y.B. SUP. CT. HIST. SOC'Y 72, 78.

were, by an imperishable potency?²⁹⁰

At this point, Justice Black substituted his own word in the margin for the word “potency,” rendering the last line “secure the while, and guarded, as it were, by an imperishable *integrity*.”

290. *A Dialogue Concerning Oratory*, in II *THE WORKS OF TACITUS* 394 (Oxford Trans., rev., New York 1869).