

1983

Constitutional Law

Paul R. Baier

Louisiana State University Law Center, paul.baier@law.lsu.edu

Follow this and additional works at: https://digitalcommons.law.lsu.edu/faculty_scholarship



Part of the [Law Commons](#)

Repository Citation

Baier, Paul R., "Constitutional Law" (1983). *Journal Articles*. 287.
https://digitalcommons.law.lsu.edu/faculty_scholarship/287

This Article is brought to you for free and open access by the Faculty Scholarship at LSU Law Digital Commons. It has been accepted for inclusion in Journal Articles by an authorized administrator of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

CONSTITUTIONAL LAW

Paul R. Baier*

I. INTRODUCTION

"The great ideals of liberty and equality," Cardozo tells us, are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders.¹

Let me begin by praising lawyers—"those who must run the race and keep the faith."² Each term brings many defenders to the bar of the Fifth Circuit, a court whose annual canvassing of the ideals of liberty and equality has made it noble. The lawyer who won Joe Hogan's case in the Fifth Circuit last term,³ and who later sealed his victory in the Supreme Court,⁴ deserves the congratulations of our profession. What a burden to sit in judgment. What a joy to share in the process. "No higher duty, no more solemn responsibility," Hugo Black wrote in his inspiring way, rests upon court and counsel "than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."⁵ *Loyola Law Review* dedicated its first Fifth Circuit survey to Mr. Justice Black, who cared for "lawyers in the great tradition" as much as he cared for the

* Associate Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Member of the Louisiana Bar and the Bar of the Fifth Circuit United States Court of Appeals. Editor, *HUGO BLACK: THE MAGNIFICENT REBEL, A PERSONAL MEMOIR*, by Hugo Lafayette Black and Elizabeth Seay Black, forthcoming.

The author wishes to acknowledge the able counsel and good company of Mr. James Viator, quondam Lecturer in Constitutional History at the Claremont Colleges, particularly with respect to unraveling the mysteries of the federal Ku Klux Klan Act of 1871.

1. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 92-93 (1921).

2. *Id.* at 93.

3. *Hogan v. Mississippi University for Women*, 646 F.2d 1116 (5th Cir. 1981).

4. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

5. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

first amendment.⁶ Civil liberties are, of course, the ultimate responsibility of courts. But it is to lawyers that we look for their protection in the first instance.

During the term just ended, I was privileged to play the lawyer's part in two cases of grave moment. Certiorari is pending in one, hence a strict sense of propriety forbids my commenting on a case referred to in the briefs as *Forest Hill II*. What is at issue is the scope of equitable remedial discretion in school desegregation cases. Whether the chancellor may close two rural communities' only schools, one predominantly black, one predominantly white, and mix their student bodies, kindergarteners included, at a mid-point ten miles from home is a troubling question. It split the panel, two-to-one. A previous panel had reversed and remanded unanimously. More than that I will not say here, other than to direct the reader to the opinion in *Valley v. Rapides Parish School Board*.⁷ Those philosophically minded might want to have a look at it.

The other case is final, and an equally strict sense of fealty to the Fifth Circuit and to the first amendment moves me to discuss it here. I know *In re Baier*⁸ better than I know other cases whose

6. The expression "lawyers in the great tradition" is how Justice Black described lawyers who have greatly honored the profession of the law:

[men] like Lord Erskine, James Otis, Clarence Darrow, and the multitude of others who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it. . . . We must not be afraid to be free.

In re Anastaplo, 366 U.S. 82, 115-16 (1961) (Black, J., dissenting).

7. *Valley v. Rapides Parish School Bd.* [*Rapides II*], 702 F.2d 1221 (5th Cir.), cert. denied, 104 S. Ct. 276 (1983); *Valley v. Rapides Parish School Bd.* [*Rapides I*], 646 F.2d 925 (5th Cir. 1981), cert. denied, 104 S. Ct. 276 (1983).

Of course, there were other desegregation opinions during the term, viz: *Ross v. Houston Independent School Dist.*, 699 F.2d 218, 225 (5th Cir. 1983) (once school system purged of every residue of official discrimination, post-desegregation demographic changes do not bar judicial recognition that the school system is unitary; "school officials who have taken effective action have no affirmative fourteenth-amendment duty to respond to the private actions of those who vote with their feet"); *Price v. Denison Independent School Dist.*, 694 F.2d 334 (5th Cir. 1982) (holding erroneous district court's method of determining whether current racially identifiable schools are unconstitutional vestiges of de jure segregation; the question is essentially one of factual inference and cannot be determined purely as a matter of law); *United States v. State of Texas*, 680 F.2d 356 (5th Cir. 1982) (reversing imposition of state-wide remedial order requiring bilingual instruction to all Mexican-American children of limited English proficiency; district court's order too broad and erroneously based on disputed stipulations).

8. No. 81-3622 (5th Cir., Sept. 7, 1982) (Brown, Reavley, and Jolly, JJ.) (unreported).

slip opinions have made a checkerboard of my desk. I shall take it up first, following the time-honored distinction among practitioners between the "interesting cases" and the "other fellow's cases." I believe by critically evaluating my own case I can offer a few practice pointers for lawyers who read these pages, as well as reflect generally on the meaning of the first amendment. Obviously I suffer from the astigmatism of the advocate; a licked lawyer is of the same conviction still.⁹ But I leave to the reader final judgment on whether the views expressed here have merit or are merely blind musings to no good end. Chief Judge Brown, for whom I have the utmost respect, has written that the purpose of this "annual looksee"¹⁰ is "to maintain the quality of the justice dispensed."¹¹ Those called to the task should therefore seek to better educate the judiciary and the profession as to what the law should be. It is as a partner, not as an adversary, that I make my first effort at surveying the constitutional work of the Fifth Circuit.¹² If I am critical of the court or of any of its decisions, I beg the reader to bear in mind Holmes's aperçu: "[O]ne may criticize even what one reveres."¹³

9. Of course, you should never begrudge judges who rule against you. As one seasoned practitioner has wisely put it: "It is a fine legal tradition to go to the tavern to cuss the judge when he decides against you, though assuredly it is unprofessional to stay mad at him more than 3 or 4 months." Frederick Bernays Wiener to Felix Frankfurter, May 8, 1964, Frankfurter Papers, Library of Congress, Box 112, Folder 002338 (quoted by permission).

10. Brown, *Preface* to [First] *Fifth Circuit Review*, 17 *LOY. L. REV.* 487 (1971).

11. Brown, *Dispensing Justice in the Fifth Circuit*, 23 *LOY. L. REV.* 681 (1977):

The ivory tower provides excellent opportunity to reflect and review from its height the law of the land below. Law review commentators illuminate the strengths and weaknesses of past decisions. In unexplored regions of the law the commentator may provide unparalleled guidance to both the practitioner and the court. Consequently, the law journal fulfills an important role in the maintenance of the quality of justice dispensed—it better educates the judiciary and the profession as to what the law should be.

Id. at 684.

12. Doubtless all who undertake survey work of this kind worry about entering into a dialogue with the court. It does seem presumptuous. But as Judge Rubin has recognized:

In selecting specimens from the year's harvest, commenting on the memorable, identifying trends that we as judges perhaps do not perceive, and criticizing both our errors in doctrine and what they consider to be our unjust or unwarranted conclusions, the authors and editors provide invaluable assistance. As judges we welcome their contribution, like all human beings we esteem their compliments, although we may sometimes find that their criticisms chafe.

Rubin, *Introduction to Fifth Circuit Symposium*, 25 *LOY. L. REV.* 441, 445 (1979).

13. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 473 (1897).

II. FIRST AMENDMENT

A. Theory and Practice

In re Baier was an application for mandamus by a group of parents whose children attended Southdowns Elementary School in East Baton Rouge Parish. The school was ordered closed pursuant to a desegregation decree drawn up by Chief Judge John Parker of the Middle District of Louisiana.¹⁴ As soon as the school was closed, Southdowns parents inquired of their elected representatives on the School Board whether any member of the Board, its staff, or its consultants had ever suggested closing Southdowns Elementary School as a possible remedy in the Baton Rouge desegregation case. The district court's opinion left the matter in doubt. Naturally the parents wanted to know whose idea it was to close their school and the justifications for doing so. To their amazement the parents were told by their elected representatives that the district court had forever barred members of the East Baton Rouge Parish School Board from disclosing to their constituents what was said or proposed during the unsuccessful settlement negotiations that had been held at the federal courthouse. Although their representatives wanted to talk about the negotiations, their lips were sealed. Several Southdown parents were lawyers; to them the district court's silencing orders raised very serious first amendment questions. Nor could the lawyers find any precedent supporting the district court's perpetual ban beyond the termination of the negotiations. No compelling reason suggests itself why citizens should be kept in the dark regarding what their elected representatives have been up to. The Third Circuit Court of Appeals struck down a similar district court confidentiality order that was issued in the name of protecting the secrecy of settlement negotiations; it constituted an unlawful prior restraint of speech in violation of the first amendment.¹⁵ *Rogers II*, as it is called, has been followed in the Fifth Circuit, it having been twice cited in Chief Judge Godbold's en banc opinion in *Bernard v. Gulf Oil Co.*,¹⁶ which also declared a district court's silencing orders in violation of the first amendment. Certainly a judicial order cutting off dialogue between the people and their elected representatives on a matter of such vital public

14. *Davis v. East Baton Rouge Parish School Bd.*, 514 F. Supp. 869 (M.D. La. 1981).

15. *Rodgers v. United States Steel Corp.* [*Rogers II*], 536 F.2d 1001 (3d Cir. 1976).

16. 619 F.2d 459 (5th Cir. 1980) (en banc), *rev'd on other grounds*, 452 U.S. 89 (1981).

consequence as the loss of a school seems to strike at the core of the first amendment:

What, then, does the First Amendment forbid? Here again the town meeting suggests an answer. That meeting is called to discuss and, on the basis of such discussion, to decide matters of public policy. For example, shall there be a school? Where shall it be located? . . . When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. . . . Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government.¹⁷

It is comforting—from the point of view of general principle—that words written in 1948 by America's foremost first amendment thinker, Alexander Meiklejohn, should so neatly fit the problems of a future generation. A little later in his book, *Free Speech and Its Relation to Self-Government*, Professor Meiklejohn exposes the philosophical core of the first amendment:

The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves.¹⁸

To the lawyers it seemed that the district court's orders broke faith with the Framers. Any notion that the confidentiality orders were necessary to shield public officials from the consequences of their own actions is the antithesis of our system of representative self-government. In this circuit, *Dinnan v. Board of Regents*¹⁹ holds quite the contrary:

If the decision-maker has acted for legitimate reasons, he has nothing to fear. We find nothing heroic or noble about the appellant's

17. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24, 26 (1948) (emphasis in original).

18. *Id.* at 88-89.

19. 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

position [a claim of privilege from disclosure of how one voted during a tenure meeting]; we see only an attempt to avoid responsibility for his actions. If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure decision-making process. However, once he accepted such a role of public trust, he subjected himself to explaining to the public and any affected individual his decisions and the reasons behind them.²⁰

Enough theory. What to do about it—procedurally speaking—is a knot worth unraveling here, lest future first amendment claims be lost on the flypaper of procedure.

Three steps came immediately to mind: (1) mandamus, an extraordinary remedy for an extraordinary case; (2) intervention in the desegregation case; (3) direct action for injunctive and declaratory relief. The first course seemed the right one, particularly in light of the ruling in *Society of Professional Journalists v. Martin*,²¹ in which the Fourth Circuit converted a complaint for injunctive and declaratory relief against a federal district court's silencing order into a petition for a writ of mandamus. In the Fifth Circuit it is well settled that mandamus is an extraordinary remedy; it will not be granted except upon a showing of compelling necessity and the lack of any alternative avenues of relief,²² although under *United States v. Denson*²³ "when the writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ *almost* as a matter of course."²⁴ But this still leaves the matter hanging.

The reaction of the court was swift and succinct: "IT IS ORDERED that the petition for writ of mandamus is DENIED."²⁵ No reasons were assigned for the denial of the writ. This left petitioners in the agonizing position of having to guess what lay in the court's mind.²⁶ Was this an adjudication on the merits? If so, con-

20. 661 F.2d at 432.

21. 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

22. FED. R. APP. P. 12. See *Weber v. Coney*, 642 F.2d 91 (5th Cir. 1981); *In re Evans*, 524 F.2d 1004 (5th Cir. 1975); *Steward v. West*, 449 F.2d 324 (5th Cir. 1971).

23. 603 F.2d 1143 (5th Cir. 1979) (en banc).

24. *Id.* at 1145 (emphasis added). See generally Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 BUFFALO L. REV. 37 (1982).

25. *In re Baier*, No. 81-3256 (5th Cir. May 11, 1981) (per Brown, C.J., Tate, and Politz, JJ.) (unreported).

26. Of course it is always difficult to divine the meaning of unexplained judicial action. Cf. *United States v. Crouch*, 566 F.2d 1311, 1316 (5th Cir. 1978) ("A judge's statement of his

sidering the claims presented, silence seems a cavalier way of disposing of the case. More likely, the panel may have thought mandamus was not the proper vehicle for challenging the district court's orders, or the panel may have felt that, because the School Board had not objected to the trial court's confidentiality orders, the parents were in no position to complain. While the first amendment protects the right to hear as well as to speak,²⁷ there must be a willing speaker. At the time the mandamus petition was filed, the School Board had taken no action challenging Judge Parker's orders in any respect. Thus the court may have reasoned that the School Board's voluntary silence precluded the parents from asserting a right to listen. Before pursuing their case further, the Southdowns parents decided to await further School Board action.

Meanwhile, another citizens group moved to intervene in the desegregation case for purposes of challenging the gag order; and on July 31, 1981, the School Board, through its attorney, formally moved the district court to lift its confidentiality orders. Intervention was denied, however, with the trial court commenting: "What conceivable interest other than idle curiosity, can you possibly have in those discussions?" With respect to the School Board's request, the district judge declared that "[w]hatever they said, whatever they thought, whatever they said they thought, I do not intend will be held against them at any later date."²⁸ After reading the transcript of the July 31, 1981 proceedings, the Southdowns parents decided to renew their legal challenge. Suing a federal judge was a bold step, to be sure, but plaintiffs were determined somehow, some way, to have their first amendment claims adjudicated on the merits. The Fifth Circuit's earlier unexplained refusal to issue mandamus left plaintiffs no realistic alternative, if they

mental processes is absolutely unreviewable. This court has no means of observing mental process.").

27. See *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas' "). *Accord* *Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("[t]his freedom . . . necessarily protects the right to receive").

28. The district court added:

"I am totally confounded by the interest, apparent interest in these settlement discussions which led to nothing. They led nowhere. They are over. They didn't work. It was apparently a bad idea on the part of Court." Record at 141 (July 31, 1981). A complete copy of the transcript on the School Board's motion to vacate the district court's perpetual confidentiality orders was attached as Appendix C to Appellants' Opening Brief in *Baier v. Parker*.

were to protect their rights, except to bring a direct action for declaratory and injunctive relief.

Plaintiffs' civil action was filed on August 31, 1981. It was summarily dismissed, on Judge Polozola's own motion, without requiring Chief Judge Parker to answer or file any responsive pleading.²⁹ Judge Polozola reasoned that judicial immunity barred plaintiffs' suit. Also, the Fifth Circuit's earlier denial of mandamus was said to be *res judicata*. Plaintiffs appealed; briefs were filed. The United States Government, representing Judge Parker, took the position that mandamus was the proper remedy, not a direct action against the district court. But plaintiffs had tried that route without success. A year dragged by. Then the Southdowns parents asked for an expedited hearing on their appeal. A School Board election was set for September 11, 1982; the gag order had now thrown its cloak of silence over the scheduled election. Representatives who wanted to talk about their records could not do so fully; voters faced the prospect of voting blindly; rumors abounded. But the Fifth Circuit would not budge. The request for an expedited hearing was denied. Appellants applied for a stay of the district court's orders pending appeal, but this too was denied. What started out as *In re Baier*, and what had wound its way back to the Fifth Circuit *sub nom. Baier v. Parker*, came to an abrupt end on September 7, 1982, when the court not only denied the stay, but ruled: "[T]reating the appeal as a petition for writ of mandamus, the petition is likewise DENIED, since the Court denied a like petition for mandamus on May 11, 1981"³⁰ This order is dizzying in its effect.

A few general reflections and I'll move on. What can be said for the future, based on this otherwise unreported example? First, the record shows Southdowns parents were never accorded an opportunity to be heard on the merits of their claims,—“not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding judicial in nature.”³¹ Since the court's first denial of man-

29. *Baier v. Parker*, 523 F. Supp. 288 (M.D. La. 1981).

30. *In re Baier*, No. 81-3622 (5th Cir. Sept. 7, 1982) (unreported).

31. Per Chief Justice Charles Evans Hughes, *Morgan v. United States*, 304 U.S. 1, 19 (1933). See also *Morgan v. United States*, 298 U.S. 468, 480-81 (1936) (per Hughes, C.J.):

The requirement of a “full hearing” has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts. The “hearing” is designed to afford the safeguard that the one who decides shall be bound

damus can be explained on any number of grounds having nothing to do with the merits, it is the law of the Fifth Circuit that, "we are loath to assume that the denial of the writ [of mandamus] without opinion was a determination on the merits of the claimed jurisdictional error."³² The Supreme Court of the United States has also ruled that the denial without opinion of an extraordinary writ "does not constitute, and cannot be fairly read as, an adjudication on the merits of the claim presented."³³ The court's second peremptory denial of mandamus likewise leaves too many questions of law and fact unanswered. Worse yet, it appears to us that, under the court's ruling, citizens of Baton Rouge were deprived of precious first and fifth amendment rights, and of the right to cast an informed ballot, all without according them their constitutional day in court. A total of six Circuit Courts of Appeals have held mandamus available in circumstances similar to those confronting the Southdowns group as a result of the district court's perpetual gag.³⁴ Justice required more than darkling silence from the Fifth Circuit in the face of petitioners' claims. Citizens who have lost their schools and want to know why are entitled, under the first amendment, to the fullest measure of enlightenment: "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender

in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

32. *Key v. Wise*, 629 F.2d 1049, 1055 (5th Cir. 1980).

33. *Pitchess v. Davis*, 421 U.S. 482, 488 (1975).

34. See *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979) (district court order prohibiting parties and counsel from making any extra-judicial statements about information produced through discovery held a proper subject for mandamus; writ issued and order declared in violation of first amendment); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); *Society Professional Journalists v. Martin*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Rogers v. United States Steel Corp. [Rogers II]*, 536 F.2d 1001 (3d Cir. 1976); *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (district court's order prohibiting parties to a civil action from discussing the case with members of the news media or the public was proper subject for mandamus; order declared in violation of first amendment); *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) (order of district court prohibiting defendants and their attorneys from making any public statements in relation to case constituted clear abuse of discretion and was proper subject for mandamus; district court's order declared in violation of first amendment). See also *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (federal district court's "no comment" rules applicable to lawyers in civil litigation held in violation of the first amendment, with the Seventh Circuit noting that "The need for informed and complete discussion . . . far outweighs any possible benefit that might accrue in terms of maintaining the laboratory conditions of a civil trial." *Id.* at 258).

an assurance of rightness."³⁵

Incidentally, desegregation in the dark ended quietly in Baton Rouge at 4:05 p.m. C.S.T. on Monday, November 22, 1982. A year and a half after the district court extended its gag in perpetuity, the following order was spread upon the record: "The Court having considered the matter sua sponte and having concluded that the circumstances which made them necessary no longer exist, the order dated March 11, 1981 and all supplements and amendments thereto are hereby vacated and set aside." Two weeks later, the Fifth Circuit denied rehearing and rehearing en banc in *Baier v. Parker* without a word. Of course, lifting the gag order came too late: "Fragile First Amendment rights," the Fifth Circuit has recognized, "are often lost or prejudiced by delay."³⁶ Southdowns Elementary remains closed.

Now for the other fellow's cases. *In re Express News*³⁷ held unconstitutional Local Rule 500-2 of the United States District Court for the Western District of Texas, which flatly prohibited any person, including the press, from interviewing any juror concerning the deliberations of a jury in a criminal case. The local rule constituted an unlawful abridgment of the first amendment right of the press to gather news and the corollary right of the public to receive information. The court's opinion builds on Supreme Court precedent, principally *Landmark Communications, Inc. v. Virginia*³⁸ and *Globe Newspaper Co. v. Superior Court*,³⁹ both of which vouchsafe the news-gathering rights of the press. "Government-imposed secrecy," said Judge Rubin, "denies the free flow of information and ideas not only to the press but also to the public."⁴⁰ The public's "right to . . . receive" information, noted the court, has been repeatedly recognized and applied to a vast variety of information.⁴¹ There are countervailing considerations, however.

35. *Anti-Facist Committee v. McGrath*, 341 U.S. 123, 171 (1951) (per Frankfurter, J., concurring). See also Justice Brandeis's comment: "Sunlight is said to be the best of disinfectants; electric light the best policeman." *THE WORDS OF JUSTICE BRANDEIS* 151 (S. Goldman ed. 1953). Compare White Rabbit to Alice, quoted in L. PAPER, *BRANDEIS* 42 (1983): "Public business ought to be conducted in private because what we do here isn't important enough to be made public, and private business should be made public because if it were kept private the public wouldn't know about it."

36. *Bernard v. Gulf Oil Co.*, 619 F.2d at 470.

37. 695 F.2d 807 (5th Cir. 1982).

38. 435 U.S. 829 (1978).

39. 457 U.S. 598 (1982).

40. 695 F.2d at 809.

41. *Id.* At this point, Judge Rubin dropped a footnote that painstakingly rehearses a

Unlike Mr. Justice Black, for whom “no law” meant “no law,”⁴² Judges Rubin, Johnson, and Williams ally themselves with the school that judges by balancing first amendment rights against competing concerns. An accused’s sixth amendment right to a fair trial comes to mind. “Like other First Amendment rights, the right to gather news is not, of course, absolute,”⁴³ said the court. But any rule of court blocking the free flow of information must be “narrowly tailored to prevent a substantial threat to the administration of justice.”⁴⁴ The rule in question failed this test. It swept too broadly, being unlimited in time and scope, applying alike to jurors anxious to talk and to those desiring privacy, and foreclosing questions about jurors’ general reactions as well as specific questions about jurors’ votes that might, under some compelling circumstances, be inappropriate. The burden rests upon government, and in this instance upon the district court, to justify the need for curtailment, not the other way around: “A court may not impose a restraint that sweeps so broadly and then require those who would speak freely to justify special treatment by carrying the burden of showing good cause.”⁴⁵ The first amendment is good cause enough.

In re Express News arose on mandamus, which the court, citing the law of the Ninth Circuit,⁴⁶ ruled was the appropriate remedy. When a federal district court’s rule is the subject matter in controversy, it is generally the United States Attorney who puts up the defense. This procedure preserves an adversarial setting while avoiding the unseemliness of requiring the district court to defend itself on mandamus. The appellate court was unpersuaded by the argument that freedom of debate and independence of thought would be jeopardized if jurors knew their arguments and ballots

total of fifteen Supreme Court cases, from *Martin v. City of Struthers*, 319 U.S. 141 (1943) (right to receive handbills) to *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980) (advertising that promotes the use of electricity).

42.

Some people would have you believe that this is a very radical position, and maybe it is. But all I am doing is following what to me is the clear wording of the First Amendment that ‘Congress shall make no law . . . abridging the freedom of speech or of the press.’ These words follow Madison’s admonition that there are some powers the people did not mean the federal government to have at all. As I have said innumerable times before I simply believe that ‘Congress shall make no law’ means Congress shall make no law.

H. BLACK, A CONSTITUTIONAL FAITH 45 (1969).

43. 695 F.2d at 809.

44. *Id.* at 810.

45. *Id.*

46. *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978).

would be published to the world. The challenged rule was a blunderbuss; it categorically denied all access for all purposes, and for all time, not merely disclosure of ballots.⁴⁷ *In re Express News* was decided the same month the court denied petitions for rehearing and rehearing en banc in *Baier v. Parker*. Would that it had come down sooner, but such is the fortuity of the flow.

Agreeing with the Third Circuit's conclusion that the same societal interests that mandate a first amendment right of access to criminal trials apply to pretrial criminal proceedings, the court in *United States v. Chagra*⁴⁸—with Judge Rubin writing—extended this right of access to bail reduction hearings held in court or in other places traditionally open to the public. The Third and Ninth Circuits have recognized a first-amendment right to attend pretrial suppression hearings,⁴⁹ and the District of Columbia Court of Appeals has held the press and public enjoy a first amendment right of access to pretrial detention hearings.⁵⁰ True, bond reduction hearings do not have a history of public access; often bail is set informally and not always in open court. But the court recognized that history is not determinative: “[T]he first amendment must be interpreted in the context of current values and conditions,”⁵¹ we are told. This utterance is one of the most dramatic penned during the term. The first amendment is not static; its meaning is not to be cabined to the values and conditions of 1791. Recognition of a right of access, however, does not fix the judicial scales “beyond counterweight.”⁵² The court repeated its earlier observation that the first amendment, despite its categorical language, is not an absolute: “There is no single divine constitutional right to whose reign all others are subject.”⁵³ The opinion lists the circumstances under which a trial court may lawfully exclude the press from bail reduction hearings.⁵⁴ In the instant case, the district judge properly excluded the press on findings of likely prejudice and a lack of alternatives to closure.

47. 695 F.2d at 810.

48. 701 F.2d 354 (5th Cir. 1983).

49. *United States v. Brooklier*, 685 F.2d 1162, 1169-71 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550, 555 (3d Cir.1982).

50. *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc).

51. 701 F.2d at 363.

52. *Id.* at 364.

53. *Id.* at 365.

54. *Id.* (“(1) [defendant’s] right to a fair trial will likely be prejudiced by conducting the hearing publicly; (2) alternatives to closure cannot protect defendant’s fair trial right; and (3) closure will probably be effective in protecting against the perceived danger.”)

This *Chagra* case has a procedural twist worthy of note. An appellate court is rarely presented an issue without an opponent, but it happened here. The defendant lost interest in the case after his guilty plea. The prosecution never supported closure. Who, then, was there to oppose the newspapers on appeal? Moreover, was it open to the media, though not a party to the case, to appeal the closure order, or must the press seek other avenues of review? The court solved the first problem by appointing an amicus curiae to defend the decision of the district court. That was a creative step, and under the collateral order doctrine, the court held it open for the press to contest closure orders by taking an appeal.⁵⁵ If the question were an open one, Judge Rubin would have required review by mandamus, not by interlocutory appeal. Mandamus is quicker, and time is of the essence in first amendment cases.⁵⁶ But the settled adjective law of the Fifth Circuit allows both modes of review, and the panel was obliged to fall in line.

B. Adult Theaters

To paraphrase Chief Justice Marshall only slightly, "The power to zone is the power to destroy."⁵⁷ In *Basiardanes v. City of Galveston*⁵⁸ the court struck down Ordinance 78-1, which flatly banned adult theaters from all of the central business district and which, in its effect, squeezed Mr. Basiardanes and company into an industrial patchwork of swamps, warehouses, and railroad tracks. Basiardanes wanted to lease his downtown building to a movie concern called Universal Amusements Company, an outfit that traded in adult motion pictures that were not obscene. The proposed theater lay across the street from a major renovation of Galveston's Grand Opera House. City officials moved quickly to block Basiardanes's efforts by passing its new ordinance which was

55. *Id.* at 358-60.

56. *Id.* at 360 n.15.

57. Or, as the Great Chief Justice put it in announcing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819): "[T]he power to tax involves the power to destroy"—words that Marshall borrowed verbatim from Webster's oral argument in the case. See 17 U.S. (4 Wheat.) at 327 ("An unlimited power to tax involves, necessarily, a power to destroy"). But see Mr. Justice Frankfurter's comment, concurring in *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466, 490 (1939): "The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223 (dissent)."

58. 682 F.2d 1203 (5th Cir. 1982).

modeled after the Detroit law upheld by the Supreme Court in *Young v. American Mini Theaters*.⁵⁹ The City fathers believed that a nexus existed between adult theaters and crime; the ordinance was aimed, purportedly, at reducing crime. But the court, distinguishing Detroit's case, saw the matter differently. Ordinarily the power to zone is subject to minimal oversight; judges will approve zoning regulations as long as they are rationally related to legitimate state interests,⁶⁰ and one would think that reducing crime in downtown Galveston is a legitimate interest. But here the ordinance touched activity protected by the first amendment, *viz.*, the showing of *non*-obscene adult movies. Galveston, in its wisdom, had defined "adult theater" as any theater from which children unaccompanied by an adult are excluded under Texas law. This bizarre scheme reduces the adult population to seeing only what is fit for children, which the court thought too constricting. "By pegging its definition of adult theaters to Texas law on obscenity for minors, Galveston's regulation of adult theaters sweeps broadly into the area protected by the First Amendment."⁶¹ *American Mini Theaters* was not controlling, since the Galveston ordinance not only dispersed adult theaters but effectively drove them off Galveston Island altogether.⁶² The court's rejection of the alleged crime nexus is a bold step, theoretically speaking. The mere assertion of a state interest is not enough. "The City must buttress its assertion with evidence that the state interest has a basis in fact and that the factual basis was considered by the city in passing the ordinance."⁶³ Nothing in the record indicated to the court that Ordinance 78-1 was passed after a weighing of the effects of adult theaters on urban life. The "empty record"⁶⁴ before Galveston City officials stood in stark contrast to the facts of the Detroit case. There the legislative record was laden with the testimony of sociologists and urban planners. One wonders why Galveston, or any legislative body for that matter, cannot adopt by reference the findings of a sister state or even of a distant jurisdiction. The spread of model legislation would be seriously restricted, and unfortunately so, were it necessary to rebuild the legislative record, so

59. 427 U.S. 50 (1976).

60. See, e.g., *Village of Belle Terre v. Boras*, 416 U.S. 1 (1974). In the Fifth Circuit, see *Stansberry v. Holmes*, 613 F.2d 1285 (5th Cir.1980).

61. 682 F.2d at 1213.

62. *Id.* at 1213-14.

63. *Id.* at 1215.

64. *Id.*

to speak, in each instance by the testimony of experts.⁶⁵ But surely the court is right, in this case, to probe the motives of city officials. Both the timing of the ordinance and its history pretty plainly show that the real reason Galveston objected to the proposed theater was its location next to the Grand Opera House, not its nexus to crime. Protection of the Opera House is a legitimate goal, said the court, but it is not one with the same weight as safe streets, "nor is it one that entitles the City to squelch free speech."⁶⁶ Ordinance 78-1 also unconstitutionally suppressed Biasiardanes's freedom to advertise. All he wanted to do was to hang a sign saying "ADULT THEATER" on his facade—a harmless gesture, reasoned the court. Commercial speech, once excluded from first amendment coverage, now enjoys constitutional protection.⁶⁷ Banning all advertising of adult theaters, regardless of content, goes too far. Nothing in Biasiardanes's simple sign depicted the "celluloid delights" within the theater; he was therefore entitled to nominal damages—no actual damages having been shown—for breach of his first amendment right to advertise.⁶⁸ The court noted, however, that under *Carey v. Phiphus*,⁶⁹ a case that every civil liberties lawyer would do well to read, attorneys' fees awards may be supported by an award of nominal damages. The court also remanded for trial on the claim of lost lease revenues, since there was evidence in the record of some actual injury to Biasiardanes's pocketbook.⁷⁰

65. *Cf. Tobacco Accessories v. Treen*, 681 F.2d 378, 380 n.2 (5th Cir. 1982) (sustaining Louisiana's Drug Paraphernalia Law, which was patterned after the Model Drug Paraphernalia Act drafted by the United States Department of Justice. Judge Politz's opinion, which upholds Louisiana's Paraphernalia Law, quoted extensively from Congressional hearings and from the statement of a United States Deputy Assistant Attorney General in support of the Model Act).

66. 682 F.2d at 1216.

67. *See Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). *Cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

68. 682 F.2d at 1219-20.

69. 435 U.S. 247, 257 n.11 (1978). *See generally* Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346 (1980). Closer to home, readers interested in exploring the matter of the fee should have a look at Judge Rubin's opinion for the court in *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980), which holds too low a \$30 per hour fee under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1976 and Supp. V. 1981); \$50 per hour was more reasonable, said the court.

70. 682 F.2d at 1220 n.22.

II. FOURTH AMENDMENT

A. Dog Sniffing in the Schools

There is more to *Horton v. Goose Creek Ind. School District*⁷¹ than first meets the eye. Actually, two *Horton* opinions were handed down during the term, some five months apart. *Horton I*,⁷² decided on June 1, 1982, is first-rate judicial craftsmanship. By that I mean it treats the question presented—whether a dog's sniff is a "search"—with a freshness of approach and with breathtaking dexterity. I realize that comparisons are invidious, but those whose lives have been touched by the work of John Minor Wisdom will doubtless excuse my praising him here by reference to his *Horton* opinions. There is much to learn about the judicial process behind these two slip opinions.

Horton I held that the sniff of a drug-detecting dog "must be recognized as a search governed by the fourth amendment."⁷³ Little did it matter to Wisdom, J., that a mountain of authorities, including the Second and Seventh Circuits, had reached the contrary conclusion. What mattered most to the panel—Judges Randall and Tate sat aside their brother—was reasoning, not recital of authority. The decided cases were confused theoretically, said the panel, and in the face of this confusion the court was hesitant to extend the rule that canine sniffing is not a search to dragnet sniffing operations in the schools "simply on the basis of precedent."⁷⁴ Instead, Judge Wisdom chose to "analyze the problem afresh and determine whether the sniffing offends reasonable expectations of privacy."⁷⁵ To say that Judge Wisdom's opinion thoroughly canvasses the authorities—rejecting some, building on others—is not to do him, and presumably his clerks, justice. One can only marvel at the case law surgically dissected in the opinion and in the notes. The panel rejects the analogy to a police officer smelling marijuana smoke. Some courts say a sniffing dog is no different from a human being, or they say the dog's olfactory sense merely "enhances" the senses of the policeman, in the same way a flashlight enhances

71. 690 F.2d 470 (5th Cir.1982) (on petition for rehearing), *cert. denied*, 103 S. Ct. 3536 (1983).

72. 677 F.2d 471 (5th Cir. 1982) (per Wisdom, J., Randall and Tate, JJ.).

73. *Id.* at 480.

74. *Id.* at 477.

75. *Id.* at 477-78.

sight.⁷⁶ Of course, this is a false analogy. "Nick's nose did not enhance Detective Berks's senses; it replaced them," the Ninth Circuit opined shortly before *Horton I* came down.⁷⁷ Judge Wisdom says of the same false analogy: "We find this reasoning unpersuasive."⁷⁸ Here is judging, let it be said, in the grand manner. The sniffing of a dog is unquestionably different from the sniffing of a human being; otherwise law enforcement agencies would not invest resources in training the animals. Judge Wisdom describes drug-sniffing dogs as "giant olfactory nerves,"⁷⁹ and his figure certainly fits the facts. The dog permits the officer to detect data otherwise imperceptible to human senses, and, unlike flashlights, drug-sniffing dogs are generally not in use in society. Therefore, on reasoning, if not authority, the court held the sniff a search.⁸⁰

But there is something very unsettling about the opinion in *Horton I*. One of the authorities listed among those whose reasoning the panel questions is *United States v. Goldstein*,⁸¹ which, surprisingly, turns out to be an earlier panel decision of the same Fifth Circuit. Doubtless Judge Wisdom's attempt to distinguish *Goldstein* and his criticism of its reasoning stirred up the colleagues. Five months later, on petition for rehearing, *Horton I* was withdrawn and *Horton II* was substituted in its place. In the Fifth Circuit no panel is free to disregard earlier decisions, however suspect their reasoning.⁸² On rehearing, Judge Wisdom was obliged to follow *Goldstein* and follow it he did: "We find *Goldstein* to be controlling on the question of whether the dogs' sniffing of student lockers in public hallways and automobiles parked on public parking lots was a search."⁸³ It thus continues to be the law in the Fifth

76. See, e.g., *United States v. Goldstein*, 635 F.2d 356 (5th Cir. 1981), *cert. denied*, 452 U.S. 962 (1981).

77. *United States v. Beale*, 674 F.2d 1327, 1333 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3529 (1983) (for reconsideration in light of *United States v. Place*, 103 S. Ct. 2637 (1983)).

78. 677 F.2d at 478.

79. *Id.*

80. *Id.* at 480.

81. 635 F.2d at 356 (per Frank M. Johnson, J., Kravitch and Allgood, JJ.).

82. As Judge Tate has pointed out, the Fifth Circuit follows "the strict circuit precedent policy, which requires all subsequent panels to follow even an isolated earlier panel precedent until it is overruled by en banc consideration . . ." Tate, *The Last Year of the "Old" Fifth (1891-1981)*, 27 *Lox. L. Rev.* 689, 690 (1981) (citing *Spinkellink v. Wainright*, 596 F.2d 637, 638 (5th Cir. 1979); *United States v. Evans*, 572 F.2d 455, 477 n.23 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978)).

83. 690 F.2d at 477 (per curiam). That *Horton II* was handed down per curiam is further evidence the panel was bowing to the Fifth Circuit's iron-clad rule of stare decisis.

Circuit, as well as elsewhere, that dog sniffing of airport luggage or student lockers is not a search.

To this outside observer, *Horton I* was a bold effort—too bold some would say—to rewrite the law of the Fifth Circuit by indirection.⁸⁴ A very wise judge once remarked within my hearing, “If you don’t like a case, distinguish it.” But there are limits to the creative capacity of even our greatest judges. That is one lesson, as I read them, in these two *Horton* opinions. Another lesson is that without judges willing to criticize the law as they find it, without a wholesome measure of thinking in the reports, fiat tends to replace reasoning in law. One need only read the latest word from the Supreme Court on the matter of dog sniffing to realize the value of thinking in print to sound judgment. The canine sniff is *sui generis*, says the Court, in one fleeting paragraph of obiter that assuredly will control the future.⁸⁵ It is now the law of the land—unfortunately without the benefit of briefing or oral argument—that canine sniffing of luggage is not a “search” within the meaning of the fourth amendment. For what it’s worth, this lowly surveyor prefers the craftsmanship of *Horton I*.

Of course, sniffing a person is quite different from sniffing a locker, in terms of its general offensiveness and one’s expectation of privacy. Judge Wisdom has made it clear, and there is no disagreement about it, that dragnet sniffing of students in the schools is a search within the meaning of the fourth amendment.⁸⁶ On this point, the Fifth Circuit stands in unison against the law of the Seventh Circuit, and justifiably so. “We need only look at the record in this case to see how a dog’s sniffing technique—*i.e.*, sniffing around each child, putting his nose *on* the child and scratching and manifesting other signs of excitement in the case of an alert—is intrusive,” said the court in *Horton II*.⁸⁷ Certainly, the thought of a Doberman pinscher marching up and down the aisles of my daughter’s sixth grade class and poking its nose up against her

84. Cf. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687, 733 (1981) (“Distinguishing Fifth Circuit holding from Fifth Circuit dictum is a difficult task for any court, and one often incapable of satisfactory performance.”).

85. *United States v. Place*, 103 S. Ct. 2637 (1983). A week later the Supreme Court summarily vacated the Ninth Circuit’s judgment in *United States v. Beale*, *i.e.*, a dog’s sniff is a search, and remanded for reconsideration. 103 S. Ct. at 3529. It appears inevitable that the Ninth Circuit will have to recant its holding in deference to the Supreme Court’s dictum. So it goes.

86. 690 F.2d at 479.

87. *Id.*

strikes me as frightening. It will take more than the fiction of *in loco parentis*, which Judge Wisdom expressly rejects,⁸⁸ to convince this parent that dog sniffing in the schools is all right. But one parent's personal view, even a judge's for that matter, is not the test. Under the fourth amendment, the test is reasonableness. Drawing an analogy to *Terry v. Ohio*, the opinion in *Horton II* goes on to apply a balancing approach whereby the intrusiveness of the search is weighed against the need for information, and a standard of "reasonable cause" based on individualized suspicion is laid down.⁸⁹ "The intrusion on dignity and personal security that goes with the type of canine inspection of the student's person involved in this case cannot be justified by the need to prevent abuse of drugs and alcohol when there is no individualized suspicion, and we hold it unconstitutional."⁹⁰ Thus, in the Fifth Circuit, the fourth amendment has not gone entirely to the dogs. And even locker-sniffing dogs, under *Horton II*, must be "reasonably reliable," a matter that was left open on remand for development of an olfactory record.⁹¹ The Supreme Court denied certiorari⁹² in *Horton II*, and there the matter rests.

III. OF LIBERTY AND PROPERTY

A. Dress Codes in the Schools

First a word about beards generally. Socrates, who was a great teacher, wore one.⁹³ But he lived in a different time, at a different place. Charles Evans Hughes, undoubtedly the greatest Chief Justice in the twentieth century up to now, wore one. It was a matter

88. *Id.* at 480 n.18.

89. *Id.* at 481.

90. *Id.* at 481-82.

91. *Id.* at 482.

92. 103 S. Ct. 3536 (1983).

93. Reginald Reynolds in his painstaking history of beards says, apropos "*Of the Beard Philosophic*":

Pliny speaks of the *respect and fear* inspired by the beard of Euphrates, a Syrian philosopher, and Strabo says much the same of the bearded Gymnosophists. The Beard Philosophic, whereby every man could grow as long a beard as Socrates deemed himself as good a philosopher, survived into the shaven age. Of such beards the younger Pliny wrote when he praised that of the philosopher Euphrates . . . a philosopher without a beard was very lyttell esteemed.

R. REYNOLDS, BEARDS: THEIR SOCIAL STANDING, RELIGIOUS INVOLVEMENT, DECORATIVE POSSIBILITIES, AND VALUE IN OFFENSE AND DEFENSE THROUGH THE AGES 40 (1949) (emphasis in original).

of convenience with him, and it contributed to Hughes's image. "Why does the public regard me as a human icicle?" Hughes once asked a friend. There were two reasons: "First, the public doesn't know you. Second, you wear a full beard."⁹⁴ A little later in his hirsute career, Chief Justice Hughes's fan mail was exceeded in volume only by Huey Long's—when the latter was in the Senate. One admirer merely drew a picture of the famous whiskers on a card. It reached Hughes without name or address.⁹⁵ One wonders what Socrates or Chief Justice Hughes would think of a rule requiring all teachers to shave their beards? Shave them they must in Rapides Parish, Louisiana.

I'm told by friends that life is different in Rapides Parish from, say, life in New Orleans. Perhaps this explains why the Rapides School Board, in its wisdom, voted to apply its Student Dress Code to *all* employees in the system, from janitors and bus drivers on up to tenured teachers. Judge Thornberry's opinion in *Domico v. Rapides Parish School Board*⁹⁶ sustained the School Board's policy against beards as a "reasonable means of furthering the school board's undeniable interest in teaching hygiene, instilling discipline, asserting authority, and compelling uniformity."⁹⁷ But doubts linger. True, a decade ago in *Karr v. Schmidt*,⁹⁸ the Fifth Circuit held en banc that hygiene, discipline, asserting authority, and compelling uniformity are legitimate concerns of the school board. But *Karr* trimmed students' hair, not teachers'. And in the *Lansdale v. Tyler Junior College*⁹⁹ case, again en banc, the court reasoned that the right of junior college students to choose their mode of personal hair grooming was within "the great host of liberties protected by the Fourteenth Amendment from arbitrary state action."¹⁰⁰ Thus college students are free to wear their hair as they see fit in the Fifth Circuit. In 1975, in the *Handler v. San Jacinto Junior College*¹⁰¹ case, another panel applied the reasoning of *Lansdale* to strike down a junior college's regulation prohibiting the wearing of beards among faculty. "School authorities may regulate teachers' appearance and activities only when the regulation

94. I.M. PUSEY, CHARLES EVANS HUGHES 377 (1951).

95. II *Id.* at 666.

96. 675 F.2d 100, *reh'g denied* 680 F.2d 1389 (5th Cir. 1982).

97. *Id.* at 102.

98. 460 F.2d 609 (5th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 989 (1972).

99. 470 F.2d 659 (5th Cir. 1972) (en banc), *cert. denied*, 411 U.S. 986 (1973).

100. *Id.* at 663.

101. 519 F.2d 273 (5th Cir. 1975).

has some relevance to legitimate administrative or educational functions," said the *Handler* court.¹⁰² "The mere subjective belief in a particular idea by public employers is, however, an undeniably insufficient justification for the infringement of a constitutionally guaranteed right."¹⁰³ The *Handler* court thought it "illogical to conclude that a teacher's bearded appearance would jeopardize his reputation or pedagogical effectiveness with college students"¹⁰⁴ One wonders what the connection is, in point of fact, between the Rapides Parish School Board's ban of beards on all of its employees and any educational aim? Certainly Socrates's example suggests that one can wear a beard and still teach effectively. Chief Justice Hughes's beard, if anything, added to his authority. What kind of beard are we talking about? A neatly trimmed Vandyke would seem to pose no threat to personal hygiene. And to say that requiring a bus driver in Rapides Parish to shave his beard will promote discipline sounds preposterous. Whose discipline are we talking about anyway, the students or the employees? That is never made clear in the discussion. Focusing a trifle harder on the purposes of the rule and its relation, genuine or not, to the aims of the school board may expose weakness lying only slightly beneath the surface of what appears to be rubber-stamp analysis.

This latest hair case falls somewhere in between the established precedents. It concerns the liberty of adults, not children. But the context is the grade and high school, not the junior college. Generally when a court is caught in the middle of its own holdings finer lines will have to be drawn. But in *Domico v. Rapides Parish School Board*, Judge Thornberry distinguishes *Handler*, which he joined, on the basis of what he perceives to be an established "bright line" applicable to hair cases between the high school door and the college gate. "[I]n the public elementary and secondary schools, such regulations are always justified by the school's needs,"¹⁰⁵ says the court, but the opinion never explains why. We are told the school board has made "a quite rational determination to limit its employees' choice of hairstyle, and we therefore will not

102. *Id.* at 277.

103. *Id.*

104. *Id.*

105. 675 F.2d at 102. But see Wilkinson & White, *Constitutional Protections For Personal Lifestyles*, 62 CORNELL L. REV. 563, 605-06 (1977) ("But proper due process analysis hardly stops with the abstract finding of a legitimate state interest. Where regulation impinges on a constitutional right—here, that of appearance—the means chosen by the state ought significantly to further the announced state objectives.").

intervene,"¹⁰⁶ but again this leaves the main question in the case—the relationship between the challenged rule and its aims—unanswered. *Kelley v. Johnson*,¹⁰⁷ which is quoted but not discussed, is a policeman's hair case, and therefore distinguishable. Police wear uniforms; tenured teachers generally wear what they please. In *Kelley*, Justice Rehnquist emphasized: "The overwhelming majority of state and local police of the present day are uniformed."¹⁰⁸ *Kelley* said nothing at all about applying student dress codes to adult teachers.

The only other case relied on by Judge Thornberry, a Seventh Circuit opinion¹⁰⁹ by then Judge (now Justice) Stevens, is also distinguishable, and in a crucial respect. Judge Stevens expressly reserved the question whether "a specific form of dress or exposure may be required or totally prohibited,"¹¹⁰ and he cited among other instances of "intolerable required conformity"¹¹¹ the official prohibition of beards during the reign of Peter the Great.¹¹² The *Domico* opinion ends by quoting the following passage from the law of the Seventh Circuit:

If a school board should *correctly* conclude that a teacher's style of dress or plumage, has an adverse impact on the educational process, and if that conclusion conflicts with the teacher's interest in selecting his own lifestyle, we have no doubt that the interest of the teacher is subordinate to the public interest.¹¹³

The key word, of course, is "correctly," and while all would agree with Judge Thornberry that "[t]he same may be said about other school system employees, such as bus drivers,"¹¹⁴ some may per-

106. 675 F.2d at 102.

107. 425 U.S. 238 (1976).

108. *Id.* at 248.

109. *Miller v. School District No. 167, Cook County, Ill.*, 495 F.2d 658 (7th Cir. 1974).

110. *Id.* at 664-65.

111. *Id.* at 665 n.25.

112. See generally VII W. & A. DURANT, *THE STORY OF CIVILIZATION: THE AGE OF LOUIS XIV.* at 398 (1963) (Peter the Great shaved his own beard in 1698; beardlessness was to be a sign of modernity, of willingness to enter into Western civilization). Compare the plight of Joseph Palmer, America's outstanding champion of the beard:

Few men in history have been persecuted as he was for courageously defending his beard as a symbol of individual freedom against rigid small-town conformity. 'I'll tell you why I wear it,' he would say, 'if anyone can tell me why other men 365 days a year scrape their faces from nose to neck.'

H. SEVERN, *THE LONG AND SHORT OF IT: FIVE THOUSAND YEARS OF FUN AND FURY OVER HAIR* 92 (1971).

113. *Miller*, 495 F.2d at 667 (emphasis added).

114. 675 F.2d at 102.

ceive that the quotation begs the very question at issue. There is a fleeting reference to “the evidence below,”¹¹⁵ but what it shows nowhere appears in the opinion. With all respect, the *Domico* opinion jumps too quickly to its conclusion; nor is it clear that Fifth Circuit case law, or the controlling law of the Supreme Court, “compels”¹¹⁶ the court’s two-page affirmance. *Domico* therefore is a case that shows how resorting to bright lines often risks obscuring real difficulties.

B. Public Employment and Procedural Due Process

*Shawgo v. Spradlin*¹¹⁷ rejects both a procedural and substantive due process challenge to the temporary suspensions of two Amarillo police officers, and the permanent demotion from sergeant to patrolman of one of them. Their cohabiting together outside marriage was in violation of catch-all department rules proscribing conduct that “if brought to the attention of the public, could result in justified unfavorable criticism of that member or the department.”¹¹⁸ This is a very hard case on its facts because other Amarillo police officers commonly engaged in the same practice without penalty, and the conduct in question was expressly approved by a supervisor of one of the officers. Moreover, Judge Tate’s opinion for the court recognizes that the actual conduct for which the officers were punished—dating and spending the night together—“is not self-evidently within the ambit of the regulations and thus does not carry with it its own warning of wrongdoing”¹¹⁹ Judge Tate’s opinion is admirably candid, and, as is characteristic of his work, he bends over backwards to emphasize the strengths of the losing side. That is good judging, if I may say so of a friend’s work. But the net result in this case strikes me as perilously wrong.

To punish police officers, whose records are otherwise spotless, for off-duty dating that they have no reason to believe is wrong and for love-making in private that they have been told is all right seems unjust—procedurally gross, if you will—in terms of elemen-

115. *Id.*

116. *Id.* at 103.

117. 701 F.2d 470 (5th Cir.), *cert. denied*, 104 S. Ct. 404 (1983) (Brennan, Marshall, and Blackmun, JJ., dissenting from the denial of *cert.*).

118. *Id.* at 473.

119. *Id.* at 478.

tary due process, which requires fair warning before discipline or discharge. Why should the Fifth Circuit go along with this?

The answer lies in recognizing *Shawgo v. Spradlin* as the unfortunate, and I think ill-advised, legacy of *Bishop v. Wood*,¹²⁰ a five-to-four opinion of the Supreme Court handed down in 1976. In *Bishop* a majority of the Court held that public employment personnel decisions, even mistaken ones, implicate no constitutionally protected liberty interest; absent a protected property state interest, personnel decisions are outside the ken of federal judicial review. Thus, in his peroration for the Court Justice Stevens says:

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.¹²¹

Judge Tate quotes this passage in *Shawgo*; he also emphasizes that "the underlying conduct—cohabitation or romantic involvement between a subordinate and superior officer—was within the scope of state personnel regulations and not independently protected by the Constitution,"¹²² a conclusion that is certainly suggested by *Kelley v. Johnson*.¹²³ The right of privacy, particularly a policeman's privacy, is not unqualified. Most observers would agree with Judge Tate when he says there exists "a rational connection between the exigencies of Department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit."¹²⁴ But what about the claim of lack of warning?

On this issue it is no answer to quote *Bishop v. Wood*. There the Court never reached the question of what process is due, since

120 426 U.S. 341 (1976).

121 *Id.* at 349-50 (footnotes omitted).

122 701 F.2d at 479.

123 425 U.S. 238, 244-49 (1976).

124 701 F.2d at 483.

neither "property" nor "liberty" interests, according to the Supreme Court, were at stake. However, in this *Shawago* case, the court acknowledged the presence of a constitutionally protected property interest under Texas civil service law, requiring cause for demotion, and demotion by due process: "The permanency of the personnel action and the substantial loss of benefits inherent in a demotion . . . support the employee's reasonable expectation of continued status unless cause exists for demotion; these factors create a legitimate claim of entitlement protected by the Due Process clause."¹²⁵ Once constitutional entitlement enters a case, due process requires fair warning. To this observer, the catch-all regulations *as applied* provided no warning at all.

Of course police officers should not live together in sin, and chiefs of police should make that clear in their regulations. But it is quite another thing to approve off-duty dating and love making and then, without warning, to punish after the fact. Judge Tate, again with admirable candor, recognizes the unfairness of it all, and he repeatedly emphasizes the availability of state judicial review:

The circumstances under which Whisenhunt was demoted may not seem 'fair' to us as judges, and we may hope that state judicial review affords a remedy for such unfairness as is perceived by us. Nevertheless, a federal court must heed the dictates of federalism that, where there is not an independently protected constitutional right, a federal court is not 'the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.'¹²⁶

Judge Tate quotes *Bishop v. Wood*'s peroration, to the effect that the United States Constitution is not a shield against incorrect personnel decisions of state agencies. But, respectfully, the Due Process Clause has always been interpreted as a shield against procedural arbitrariness writ large, and nothing in *Bishop v. Wood* forecloses recognition that in public employment cases, where constitutional entitlements are at stake, federal courts remain free to vouchsafe public employees against fundamentally unfair modes of governmental action. There are enough "cracks in the 'new property'"—to use Professor Van Alstyne's felicitous

125. *Id.* at 476.

126. *Id.* at 478 (citing *Bishop v. Wood*, 426 U.S. at 349-50).

figure¹²⁷—without the need for further federal court erosion of *federal* due process guarantees. State judicial review may prove a false hope. With great respect to the panel, *Shawgo v. Spradlin* is a hard case of missed opportunity.

C. Taxpayer Due Process

Daniel R. Rutherford, pro se mind you, won his and Mrs. Rutherford's case¹²⁸ against the Internal Revenue Service during the term, and Judge Johnson's bold opinion for the court deserves a word of praise. The complaint sketched a portrait of palpably unfounded tax over-assessment, lawless vendetta, and mental harassment on the part of an IRS agent by the name of Kuntz. The Rutherfords sought money damages for mental anguish, recovery of legal fees needlessly expended in fighting off the IRS, and punitive damages. The trial court dismissed the complaint, ruling that available administrative procedure for recovery of tax over-assessments is sufficient due process. On appeal, the court reversed, in effect creating a *Bivens*-type¹²⁹ tort action for taxpayer harassment. Characterizing the interests asserted as "an attempt to lay claim not to a property interest, but to a liberty interest derived from and protected by the substantive aspects of the due process clause,"¹³⁰ Judge Johnson reasoned that the remedy suggested by the trial court is not responsive to the wrong stated in the com-

127. Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 455, 487 (1977), wherein Professor Van Alstyne argues that "liberty" as used in the due process clause should be defined to include freedom from arbitrary adjudicative procedures or freedom from governmental adjudication of individual claims by unreliable means. But see *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982), wherein the court, albeit finding a minimal entitlement sufficient to invoke the guarantee of due process, was careful to point out that:

the Supreme Court's current mode of analysis in procedural due process cases forecloses recognition of a substantive entitlement to freedom from governmental procedural arbitrariness. . . . For now at least, an individual has no constitutional freedom from fundamentally unfair modes of governmental action, the threatened deprivation of which would trigger procedural due process protections.

Id. at 1037 n.30 (citation omitted). The *Haitian Refugee* court struck down expedited processing of Haitian asylum claims because "the government created conditions which negated the possibility that a Haitian's asylum hearing would be meaningful in either its timing or nature." *Id.* at 1040.

128. *Rutherford v. United States*, 701 F.2d 580 (5th Cir. 1983).

129. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (recognizing a federal cause of action for damages where federal narcotics agents make a warrantless search and arrest of the petitioner without probable cause and in violation of the fourth amendment).

130. 702 F.2d at 583.

plaint. "In the language of procedural due process, it provides the Rutherfords no 'opportunity to be heard' on their allegations that Kuntz violated their constitutional rights."¹³¹ Because a refund proceeding is not the process that is due, the court reversed the trial court's decision that available judicial and administrative proceedings satisfy the fifth amendment's guarantee of due process.

Curiously, the court in *Rutherford* left open the question whether the substantive aspects of the due process clause create in taxpayers a liberty interest in freedom from malicious harassment "of the kind, degree and effect"¹³² as that attributed to agent Kuntz. "Implication of nontextual substantive rights from the general monitions of the due process clause is a matter not to be undertaken lightly,"¹³³ cautioned the court. Since the matter of substantive right had been neither briefed nor argued, it was left open for initial decision by the district court. Judge Johnson's approach—deciding on what process is due while at the same time pretermittting the question of substantive right—is contrary to the analysis suggested in *Board of Regents of State Colleges v. Roth* and its offspring.¹³⁴ The usual approach is to determine, first, whether liberty or property interests are at stake, and only then to consider what process is due. Coming at these questions in reverse order leaves the reader, not to mention Mr. and Mrs. Rutherford, hanging. What appears a signal victory for the harassed taxpayer may prove, on remand, an empty dictum. We shall see.

D. Regulating Doctors

The court in *Maceluch v. Wyson*¹³⁵ perceived a rational basis for legislative differentiation between doctors of medicine and doctors of osteopathy. The latter emphasize manipulative therapy rather than the use of surgery or drugs in health care. The court reasoned that two schools of medicine, even if they differ only in their advocacy of differing philosophical approaches to the same scientific realities, "present a difference that a legislature may note without unlawfully discriminating against one, or preferring one

131. *Id.* at 584.

132. *Id.*

133. *Id.*

134. 408 U.S. 564 (1971). See also *Meachum v. Fano*, 427 U.S. 215 (1976); *Bishop v. Wood*, 426 U.S. 341 (1976). Accord *Paul v. Davis*, 424 U.S. 693 (1976).

135. 680 F.2d 1062 (5th Cir.1982).

over the other."¹³⁶ Hence there was nothing unconstitutional about requiring doctors of osteopathy to utilize the designation "D.O." rather than the familiar "M.D." following their names in connection with professional practice. Controlling the designation under which physicians may practice is a form of economic regulation, said the court; furthermore, "the 'right' to be admitted to a profession, including medicine, is not fundamental *per se* in the constitutional sense."¹³⁷ Absent constitutionally protected interests, Judge Higginbotham is surely wise to eschew the role of super-medical board in the guise of judicial review:

A federal court decree is clean, swift, and difficult to overturn. Its powers attract those who have lost in the rough and tumble of legislative politics, but its power is undemocratic and antimajoritarian. Accordingly, the rationale for the exercise of judicial power requires, at the least, that the 'constitutional' interest impinged by the legislature be one traceable to the Constitution. The Court has no veto. That belongs to the governor. And saying it is the Constitution that vetoes does not make it so.¹³⁸

E. Removal of Clinical Privileges

Tenured medical school professors generally practice what they profess, usually by way of clinical privileges. *Daly v. Sprague*¹³⁹ leaves in doubt whether these privileges rise to the level of constitutionally protected "property" in the *Roth* sense of the word, *viz.*, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."¹⁴⁰ Justice Stewart's opinion for the Court in *Roth* goes on to say that,

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.¹⁴¹

136. *Id.* at 1066.

137. *Id.* at 1065.

138. *Id.* at 1069-70.

139. 675 F.2d 716 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1448 (1983).

140. *Roth*, 408 U.S. at 577.

141. *Id.*

Regardless of what one thinks of Justice Stewart's idea that property interests are not created by the Constitution, which some commentators think a dubious proposition,¹⁴² certainly the Fifth Circuit is obliged to follow the law—however well or poorly the Supreme Court declares it. Thus, the Fifth Circuit has said “we look to state law for the existence of a property interest.”¹⁴³ Judge Randall's opinion for the court in *Daly v. Sprague* is exemplary not only in terms of carefully following the law, but also in terms of forcefully laying it out. There is something powerful and inexorable about Carolyn Randall's opinions for the court. *Daly* is a fine example of no-nonsense writing in the reports. Substantively, the court acknowledges that possession of medical *staff* privileges may constitute a property interest protected against arbitrary deprivation. But the record in *Daly*—note well ye lawyers—was too sparse to satisfy plaintiff's burden of showing constitutional entitlement. The record was barren of facts showing that Daly's clinical privileges were analogous to medical staff privileges, or that there was any explicit written or oral agreement which created an entitlement to these privileges. “We do not intimate that clinical privileges could not rise to the level of a constitutionally protected property interest; we only say that, in this case, Daly did not meet his burden of presenting facts to show that a property interest existed.”¹⁴⁴ Thus, *Daly* is a case that turns on a failure of proof. Although in fairness to the licked lawyer, not to mention future clients, one wonders what kind of proof would satisfy Judge Randall.

Likewise Dr. Daly did not demonstrate the existence of a liberty interest by his claim that removal of clinical privileges damaged his reputation. There was no “*stigma-plus*” as is required under both the Supreme Court's opinion in *Paul v. Davis*¹⁴⁵ and the Fifth Circuit's holding in *Moore v. Otero*.¹⁴⁶ Dr. Daly retained his professorship throughout the incident in question, and he suffered no “drastic change in status” by reason of the temporary removal of clinical privileges after he indicated he would be unavailable due to his wife's illness.¹⁴⁷ On his return from voluntary leave, his clinical privileges were quickly restored. “Any alleged damage

142. See Monaghan, *Of “Liberty” and “Property,”* 62 CORNELL L. REV. 405, 434-39 (1977).

143. 675 F.2d at 727 (citing *Moore v. Otero*, 557 F.2d 435, 437 (5th Cir. 1977)).

144. 675 F.2d at 727.

145. 424 U.S. 693, 700-11 (1976).

146. 557 F.2d 435, 437 (5th Cir. 1977).

147. 675 F.2d at 728.

to reputation because Daly could not see patients or because he would be forced to reveal the temporary loss of privileges does not implicate a liberty interest,"¹⁴⁸ the court reasoned. All was not lost, however, as Judge Randall reversed the trial court for its unexplained failure to consider plaintiff's first amendment claim. Dr. Daly also alleged that defendant Sprague forbade him from communicating with his patients, and that, as a result, he was unable to participate in a consultation with another physician. These allegations, the court ruled, "raise first amendment concerns which are not dependent upon the existence of a liberty or property interest."¹⁴⁹ Summary judgment for failure to state a claim was therefore improper as to Daly's first amendment allegations, and the court remanded the matter for supplemental briefing and discovery, if necessary, and for the trier's consideration on the merits of Daly's first amendment claim.

IV. *SCOTT v. MOORE*¹⁵⁰

A. 42 U.S.C. § 1985(3)

Here is the term's most spectacular case: en banc, one of the Old Fifth's last; a divided court on a perplexing question of law and history; two principal opinions, one by Judge Charles Clark for fourteen members of the court, now the law of the Circuit from the pen of its new Chief; a dissent for eight judges authored jointly by Judges Rubin and Williams, scholars both; and separate dissenting opinions by Judges Anderson and Garwood. At first glance, the facts of the case suggest nothing more than mob violence against nonunion construction workers along Alligator Bayou near Port Arthur, Texas. This is not meant to excuse the busting of heads with iron pipe, only to ask what this assault and battery case is doing in federal court. The late Mr. Justice Harlan once put a similar question to then Solicitor General Thurgood Marshall during the oral argument of *United States v. Guest*:¹⁵¹ "Could the Congress make the murdering of a Negro a federal crime?"¹⁵² Solicitor

148. *Id.*

149. *Id.*

150. 680 F.2d 979 (5th Cir.1982) (en banc).

151. 383 U.S. 745 (1966).

152. The quotation is from the sound recording of the argument, No. 65, Oct. Term 1965, *United States v. Guest*, argued Nov. 9, 1965. The author uses excerpts from the actual oral arguments in the *Guest* case, including Mr. Justice Harlan's question, in teaching con-

General Marshall said no, based on his understanding of controlling law. But a lot of law, not to mention legal history, has gone over the damn since then, beginning with the *Guest*¹⁵³ case itself in 1966. At bottom, what is ultimately at stake in *Scott v. Moore* is nothing less than the proper allocation of judicial authority between the courts of the Union and the courts of the States.

In barest outline, the essentials are these: First, the Reconstruction Congress that passed the Ku Klux Klan Act of 1871, including section 2 of the original act,¹⁵⁴ was pretty plainly worried about massive, military-like political terrorism on the part of the rogues in white sheets in the postbellum South. Negroes were murdered not because they were black, but because they were Republicans—a point that has been lost to history.¹⁵⁵ The ultimate goal of

stitutional law at the LSU Law School. For further details, see Baier, *What Is the Use of a Law Book Without Pictures or Conversations?*, 34 J. LEGAL EDUC. ____ (1984) (forthcoming).

153. 383 U.S. 745 (1966), of which Professor Alfred Avins has said: "[T]he United States Supreme Court has turned history inside out. . . . [T]he *Guest* case is so wide of the mark that it would be necessary to burn all of the Congressional Globes in the nation to support it." Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331, 381 (1967). See generally Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

154. Codified at 42 U.S.C. § 1985(3) (Supp. V 1981).

155. Common citizens, too, were the object of Klan violence when they supported the Republicans—thus, both whites and blacks who voted Republican were visited by Klansmen; contrariwise, voters of both races were left alone when they supported Democrats. It was not therefore race but party affiliation that singled a voter out for Klan attention. To prove this "political" motive for Klan terrorism, Congressman Stoughton (R. Mich.) quoted the testimony of James Boyd, a confederate veteran and Klansman, before the Joint Ku Klux Klan Investigating Committee of 1871:

Question. What is your knowledge of the object and extent of this organization [the White Brotherhood] throughout the State [North Carolina]?

Answer. Their object was the overthrow of the reconstruction policy of Congress and the disfranchisement of the negro.

Question. Were there any whippings in the county?

Answer. Yes, sir. I believe there were one hundred or one hundred and fifty in the last two years in the county, *white and black*.

CONG. GLOBE, 42d Cong., 1st Sess. 320 (Mar. 28, 1871) (emphasis added). Representative Stoughton also quoted from the testimony of freedman Caswell Holt, "who was twice visited by the Ku Klux." Speaking of blacks in his county, Holt stated that:

[The Ku Klux Klan] wanted to run them all off because the principal part of them voted the Radical [Republican] ticket. . . . *Question.* Were those that would not vote the Conservative [Democratic] ticket the ones that had these outrages committed on them? *Answer.* Yes, sir. You never saw one bothered at all that voted the Conservative ticket.

CONG. GLOBE, 42d Cong., 1st Sess. 321 (Mar. 28, 1871). Congressman Buckley (R. Ala.) supported the observation of Boyd, Holt, and others that racial oppression was not the primary animus or object of the Klan—its true motive being a desire to wrest and keep control of state governments from the Republicans, thereby subverting Congressional Reconstruction:

the Klan, the Republicans believed, was usurpation, through terror and political subversion, of Republican control of Southern states, thereby overthrowing Reconstruction policy and withdrawing from the freedmen the equal protection of laws and the equal privileges and immunities that the Reconstruction Amendments to the Constitution were meant to secure.¹⁵⁶ The Forty-Second Congress, like Congresses ever since, was divided on what to do. The Radical Republicans had some far reaching ideas that you can read about, either originally in the *Congressional Globe*, or second-hand in the *University of Chicago Law Review*.¹⁵⁷ Representative Shanks (R.-Ind.) asserted in debate that the federal government possessed the authority "to go down into the several States to protect [United States] citizens" in the enjoyment of their natural rights. Later Shanks declared, "I do not want to see [the original bill] so

What is the philosophy of Kukluxism? In what does it take its origin? It does not originate in Republican misrule. . . . Nor does this Ku Klux business take its origin in the antagonisms of race. White and black suffer alike; more colored than white, because the colored are the most numerous.

Id., app. at 194.

The observations contained in these primary sources are corroborated and confirmed by Harold M. Hyman and William M. Wiecek in their recent book *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 301 (1982): "But concerns about civil rights, even in their Reconstruction context, were never wholly race-centered: they included wide and growing attention to the condition of white Unionists and bluecoats. Northerners, especially Republicans, were accustomed to blending these commitments."

156. The purpose of the Klan violence and intimidation was to subvert and replace the Republican State governments with Democratic regimes sympathetic to a return to the *status quo ante bellum*, to a restoration of the Bourbon hegemony. The remarks of Congressman Wilson (R. Ind.) are typical of the Republicans' perceptions: "And, sir, what is the purpose of all this bloody work? . . . [I]t is for the express purpose of controlling government in the States where these things are done, by preventing citizens from exercising their legitimate constitutional privileges." *CONG. GLOBE*, 42d Cong., 1st Sess. 484 (Apr. 5, 1871).

For corroboration of the Republicans' view by modern historians, see D. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* 11, 14 (1981); and A. TREALEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* pt. VI, at 383-98 (1971).

157. Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402 (1979). Professor Alfred Avins also recounts the legislative history in his article *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 329 (1967). These articles are cited in both the majority and the dissenting opinions. Judges Rubin and Williams refer to B. SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES* (1970), and to several other law review articles and notes, including Wildman, 42 U.S.C. § 1985(3)—*A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved*, 17 SAN DIEGO L. REV. 317 (1980); Comment, *Private Conspiracies to Violate Civil Rights*, 90 HARV. L. REV. 1721 (1977); Note, *The Troubled Waters of Section 1985(3) Litigation*, 1973 LAW & SOC. ORD. 639. It is obvious that *Scott v. Moore* stimulated the court's scholarly abilities; the opinions total 44 pages (not counting headnotes) and 90 footnotes.

amended that there shall be taken out of it the frank assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State."¹⁵⁸ But this view, and with it the original version of Section 2 of the Ku Klux Act, was rejected on grounds that Congress did not have the power to federalize tort law. In the words of Congressman John A. Bingham, chief author of the fourteenth amendment: "God forbid . . . that by so legislating we would strike down the rights of the State. . . . I believe our dual system of government essential to our national existence."¹⁵⁹ One thing stands out from the debates: As finally passed, the Ku Klux Act was aimed at affording protection to United States citizens in the South within the contours of the federal system the Republicans wanted to preserve—one with "a clear and well defined line between the powers of the General Government and the powers of the States."¹⁶⁰ Looking back over the history of our constitutional law, it's fair to say the line has remained neither clear nor well-defined.

At this point I had better confess that I am no historian. Like most judges I take my history from the law reviews and from those more qualified than I to divine legislative purpose from the dusty pages of the *Congressional Globe*. But we all are obliged to do the best we can.¹⁶¹ *Scott v. Moore*, as we shall see in a moment, confronts us with two versions of history; in doing so it raises the thorny problem of objectivity and reconstruction in history, a matter that has justifiably worried both scholars and practitioners alike.¹⁶²

One historical exegesis, not cited by either the majority or the dissent in *Scott v. Moore*—this time from a professional historian of solid reputation in the field of Reconstruction history, Professor Michael Les Benedict—pretty well sums up the congressional mood that gave us the Ku Klux Klan Act as best I can fathom it:

158 CONG.. GLOBE, 42d Cong., 1st Sess. app. at 141 (Apr. 3, 1871).

159. *Id.* app. at 84 (Mar. 31, 1871).

160. *Id.* at 187 (Rep. Chas. Willard, R. Vt.) (Apr. 6, 1871).

161. Most law schools, including the better ones, make no effort to train their students in the techniques of historical scholarship. What counts most is current caselaw, never mind the past. Even the leading treatises in constitutional law are lamentably bereft of historical information and background. Of course this is all wrong. See generally Scheiber, *American Constitutional History and the New Legal History: Complimentary Themes in Two Modes*, 68 J. AM. HIST. 337, 349 (1981).

162. See generally C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); F. WIENER, *USES AND ABUSES OF LEGAL HISTORY: A PRACTITIONER'S VIEW* (1962) (Selden Soc. Lecture).

As to the permanent protection for Americans' rights, despite arguments to the contrary by those modern legal scholars who write in the tradition of a new nationalism, all the evidence of the congressional discussions, the ratification debates, and the public controversy indicates that Republicans intended the States to retain primary jurisdiction over citizen's rights.¹⁶³

Thus a limiting amendment was added to the Act as originally proposed, substituting the language now found in section 1985(3), proscribing conspiracies with "*the purpose of depriving any persons or class of person, directly or indirectly, of the equal protection of the laws, or equal privileges and immunities under the laws.*" It is not self-evident just what this means.

Enough legislative history. Like all statutes, section 1985(3) must be interpreted and applied not only to the problems of the past, but to the problems of the present, and to those of the future. Doubtless history should play a part in determining the meaning of either a federal statute or the United States Constitution. Surely Cardozo was right in saying: "[H]istory, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future."¹⁶⁴ But there are occasions when courts decline to follow history in determining present law, and thereby the law of the future. In Dean Pound's famous expression: "Law must be stable and yet it cannot stand still."¹⁶⁵ Thus there is in this Alligator Bayou case another ultimate concern, not of political sovereignty, but of the interrelationship between law and history.

Enter the courts. The year is 1971, the centennarie of the Klan Act; the case is *Griffin v. Breckenridge*,¹⁶⁶ on certiorari from the Fifth Circuit; at issue are questions going to the scope and constitutionality of 42 U.S.C. section 1985(3). Justice Stewart begins by paying tribute to Judge Irving Goldberg's opinion for the Fifth Circuit below, which expressed "serious doubts" as to the "continued vitality" of *Collins v. Hardyman*,¹⁶⁷ which read a state action element into section 1985(3). Speaking for the Fifth Circuit, Judge Goldberg said that "it would not surprise us if *Collins v. Hardyman* were disapproved and if § 1985(3) were held to embrace pri-

163. Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 48.

164. B. CARDOZO, *supra* note 1, at 53.

165. R. POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923).

166. 403 U.S. 88 (1971).

167. 341 U.S. 651 (1951).

vate conspiracies to interfere with rights of national citizenship,"¹⁶⁸ but he concluded that "[s]ince we may not adopt what the Supreme Court has expressly rejected, we obediently abide the mandate in *Collins*."¹⁶⁹ Here again is judging in the grand manner. What a joy to be reversed by the Supreme Court—sometimes.

Griffin v. Breckenridge rejects the artificially restrictive construction of *Collins*, saying that "in the light of the evolution of decisional law in the years that have passed since that case was decided . . . many of the constitutional problems there perceived simply do not exist. Little reason remains, therefore, not to accord to the words of the statute their apparent meaning."¹⁷⁰ Plainly, there is no state action element in the words of the statute, and *Griffin* construes it to cover private conspiracies. But not all tortious conspiratorial interferences with the rights of others are covered.

The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.¹⁷¹

At this point Justice Stewart emphasized the language quoted above requiring intent to deprive persons or classes of persons of equal protection of the laws, or equal privileges and immunities under laws. "[T]here must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action,"¹⁷² said Justice Stewart for the Court. This latter statement, as best I can make out, is a quantum jump away from the original purpose of the Ku Klux Klan Act, *viz.*, political subversion.¹⁷³ But remember a century has intervened; original purpose may have little to do with present problems. The Klan in

168. *Griffin v. Breckenridge*, 410 F.2d 817, 825-26, (5th Cir. 1969).

169. *Id.* at 826-27.

170. 403 U.S. at 95-96.

171. *Id.* at 102.

172. *Id.*

173. There is a marked tendency for the modern mind, looking backwards, to see its own day and age, and its own problems, reflected in the past, rather than to see the past for what it really was. This tendency—historians call it the "fallacy of presentism"—doubtless produces other, lesser slips, such as dating the *Congressional Globe* 1971 instead of 1871, as it mistakenly appears in both the en banc majority slip opinion and in the published report of *Scott v. Moore*, 640 F.2d at 721 (panel opinion); 680 F.2d at 993 (en banc majority opinion). This blunder escaped the notice of 24 Fifth Circuit judges, 72 law clerks (each judge has three), and the sharp eyes at West Publishing Co.

1971 is a different animal, out to bust black skulls for different reasons. Racism has replaced politics in the scheming of the Klan.

The complaint in *Griffin* recited a scenario typical of the Invisible Empire at its worst: A bunch of whites mistook blacks travelling on state and federal highways in Mississippi for civil rights workers; blocked their way; dragged them out of their car; and beat them over the head with clubs. Justice Stewart for a unanimous Supreme Court understandably had little tolerance for this kind of conduct. "Indeed, the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not."¹⁷⁴ Query, what about a conspiracy aimed at busting nonunion hardhats along the banks of Alligator Bayou? How far out from the core is it permissible to draw analogies? And what of the penumbra? You can see where we're going.

In *Griffin* the Court was quick to throw the mantle of the statute's federal protection over "Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men."¹⁷⁵ This was authorized by the thirteenth amendment and its enforcement clause, said Justice Stewart. Furthermore, plaintiffs were exercising their right of interstate travel, one of those basic rights protected by the Constitution even as against private deprivation. It was clear to Justice Stewart that plaintiffs "had suffered from conduct that Congress may reach under its power to protect the right of interstate travel."¹⁷⁶ Justice Stewart wound up his reversing opinion in the accustomed fashion: "The judgment is reversed, and the case is remanded to the United States District Court for the Southern District of Mississippi for further proceedings consistent with this opinion."¹⁷⁷ This brings us, full circle, back to the Fifth Circuit.

We reach *Scott v. Moore* proper. Judge Clark's majority opinion, affirming injunctive¹⁷⁸ and monetary relief against the defendants, including several unions, is built upon two major premises: (1) private, conspiratorial abridgment of first amendment freedoms

174. 403 U.S. at 103.

175. *Id.* at 105.

176. *Id.* at 106.

177. *Id.* at 107.

178. Whether the Norris-LaGuardia Act, 29 U.S.C. §§ 104-105 (1976) precludes injunctive relief on the facts presented is beyond the scope of this article.

is a denial of equal protection of the laws within the meaning of section 1985(3) as interpreted in *Griffin*; and (2) Congress intended the statute to reach not only racially motivated class-based denials of equal protection, but other similar kinds of class-based "invidious discrimination" as well. This latter idea follows the reasoning of the Fifth Circuit, again sitting en banc, in *Kimble v. McDuffy*,¹⁷⁹ decided in 1981, ten years after *Griffin*. In *Kimble* the court considered what other kinds of class-based animus section 1985(3) might reach, and concluded two types of classes come within the statute's coverage. First, the statute covers classes "having common characteristics of an inherent nature"—viz., those kinds of classes offered special protection under the equal protection clause.¹⁸⁰ The Fifth Circuit also recognized that:

The class-based animus required by the Supreme Court in *Griffin* and now reasserted by this court is not identical with the class-based distinctions required to support an action under the equal protection clause. . . . For example, section 1985 was certainly intended to cover conspiracies against Republicans; distinctions based on affiliation with a major political party are not among those traditionally subject to special scrutiny under the Fourteenth Amendment. What *Griffin* stands for, and what we now hold, is that Section 1985 was intended to encompass only those conspiracies motivated by animus against the kinds of classes Congress was trying to protect when it enacted the Ku Klux Klan Act.¹⁸¹

The essential minor premise in *Scott v. Moore*, of course, is that the nonunion construction workers who were injured in the case, although not the usual "discreet and insular minorities"¹⁸² protected by the equal protection clause, are "the kind[] of class[] Congress was trying to protect when it enacted the Ku Klux Klan Act."¹⁸³ You can see how a statute, once it is cut loose from its historical moorings, is not easily cabined.

The majority in *Scott v. Moore* refuses to follow the law of the Fourth and Seventh Circuits to the effect that section 1985(3) provides no remedy for purely private impairment of first amendment speech and associational freedoms.¹⁸⁴ These holdings, according to

179. 648 F.2d 340 (5th Cir. 1981) (en banc).

180. *Id.* at 347.

181. *Id.* at 347 n.9.

182. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4. (1938).

183. *Kimble v. McDuffy*, 648 F.2d at 347 n.9.

184. *Bellamy v. Mason's Stores*, 508 F.2d 504 (4th Cir. 1974); *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976).

Judge Clark, are inconsistent with the Supreme Court's reasoning in *Griffin* and "so long as *Griffin* remains viable, we are bound by its determination that section 1985(3) reaches all deprivations of equal protection, whatever their source."¹⁸⁵ The difficulty with Judge Clark's analysis is that the first amendment, even as transmogrified by incorporation into a fourteenth amendment right,¹⁸⁶ has always been viewed as a restriction against government, not private individuals. Constitutional law is confusing enough without the notion of a first amendment violation of the equal protection clause by private conspiracy. Although section 1985(3) plainly reaches both public and private conspiracies aimed at denying persons equal protection of the laws, "it is a non sequitur to conclude that it, therefore, reaches all constitutional violations."¹⁸⁷

Contrary to what is said in the majority opinion, the determination whether a conspiracy is aimed at depriving "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"¹⁸⁸—which is the language of the limiting amendment—does not have as a component "the violation of some protected right."¹⁸⁹ Justice Stewart's opinion for the Court in *Griffin* carefully separates the determination of invidiously discriminatory animus—the second element of a section 1985(3) claim—and the determination whether the conspiracy deprived another "of having and exercising any right or privilege of a citizen of the United States"—the fourth element of the cause of action.¹⁹⁰ Subsequent to *Griffin* the Supreme Court has made it clear that section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates."¹⁹¹ Those designated rights are the rights of national citizenship, as Judge Irving Goldberg correctly recognized when *Griffin v. Breckenridge* was first before the Fifth Circuit in 1969; and while the first amendment, including freedom of association, is certainly a "right or privilege of a citizen of the United States," this national right only shields the people against government, not

185. 680 F.2d at 990.

186. See *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (per Hughes, C.J.) ("It is no longer open to doubt that the liberty of press, and of speech, is within the liberty safeguarded from invasion by state action."); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (dictum).

187. *Scott v. Moore*, 680 F.2d at 1012 (Rubin and Williams, JJ., dissenting).

188. 42 U.S.C. § 1985(3).

189. 680 F.2d at 988.

190. See 403 U.S. at 102-03 for an especially pertinent discussion.

191. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979).

their neighbors. As Judges Rubin and Williams recognize in their dissent—correctly, it is submitted: “The extension of § 1985(3) to protect against *private* infringement of every right protected against *governmental* action by the Constitution would create a *Bivens*-type tort action against every private conspiracy that affects a federal constitutional right.”¹⁹² With all respect, the majority in *Scott v. Moore* interprets section 1985(3) to create substantive rights in the name of guaranteeing equal protection of the laws, an approach the Supreme Court has expressly rejected in the parallel field of constitutional interpretation. “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws,”¹⁹³ the Supreme Court has said. By parity of reasoning, it is likewise not the function of the Fifth Circuit to create substantive statutory rights in the name of guaranteeing equal protection, or to overrule the *Civil Rights Cases*¹⁹⁴ by statutory reconstruction.

The majority’s minor premise—that nonunion construction workers are the kind of class Congress was trying to protect when it passed the Ku Klux Klan Act in 1871—also seems strained. Certainly Congress could not have specifically intended to protect nonunion workers; the labor movement in America was yet to be born. The purpose of the Klan Act was protection of Republicans against political repression, not labor violence. By way of response, the majority resorts to reasoning by analogy. We are told: (1) “an animus directed against nonunion association is closely akin to animus directed against political association”; and (2) “the position of these nonunion employees in Jefferson County, Texas, is markedly similar to that of the Republicans in the South.”¹⁹⁵ It is precisely at this point that the majority and the dissent part company. Says the dissent: “Congress in 1871 was assuredly not trying the protect

192. 680 F.2d at 1014.

193. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

194. 109 U.S. 3 (1883). Compare Mr. Justice Jackson’s comment, dissenting in *United States v. Harriss*, 347 U.S. 612, 635 (1954): “Judicial construction, constitutional or statutory, is always subject to hazards of judicial reconstruction.” Compare Frankfurter, J., concurring in *Graves v. N.Y. ex rel. O’Keefe*, 306 U.S. 466, 491-92 (1939), wherein note is taken of the occasional tendency on the part of judges “to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution.” The same thing, of course, can be said of statutory construction, and the judicial history of section 1985(3)—from *Griffin v. Breckenridge* on down—is a striking illustration of this encrustation phenomenon.

195. 680 F.2d at 994.

non-union workers, not only because it would not then have recognized the difference between union members and non-union members but simply because the Klan posed no threat to such workers."¹⁹⁶ What the majority forgets, and the dissent notes only slightly, is that as soon as the Klan spread from Tennessee in the spring of 1868, "the Ku Klux conspiracy no longer lay within the power of most states to control."¹⁹⁷ It was this state powerlessness that prompted extension of federal protection in the first place.¹⁹⁸ Nothing suggests that the sovereign state of Texas, with its criminal and civil courts, was powerless to bring the violence at Alligator Bayou under control, or to provide adequate relief to its victims. With all respect to the court, the majority's failure to take into account the availability of state relief is faithless to the Klan Act's original history, if not its literal text, and unjustifiably extends federal judicial power beyond its legitimate borders.¹⁹⁹

Judges Rubin and Williams would apply "a purely historical test"²⁰⁰ in interpreting the Klan Act. On the other side of the fence, Judge Clark instructs us that "the protection afforded by the civil rights acts is not static."²⁰¹ The dissent reads the law narrowly, tying it to the past. Judge Clark construes the statute with the breadth of a constitution, bequeathing it to the future.²⁰² Perhaps there is no right or wrong here, only sides to choose. Some judges prefer to follow history. Other judges, equally faithfully to

196. 680 F.2d at 1017 (Rubin and Williams, JJ., dissenting).

197. A. TRELEASE, *supra* note 156, at 383.

198. By early 1871 the crisis for the Republican Reconstruction governments of the South had become so pronounced that President Grant himself requested the passage of legislation aimed at stabilizing the South, for state authorities were themselves powerless to act: "[T]he power to correct these evils is beyond the control of the State authorities" CONG. GLOBE, 42d Cong., 1st Sess. 236 (Mar. 23, 1871).

See also the remarks of Congressman Cook (R.-Ill.) defending "the right of the United States to interfere and protect the citizen in person and property, when, by unlawful combinations too strong for the State authorities to put down or subdue, the citizen is deprived of his rights." *Id.* at 485 (Apr. 5, 1871).

199. For Harold Hyman's evidence and argument that after the Civil War, Northern Republicans progressively returned to their antebellum philosophy of "state-centered federalism," see H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 433-45 (1973). See also H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 465 (1982) (describing the 1870's as "a period of skyrocketing respect for state rights").

200. 680 F.2d at 1016.

201. *Id.* at 992.

202. But compare Mr. Justice Jackson's *aperçu*, concurring in the result, in *Douglas v. Jeannette*, 319 U.S. 157, 181 (1943): "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."

their oaths, look to the future. *Griffin v. Breckenridge* itself cut the Klan Act loose from history.²⁰³ Judge Clark and the majority in *Scott v. Moore* continue the voyage. Should the law follow history, or make it? There is no one answer.

And what of the statute as construed by the majority? Can Congress reach out this far? The majority says yes, pegging its construction on the commerce clause, and citing such familiar precedents as *United States v. Darby*,²⁰⁴ *Wickard v. Filburn*,²⁰⁵ and *Katzenbach v. McClung*.²⁰⁶ There was evidence of goods purchased outside Texas; that was enough commerce among the states to satisfy the majority. Judge Clark quotes Chief Justice Marshall's immortal utterance in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."²⁰⁷ Applying these standards, the majority concludes Congress acted within its constitutional power "when it enacted section 1985(3) to reach the private conspiracy involved here."²⁰⁸ This assumes, of course, that Congress was thinking about interstate commerce when it passed the Klu Klux Klan Act in 1871, a dubious proposition at best. As a matter of demonstrable historical record, the Forty-Second Congress had no such thing in mind. The dissenting judges make this clear, and Judge Garwood's response to the majority's reliance on *McCulloch v. Maryland* is devastating: "It stands *McCulloch v. Maryland* on its head to say that an 'end' not intended by Congress, and which Congress was not required to intend, can be used to sustain, and in sustaining to transform, an act of Congress taken in the exercise of distinctly different constitutional powers."²⁰⁹ In the old *Myers* case in the Supreme Court, Senator George Wharton Pepper told the

203. So did *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). See generally Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89; Gerber, *Playing Tricks on the Dead: Jones v. Alfred H. Mayer Company, An Historical Inquiry*, 1 PACE L. REV. 59 (1980). Professor Louis Henkin has charged that the *Jones* Court was "carried away by opportunity and temptation to do also Congress' share and to give the country statutes which no Congress ever enacted." Henkin, *The Supreme Court 1967 Term-Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 83 (1968).

204. 312 U.S. 100 (1941).

205. 317 U.S. 111 (1942).

206. 379 U.S. 294 (1964).

207. 17 U.S. (4 Wheat.) 316, 421 (1819).

208. 680 F.2d at 998.

209. 680 F.2d at 1025 (Garwood, J., dissenting).

Court: "I appeal to the [historical] record, because when this great tribunal declares the law we all bow to it; but history remains history, in spite of judicial utterances upon the subject."²¹⁰

The philosopher Sidney Hook has written:

There is a difference between using our knowledge of the history of the past in order to influence the future, to help bring about events we regard desirable and to forestall those which are undesirable, and making or manufacturing a history of the past solely with an eye to achieve our aims.²¹¹

Scott v. Moore, if not bad statutory construction, is bad constitutional law because it rests upon—say it softly—fiction.

Editor's Addendum

On July 5, 1983, after Professor Baier's analysis of *Scott v. Moore* was submitted to the *Review*, the United States Supreme Court, in a five-to-four decision, reversed the en banc decision of the Fifth Circuit. In *United Brotherhood of Carpenters v. Scott*,²¹² the Court confirmed the view that, even in a section 1985(3) context, state involvement is still required to violate first amendment rights.²¹³ The Court recognized that section 1985(3) does not create substantive statutory rights and that nonunion construction workers are not the kind of class that comes within the protection of section 1985(3).²¹⁴ In refusing to hold that section 1985(3) covers conspiracies motivated by invidiously discriminatory intent other than racial bias, the Court interpreted the statute not to include group actions resting on economic motivations such as union controversies.²¹⁵

210. *Myers v. United States*, 272 U.S. 52, 70 (1926). See also Professor Alfred Avins's statement, in oral argument before the United States Supreme Court in *Katzenbach v. Morgan*, 384 U.S. 641 (1966): "I will say that I think it would be necessary for the Department of Justice to burn the Congressional Globe debates if they were to convince anybody that the original understanding was in accordance with this statute." Record of Argument 49-50, quoted in Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U.L.J. 331, 381 n.249 (1967).

211. Hook, *Objectivity and Reconstruction in History*, in *PHILOSOPHY AND HISTORY* 250, 255 (S. Hook ed. 1963).

212. 103 S. Ct. 3352 (1983).

213. *Id.* at 3357.

214. *Id.* at 3358-60.

215. *Id.* at 3360.