

Constitutional Law—Civil

by John O. Cole*

I. INTRODUCTION AND CASES OF INTEREST

In the American judicial system, constitutional law issues form the warp onto which the woof of many a law suit is woven, and a survey of all such cases would be a huge undertaking. This article is confined to a select group of those relatively pure constitutional law cases that arise under the Bill of Rights in their civil capacity and those that arise under the due process and equal protection clauses of the fourteenth amendment.

Possibly the most interesting and far reaching case that arose in the survey period was *Muir v. Alabama Educational Television Commission*.¹ This case developed out of a decision by the Alabama Educational Television Commission (AETC) to withdraw an announced broadcast of a program because of its content. The program was the controversial *Death of a Princess* that had brought strong protests from Saudi Arabia when it was shown in England. During the week before the broadcast certain Alabama residents protested its showing, by citing a fear for the safety of American personnel working in Saudi Arabia if the program were shown. The AETC decided to cancel the show two days before its scheduled date, and plaintiffs immediately brought suit to compel the AETC to broadcast the film as advertised and to enjoin the AETC from making political decisions regarding programming.

The district court granted summary judgment for defendants on the grounds that the first amendment protects the right of broadcasters, both public and private, to make programming decisions free of all interference, and that the viewers have no constitutional right of access to the program that would override the programming discretion of the television station. A similar suit in Houston, Texas, concerning the same program

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1. 656 F.2d 1012 (5th Cir. 1981).

drew a different response.² In that case, the district court judge found for the plaintiffs on the grounds that the public television station there was a public forum and that its decision not to broadcast the program on the basis of its content was an unconstitutional prior restraint. The *Muir* case reached the appellate level first, and the opinion by Judge Markey of the United States Court of Customs and Patent Appeals, sitting by designation, stands as precedent unless and until it is modified by the en banc court. In a nutshell, Judge Markey affirmed the district court's decision and held that a public television station is not a "public forum" to which the viewers have access and further, that the first amendment protects the right of both public and private broadcasters to make program decisions free of interference, subject to the fairness doctrine.³ The freedom from interference in these decisions survives even when a claim is made that a decision based on political considerations is a clear form of political censorship by the government.

Judge Clark dissented, finding the majority opinion "fatally flawed by its failure to recognize the constitutionally mandated differences in the scope of editorial discretion of *public* and *private* broadcasters."⁴ He goes on to state his view that "when a public broadcaster cancels a scheduled program on the basis of the program's content, unless the procedural guidelines established in *Freedman v. Maryland*⁵ are followed, the state commits an act of censorship that runs afoul of the First and Fourteenth Amendments."⁶ Judge Clark objected to characterizing this case as turning on the notions of "public forum" and "right to access" and premised his approach on finding objectionable government censorship of ideas. When *Barnstone v. University of Houston, KUHT-TV* reached another Fifth Circuit panel, *Muir* was followed as precedent, but Judge Reavley while feeling bound by *Muir*, wrote a separate opinion disagreeing with the decision. Agreeing that there was no "public forum" or "right to access" problem in this case, he thought it was established that "once the government makes a facility available for a particular speaker, it may not deny the use of the facility to the speaker because it objects to the contents of his message."⁷ Thus, if it can be established that the government has attempted to silence a message on political grounds, then that decision is presumptively unconstitutional. We await an en banc analysis of these questions, followed, in all probability, by a Supreme Court review

2. *Barnstone v. University of Houston, KUHT-TV*, 514 F. Supp. 670 (S.D. Tex. 1980) *rev'd*, 660 F.2d 137 (5th Cir. 1981).

3. Relying on *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

4. 656 F.2d at 1026 (emphasis in original).

5. 380 U.S. 51 (1965).

6. 656 F.2d at 1026.

7. *Barnstone v. University of Houston, KUHT-TV*, 660 F.2d 137, 140 (5th Cir. 1981).

In another case with intriguing overtones (or undercurrents), the court reviewed the constitutionality of a Florida statute pertaining to abortions as a result of a class action suit filed by a licensed physician on behalf of his patients.⁸ The first section attacked stated that an unmarried minor must have either the written informed consent of a parent or guardian or an order from the circuit court (along with her own consent) to obtain an abortion.⁹ These requirements alone are not objectionable, but the last sentence of the section stated that, "[t]he court shall determine the best interest of the minor and enter its order in accordance with such determination."¹⁰ Both the district court and Fifth Circuit agreed that this sentence invalidated the section because of the holding in *Bellotti v. Baird*.¹¹ In *Bellotti*, the Supreme Court stated that a state may require parental consent or judicial authorization for an abortion in the case of an unmarried minor, but that judicial authorization *must* be given if the minor is deemed to be mature, or in the case of an immature minor, if the court determines the abortion to be in the best interests of the minor.¹² The last sentence of the Florida statute mandates that the court determine the minor's best interest regardless of the maturity issue and thus, this part of the statute is unconstitutional.

A more interesting question in the case was raised by that part of the statute burdening a married woman's right to an abortion. Subsection 4(b) required that a wife who is neither separated nor estranged from her husband furnish him with notice of the proposed abortion and allow him the opportunity to consult with the wife concerning the decision. As a prerequisite to securing an abortion, the wife had to provide the physician with either (1) a written statement that such notice and opportunity had been given, or (2) the written consent of her husband. This requirement was applicable to all three trimesters of the pregnancy. The state sought to justify the notice provision as a means of maintaining and promoting the marital relationship and as a means of protecting the husband's interest in the procreative potential of the marriage. The Fifth Circuit found that the interests involved were "sufficiently weighty" to justify the admitted burden on the woman's abortion decision, and found the notification provision valid.

In discussing the notification requirement, Judge Tjoflat characterized it as an inquiry into the weighing of two competing values: on the one hand is the woman's right to privacy in the abortion decision which is clearly burdened by the notification provision, and on the other, "the

8. *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981).

9. FLA. STAT. ANN. § 390.001(4)(a) (Supp. 1981).

10. *Id.*

11. 443 U.S. 622 (1979).

12. *Id.* at 647-48.

state's interest in ensuring that the institution of marriage maintains its authenticity."¹³ The concept of authenticity was further explicated in a footnote. As the note stated,

By authenticity we mean a marital relationship characterized by institutional integrity, *not* marital harmony, as the district court apparently assumed. . . . The concept we wish to convey is that the state has an interest in attempting to ensure that the institution of marriage maintains its identity with its conceptual essence. For example, the appellants have asserted that the notice provision furthers truthful and forthright communication between the spouses and mutuality of decisionmaking, which reflects Florida's notion of marriage as an ongoing, dual passage through life. The state interest underlying the regulation, therefore, is in attempting to bring the real into as close proximity as possible with the state's ideal conception.¹⁴

This is dangerously loose language. Does the state have the power to mandate that a marital relationship be "authentic," or to require that a marriage maintain an identity with its "conceptual essence"? Supreme Court precedent has led this author to believe that the right to privacy in its only interesting sense was just the right to be inauthentic or to set up a marital relationship as far from the conceptual essence as one (or two) people might decide. As Justice Marshall, dissenting in *H.L. v. Matheson*,¹⁵ points out, when speaking of a parental notification provision for a minor contemplating an abortion, "[t]hrough its notice requirement, the State in fact enters the private realm of the family rather than leaving unaltered the pattern of interactions chosen by the family."¹⁶ At the least, the new Eleventh Circuit should exercise great caution in this area, for the notion that the state can mandate authenticity, once released, may not be easily cabined. We must by all accounts keep in mind that 1984 approaches.

Having mentioned the most interesting case, and the most intriguing case, I close this introduction with a case that is neither interesting nor intriguing. It is simply insensitive to important privacy rights. In *Spiegel v. City of Houston*,¹⁷ plaintiffs were owners of adult movie theaters in Houston, Texas. They alleged a conspiracy to drive them out of business and brought an action against the City of Houston, its police department, and the district attorney. Both monetary damages and an injunction were sought. Plaintiffs cited four instances in which the Houston police har-

13. 659 F.2d at 484.

14. *Id.* at 484 n.4 (emphasis in original).

15. 101 S. Ct. 1164 (1981).

16. *Id.* at 1191.

17. 636 F.2d 997 (5th Cir. 1981).

passed their businesses, including three instances in which the police detained patrons and forced them to give their names and addresses. In one of these instances the media came in with the police and witnessed the patrons being questioned by police. The pictures were shown on television that night. In each case the show was stopped. The owners claimed serious damage to their businesses.

The district court, on these facts, granted plaintiffs a temporary injunction forbidding the police from forcing patrons of such theaters to give their names and addresses and forbidding the arrest of the employees when the arrest tends to close down the theater. The preliminary injunction did not prevent enforcement of Texas' obscenity statutes, but it did order that these harassing tactics be stopped.

Judge Coleman, writing for the panel, reversed the issuance of the injunction. Judge Coleman agreed that "[s]ince none of the films involved at the time of the raids had been determined as obscene according to appropriate community standards, they are . . . entitled to First Amendment protection."¹⁸ He held, however, that the injunction forbidding the taking of patrons' names was overbroad.¹⁹ Judge Coleman stated that "we can envision good faith law enforcement efforts which do require taking information from patrons, perhaps against their will."²⁰ For example, the patron may be a minor or a good witness. While an injunction against bad faith police tactics would be appropriate,²¹ enjoining the act of taking names and addresses goes too far. This author "can envision good faith law enforcement efforts" in every nook and cranny of first amendment jurisprudence, thus vitiating any injunctive relief against prior restraint of protected first amendment activity. One is reminded of the classic low scrutiny approach in the economic areas. As the Supreme Court said in *Williamson v. Lee Optical Co.*,²² in upholding a legislative action, "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."²³ These movies might not have been judged obscene at the relevant time but they are probably dirty movies and it "might be thought" that the police methods in this case were a rational way to enforce the law. This is all true, and yet terribly insensitive to the values expressed in the first amendment.

18. *Id.* at 1001.

19. *Id.* at 1002.

20. *Id.*

21. For example, when the names are taken to discourage future patronage of the theater.

22. 348 U.S. 483 (1955).

23. *Id.* at 488.

II. FIRST AMENDMENT

A. Obscenity

In *Reeves v. McConn*,²⁴ the court, in the process of striking down a Houston, Texas ordinance that regulated the operation of sound amplification equipment as overbroad, sustained a challenge to that part of the ordinance which prohibited amplification of words that were obscene. The court relied on the Supreme Court's holding in *FCC v. Pacifica Foundation*,²⁵ that had allowed regulation of "dirty words" (but not constitutionally obscene) in the context of the broadcast media. The court reasoned that amplified sound was analogous to broadcasting in the relevant sense that the unwilling listener could not easily avoid it.²⁶ Petitioner filed for a rehearing on this point and a rehearing en banc and argued that reliance on *Pacifica* was misplaced because government regulation of broadcast media is based upon the possibilities of intrusion deep inside the home. The court disagreed and denied a rehearing on the basis that amplified sound can reach into the home and even if not, the listener has the right to be protected from it when he is in a public place since he cannot easily escape it. The petitioner objected to the vagueness of the term obscene when used to cover words considered merely indecent or profane, but the court held that in the context of broadcast speech, including amplified speech, no vagueness problem arises with such an interpretation.²⁷

B. The Press and the Media

In *Belo Broadcasting Corp. v. Clark*,²⁸ several broadcasting stations asked to copy audiotapes of discussions between defendants and FBI operatives in the "Brilab" investigation in which the speaker of the Texas House of Representatives, two attorneys, and a labor official were implicated in a bribery scheme. The district court denied the request on the grounds that widespread publication of the tapes would interfere with the sixth amendment right to a fair trial. On appeal, the Fifth Circuit affirmed. The court held that this question had been settled by the Supreme Court in *Nixon v. Warner Communications, Inc.*²⁹ In *Warner Communications*, the Court made it clear that while reporters could not

24. 631 F.2d 377 (5th Cir. 1980).

25. 438 U.S. 726 (1978).

26. 631 F.2d at 387.

27. *Id.*

28. 654 F.2d 423 (5th Cir. 1981).

29. 435 U.S. 589 (1978).

be prohibited from reporting what was learned in open court,³⁰ neither the public nor the press had a right to physical access to exhibits introduced as evidence at a trial. The broadcasters sought to hurdle the *Warner Communications* approach by appealing to the recent pronouncements of the Court on the fair trial-free press issues in the *Richmond Newspapers, Inc. v. Virginia* case.³¹

Appellants presumably made an argument similar to the following:

Read from the structural perspective, *Richmond Newspapers* also provides powerful support for the Court's decisions articulating a first amendment right to receive information independent of speech rights held by those who seek to convey it. Indeed, the emergent rule of these cases—that the Constitution affords protection “to the communication, to its source and to its recipients both”—can be understood only from the structural standpoint. The right-to-receive decisions go beyond merely guarding against government censorship of “willing speakers.” They acknowledge a larger value, the value of having important information and opinion present in the “marketplace of ideas.” *Richmond Newspapers* recognizes that government, by virtue of its unique institutional position, may be the exclusive possessor of information that is necessary to informed self-government. Without a means of tapping that information, public discussion about government cannot be expected to achieve the “uninhibited, robust, and wide-open” quality envisioned by the framers.³²

According to the Supreme Court this “right to know” about criminal proceedings served the functions of assuring fairness to the accused and producing a community cathartic effect. It also had prophylactic benefit for the administration of justice. The Fifth Circuit thought that *Richmond Newspapers* did not disturb the rule that the press has no greater right to access of exhibits than the public and that neither has the right to a copy of the tapes in question.³³

C. Overbreadth

In *Johnson v. City of Opelousas*,³⁴ an action was brought challenging the constitutionality of a juvenile curfew ordinance on first and fourteenth amendment grounds. The district court upheld the ordinance with

30. See *Cox Broadcasting v. Cohen*, 420 U.S. 469 (1975), in which the Court struck down a state law prohibiting publications by the press of the name of rape victims that had been revealed in open court.

31. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

32. *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 155-56 (1980).

33. 654 F.2d at 427-28.

34. 658 F.2d 1065 (5th Cir. 1981).

one minor exception, but the Fifth Circuit found the curfew overbroad and reversed. The curfew ordinance prohibited unemancipated minors under seventeen years of age from being on public streets or in a public place between 11:00 p.m. and 4:00 a.m., Sunday through Thursday, and between 1:00 a.m. and 4:00 a.m., Friday and Saturday, unless accompanied by a parent or responsible adult or on an emergency errand. The court found only three other federal cases that had considered such a challenge, two of which had struck down such ordinances.³⁵ The court noted that "[a]lthough the totality of the relationship between the juvenile and the state is undefined, it is clear that minors as well as adults are protected by the Bill of Rights and the Fourteenth Amendment."³⁶ Expressing no opinion on the constitutionality of a narrowly drawn ordinance, the court found that this ordinance, which by its terms would prohibit attendance at religious or school meetings, dances, sporting events, legitimate employment, and so on, manifestly infringed on constitutionally protected activity.

The court realized that the first amendment protection accorded minors was not isomorphic with adults, and it cited the plurality's comments in *Bellotti v. Baird*,³⁷ which set out three reasons for treating minors differently under the first amendment. As the plurality stated, the three reasons are: "The peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing."³⁸ The court found that none of these three factors applied to the overly broad restrictions in the case before them, and that the court had no significant interest that would not be present in the case of an adult.³⁹

The Louisiana High School Athletic Association, in an effort to curtail athletic recruitment abuses, passed a rule prohibiting member schools from exerting undue influence over prospective students. The rule stated that "[i]t is a violation of the undue influence rule when school officials initiate or are a party to contacting or recruiting prospective athletes by any means to encourage them to attend their school."⁴⁰ The Holy Cross High School sent a teacher-coach to another school to speak to students about the scholastic and academic program available at Holy Cross and, based on his activities, the Association found the school in violation of

35. *Id.* at 1071.

36. *Id.* at 1072; see *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1967); *In re Gault*, 387 U.S. 1 (1967).

37. 443 U.S. 622 (1979).

38. *Id.* at 634.

39. 658 F.2d at 1073.

40. *Holy Cross College v. Louisiana High School Athletic Ass'n*, 632 F.2d 1287, 1288 (5th Cir. 1980).

this undue influence rule. The school went to federal court and attacked the Association's undue influence rule as an impermissible infringement on their first amendment right. The district court dismissed for lack of subject matter jurisdiction, but the Fifth Circuit reversed and found that the appellant's claim was not meritless or frivolous because there was clearly state action which arguably infringed on a first amendment right.⁴¹

D. Miscellaneous

In *Karen B. v. Treen*,⁴² the parents of public school students sought declaratory and injunctive relief concerning a Louisiana statute and school board regulation that established guidelines for student participation in prayer at school. Under the guidelines, each school day began with a minute of prayer followed by a minute of silent meditation. Each teacher was required to ask if any student wished to volunteer a prayer, and if no student wished to pray, the teacher could offer a prayer. If no one wished to pray, then the period of silent meditation was to be observed immediately. No prayer could be longer than one minute in duration. According to regulations, any student who desired to participate in the minute of prayer was required to submit the express written permission of his parents and make a verbal request to join in the exercise. Students without permission could either report to class and remain seated throughout the morning exercises, or remain outside the classroom under other supervision. The district court denied relief to the parents, but the Fifth Circuit reversed and found that the statutory scheme and school regulations violated the establishment clause of the first amendment. The majority of the panel examined the Louisiana scheme in light of the three principle criteria that the court has used to determine whether a state legislative enactment comports with the establishment clause. These three criteria are: (1) whether the statute has a secular legislative purpose; (2) whether the principle or primary effect of the statute is neither to advance nor to inhibit religion; and (3) whether the statute fosters "an excessive government entanglement with religion."⁴³ The majority found all three of these criteria violated by this scheme. Judge Sharp, from the Northern District of Indiana, sitting by designation, dissented, believing that none of the three criteria of *Lemon v. Kurtzman* were violated.⁴⁴

The district court had upheld the voluntary program under the three-pronged *Lemon* test. The district court had found evidence of a secular

41. *Id.* at 1289.

42. 653 F.2d 897 (5th Cir. 1981).

43. *Id.* at 900 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

44. 653 F.2d at 903.

purpose from testimony of the sponsors of the legislation: that it does not inhibit or promote religion because the prayer offered could "relate to anything from sports to the weather to religion;"⁴⁵ and that excessive entanglement was avoided by the provision for affirmative permission prior to participation. The Fifth Circuit, relying on the recent Supreme Court decision, *Stone v. Graham*,⁴⁶ which struck down a Kentucky law requiring the Ten Commandments to be posted in all classrooms, held the purpose to be clearly religious and discounted the avowed secular purposes. In *Stone*, the posters were purchased with private money, and all bore the following inscription: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."⁴⁷ The Supreme Court was unmoved by this attempted secularization of a religious text and stated that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."⁴⁸ The dissent disagreed, finding that the purpose here was to provide students with the freedom to exercise their religion and that this purpose is itself a "perfectly legitimate, secular purpose."⁴⁹ The majority held that the regulations clearly promoted religion by encouraging the observance of religious ritual, while the dissent again disagreed on the basis that allowing audible prayer has the primary effect of promoting religious freedom, not religion. Finally, the majority found excessive entanglement in the necessity for school authorities to stay constantly involved in this area to ensure neutrality and voluntariness, while the dissent thought the entanglement de minimis. The tensions in this controversial area are well illuminated by the majority and dissenting opinions in this case.

III. PRIVACY

In *Dike v. School Board*,⁵⁰ the plaintiff, Janice Dike, sued the school board and superintendant under 42 U.S.C. section 1983,⁵¹ challenging the board's refusal to permit her to breastfeed her child during her duty-free lunch period. For three months her husband brought the baby to school and the mother fed the infant in a private room. She was then ordered to stop and did so, but the baby did not react well and plaintiff was eventu-

45. *Id.* at 901.

46. *Stone v. Graham*, 449 U.S. 39 (1980).

47. *Id.* at 41.

48. *Id.*

49. 653 F.2d at 904.

50. 650 F.2d 783 (5th Cir. 1981).

51. 42 U.S.C. § 1983 (1970).

ally compelled to take an unpaid leave for the remainder of the school term in order to continue her breastfeeding. Plaintiff sued for an injunction and backpay and alleged that she had a constitutional right to breastfeed and that she could do so in privacy without disruption of school activities.

The district court deemed the action frivolous, dismissed it, and awarded attorneys' fees to defendant. The Fifth Circuit reversed, citing right to privacy decisions that support the right to autonomous decisions in such areas as marriage,⁵² procreation,⁵³ contraception,⁵⁴ abortion,⁵⁵ family relationships,⁵⁶ and the special parental interest in nurturing and rearing their children.⁵⁷ As the court stated:

Breastfeeding is the most elemental form of parental care. It is communion between mother and child that, like marriage, is "intimate to the degree of being sacred". . . . Nourishment is necessary to maintain the child's life, and the parent may choose to believe that breastfeeding will enhance the child's psychological as well as physical health. In light of the spectrum of interests that the Supreme Court has held specially protected we conclude that the Constitution protects from excessive state interference a woman's decision respecting breastfeeding her child.⁵⁸

The court remanded for trial to determine if the school board's presumably legitimate interests in avoiding disruption of the educational process, ensuring that teachers perform their duties without distractions, and avoiding potential liability for accidents are strong enough and narrowly enough drawn to override the mother's interest in privacy.

In *Fadjo v. Coon*,⁵⁹ the Fifth Circuit spoke to another aspect of constitutional deprivation under 42 U.S.C. section 1983.⁶⁰ The plaintiff, Fadjo, was beneficiary on six insurance policies on the life of a person who disappeared under suspicious circumstances. The insured had rented a fishing boat that was later found bloodstained and empty and no body was found. The insurance companies and the state attorney both began an investigation. The state subpoenaed testimony and documents from

52. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

53. *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

54. *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

55. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Roe v. Wade*, 410 U.S. 113 (1973).

56. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

57. *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

58. 650 F.2d at 787 (citation omitted).

59. 633 F.2d 1172 (5th Cir. 1981).

60. 42 U.S.C. § 1983 (1970).

Fadjo and, according to his judicial complaint, he was compelled to provide information about private details of his life. He offered the testimony after assurance from the state's investigator that his testimony was absolutely privileged. The investigator allegedly showed the evidence to a private investigator for the insurance companies and thereby damaged Mr. Fadjo's reputation, which forced him to move and effected his ability to find another job. The district court dismissed Fadjo's suit for lack of subject matter jurisdiction because he had failed to present a substantial federal question. The Fifth Circuit reversed, finding a nonfrivolous allegation of a deprivation of a constitutional right in the contention that plaintiff's right to privacy had been violated. The court held that plaintiff had a privacy interest in the right to confidentiality or nondisclosure which could have been violated in this case. As the Supreme Court stated in *Whalen v. Roe*,⁶¹ the right to privacy has two strands: "one is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."⁶² The first strand, the so-called "right of confidentiality" was argued on behalf of state senators⁶³ and federal judges⁶⁴ in challenging financial disclosure laws. Although the claims in those cases were not successful on the merits, the right to confidentiality was taken seriously. In deciding the merits of this type of claim the court needs to balance the alleged invasion of privacy against legitimate interests of the state in obtaining and disseminating the information. The appellees argued in *Fadjo* that the dismissal should be upheld on the basis of *Paul v. Davis*,⁶⁵ which stated that publication of an official act such as arrest was not a violation of privacy. The court distinguished *Paul* on its facts and also indicated that *Paul* needed to be read in light of *Whalen*, which adds the right to confidentiality to the right to autonomous decision making.

IV. VOTING

Voting dilution claims go beyond the one person-one vote inquiry and rest on a claim of inequality in the distribution of interest groups within a voting district rather than an inequality of voting bodies. The allegation often arises that at-large election districts dilute the voting effectiveness of an interest group by submerging that group within a greater majority,

61. 429 U.S. 589 (1977).

62. *Id.* at 599-600.

63. See *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

64. See *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981).

65. 424 U.S. 693 (1976).

so that the minority interest group is unable to elect a representative or be heard effectively in the democratic process. This dilution results in cities and counties with a large minority of black voters (for example, thirty to forty percent) that have never elected a black official and against whom a claim of insufficient concern for minority needs is often pressed. Great confusion currently reigns in the Supreme Court's attempted answer to the questions that surround this problem, and instead of a clear beacon lighting the way, we perceive only the babble of many tongues.⁶⁶ Some principles are relatively more clear than others. No particular group has a right to elect representatives proportional to its number, and even at-large voting, which allows consistent defeat at the polls by a minority group, is not per se unconstitutional under the fourteenth or fifteenth amendments.

In the early 1970s the Supreme Court made it clear in *White v. Regester*⁶⁷ that while at-large elections are not a per se unconstitutional dilution of minority voting strength,⁶⁸ these election schemes could be unconstitutional in certain circumstances. What those circumstances are or should be has badly divided the Supreme Court and left lower courts in a state of confusion.

In *City of Mobile, Alabama v. Bolden*,⁶⁹ the Supreme Court addressed this question, but a deeply divided Court shed little light on this issue. An analysis of the confusion engendered by that case is beyond the scope of this survey, but a thorough discussion of *Bolden* appears in *Lodge v. Buxton*.⁷⁰ *Lodge* stands as an excellent introduction to this area. For present purposes, it may be helpful to quote the conclusions reached in that case as a general guide:

A cause of action under the Fourteenth or Fifteenth Amendment asserting unconstitutional vote dilution through the maintenance of an at-large electoral system is legally cognizable only if the allegedly injured group establishes that such system was created or maintained for *discriminatory purposes*. A discriminatory purpose may be inferred from the totality of circumstantial evidence. An essential element of a *prima facie* case is proof of unresponsiveness by the public body in question to the group claiming injury. Proof of unresponsiveness, alone, does not establish a *prima facie* case sufficient to shift the burden of proof to the party defending the constitutionality of the system; responsiveness is a determinative factor only in its absence. The *Zimmer* criteria may be indicative but not dispositive on the question of intent. Those factors are

66. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

67. 412 U.S. 755 (1973).

68. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

69. 446 U.S. 55 (1980).

70. 639 F.2d 1358 (5th Cir. 1981).

relevant only to the extent that they allow the trial court to draw an inference of intent. The *Zimmer* criteria are not the exclusive indicia of discriminatory purpose and, to the extent that they are not factually relevant in a given case, they may be replaced or supplemented by more meaningful factors. Even if all of the *Zimmer* and other factors are established, an inference of discriminatory purpose is not necessarily to be drawn. The trial court must consider the totality of the circumstances and ultimately rule on the precise issue of discriminatory purpose. Finally, given the reality that each case represents an extremely unique factual context for decision, this Court will give great deference to the judgment of the trial court, which is in a far better position to evaluate the local political, social, and economic realities than is this Court.⁷¹

None of these conclusions should be relied on too heavily. As Judge Goldberg said when speaking of the confusion in this area, "[i]t is clear that these questions divided the Supreme Court producing the indecisive opinion and amorphous holding in *Bolden*; it is equally clear that their resolution will have to be the product of a long rebuilding process."⁷² It is hoped that the Supreme Court will move to clarify some of the issues.⁷³

In a related case, the court had before it a suit challenging the composition and method of selection of the Board of Education in the city of Thomaston, Georgia. Under the relevant statute,⁷⁴ enacted in 1915 and amended in 1978, the method of selection for the Board was that each year one of the members would retire and that member, along with the remaining members on the Board, would "elect" a new member. No black member had ever been "elected" until this law suit was filed. Then a black was put on the Board. The district court, relying on *Bolden*,⁷⁵ held that no discriminatory purpose had been shown and entered judgment for defendants, but the Fifth Circuit reversed.⁷⁶ Although appellants had characterized this as an election case, thus raising the *Bolden* arguments, the Fifth Circuit saw it as an appointment case since the Board position was not truly an elected position in the usual sense of the word.⁷⁷ This difference was deemed crucial. As Judge Morgan said for the panel,

Elections are a product of the general right to vote and may be affected by subtle factors unrelated to racial motives. In an election case, the fact that no black has ever been elected under a particular system of election does not necessarily reflect purposeful discrimination; whereas, in an ap-

71. *Id.* at 1375 (emphasis in original).

72. *Jones v. City of Lubbock*, 640 F.2d 777, 778-79 (5th Cir. 1981).

73. 639 F.2d 1358, *prob. juris. noted, sub nom. Rogers v. Lodge*, 102 S. Ct. 87 (1981).

74. 1915 Ga. Laws 848 (reaffirmed 1933; amended 1978).

75. 446 U.S. 55 (1980).

76. *Searcy v. Williams*, 656 F.2d 1003 (5th Cir. 1981).

77. *See Sailors v. Kent Bd. of Educ.*, 387 U.S. 105 (1967).

pointment case, the fact that no black has ever been appointed to a particular position, offered without explanation, is an indicator of purposeful discrimination.⁷⁸

Relying on a prior holding,⁷⁹ the court noted⁸⁰ that self-perpetuating boards are not per se unconstitutional. The court suggested, however, that a self-perpetuating board performing such an important government function as the one before it might present different problems than a board which performs a primarily proprietary function.

V. DUE PROCESS

In 1976, the Florida Legislature enacted a statute⁸¹ to provide a system of accountability for education in the state. As a part of this statutory scheme, students were required to perform satisfactorily in functional literacy as determined by the State Board of Education. In 1978, the Act was amended to require passage of a functional literacy examination prior to receipt of a state high school diploma. The first time that the test was given seventy-eight percent of the black students taking the exam failed one or more sections. In comparison, twenty-five percent of the white students failed one or more sections. In the second administration of the test seventy-four percent of the black students failed one or both sections while twenty-five percent of the whites retaking the test failed. In May 1979, of the approximately 91,000 high school seniors in Florida public schools, approximately twenty percent of the black students had not passed the test as compared to approximately two percent of the white students. Plaintiffs brought a class action challenging the right of the state to impose the passing of an examination as a condition precedent to the receipt of a high school diploma. The district court found that the statutory scheme, as applied, violated the equal protection clause of the Constitution and the due process clause. The Fifth Circuit affirmed,⁸² finding an implied property interest in receiving a diploma because of the expectation created in the students that if they attend school during the required years and pass the required courses they would receive a diploma. Thus, the rapid implementation of the testing program, which had severe consequences for the Class of 1979, was seen as a violation of due

78. 656 F.2d at 1009 (relying on cases in which discriminatory purpose is inferred directly from discriminatory impact in the administration of a neutral statute. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Turner v. Fouche*, 396 U.S. 346 (1970)).

79. See *Byrd v. City of San Antonio, Texas*, 587 F.2d 184 (5th Cir.), *cert. denied*, 444 U.S. 829 (1979).

80. 656 F.2d at 1010 n.8.

81. FLA. STAT. ANN. § 229.55 (West 1979).

82. *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981).

process. In addition, the court found a due process violation in the administration of a test which was fundamentally unfair in that it may have covered matters not taught in the schools. Although on oral argument counsel for the state assured the court that the state could prove that the test covered things actually taught, the Fifth Circuit found that such assurances were not in the record. Further, an examination that tests matters outside the curriculum violates the equal protection clause because it classifies students into passers and failers without a rational relation to the purpose for which it was designed. In addition, the court affirmed the trial judge's holding that the immediate use of the diploma sanction for failing the test would punish black students for deficiencies created by the previously dual school system.

*Brown v. Vance*⁸³ concerned a challenge to a statutory fee system for compensating justices of the peace in Mississippi. This consolidated appeal dealt with both criminal and civil courts. Under the fee system, the judges' compensation depended on the number of cases filed in each court. Plaintiffs alleged that since police officers favor judges with high conviction rates and since collection agencies and other creditors favor creditor-oriented judges, the system tempted judges to play to their respective clientele. The district court held that the presumption of honesty and integrity which accrued to justices of the peace had not been overcome by plaintiffs and entered judgment for defendants. The Fifth Circuit reversed, citing the principle first stated in *Tumey v. Ohio*:⁸⁴

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.⁸⁵

The court found that the "possible temptations" standard applied in this case even though the temptation was not so obvious on its face.⁸⁶

In *Shillingford v. Holmes*,⁸⁷ a city police officer, while engaged with others in making an arrest during a Mardi Gras parade, struck a tourist taking pictures of the incident in the face with a night stick. The blow smashed the camera into the tourist's face. The camera was destroyed and the tourist's forehead was lacerated. Plaintiff brought an action in

83. 637 F.2d 272 (5th Cir. 1981).

84. 273 U.S. 510 (1927).

85. *Id.* at 532, quoted in *Brown v. Vance*, 637 F.2d at 278. See also *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

86. 637 F.2d at 280.

87. 634 F.2d 263 (5th Cir. 1981).

federal court under 42 U.S.C. section 1983,⁸⁸ claiming a deprivation of his constitutional rights and seeking compensation and punitive damages. It is settled that not every case of physical abuse by police under color of state law constitutes a deprivation of constitutional rights; some cases of minor injury do not constitute a constitutional invasion and the only remedy lies in a state tort action. In determining whether a constitutional deprivation has occurred in such a case the court will look at: (1) the amount of force used in relation to the need presented, (2) the extent of the injury inflicted, and (3) the motives of the officer. As the court of appeals indicated in the case at bar:

If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience, it should be redressed under Section 1983.⁸⁹

The district court dismissed the complaint, finding that plaintiff was not severely injured and that this incident did not "shock the conscience."⁹⁰ The Fifth Circuit reversed on the basis of an independent review of the district court's legal conclusion concerning the constitutional claim. The court held that severity of the wound was not dispositive because it was merely fortuitous that the injuries were minor. The court held that the physical abuse in this case was sufficiently severe, sufficiently disproportionate to the need, and so deliberate and unjustified as to establish a constitutional deprivation.⁹¹ The Fifth Circuit reversed the district court's dismissal of plaintiff's claim, and, presumably because defendant was in default below, remanded for a determination of damages, both compensatory and punitive.

In *Davis v. Page*,⁹² the question was whether Florida's procedure of appointing counsel for indigent parents on a case-by-case basis in an adjudication of dependency hearing, in which a child was taken from its parents, met minimal due process guidelines. The en banc panel voted thirteen to eleven that such procedure was unconstitutional, because in their view,

the complexity of these proceedings always necessitates the offer of counsel to avoid the erroneous deprivation of a fundamental liberty interest. The right involved is absolute and should not be subject to the discretion of the trial judge. We thus hold that in a formal adjudication of depen-

88. 42 U.S.C. § 1983 (1970).

89. 634 F.2d at 265.

90. *Shillingford v. Holmes*, 490 F. Supp. 795 (E.D. La. 1980).

91. 634 F.2d at 266.

92. 640 F.2d 599 (5th Cir. 1981).

dency under Florida law, where prolonged or indefinite deprivation of parental custody is threatened, due process requires that an indigent parent be offered counsel and that counsel be provided unless a knowing and intelligent waiver is made.⁹³

The majority judges applied the three-part test developed in *Mathews v. Eldridge*⁹⁴ and found that (1) the private interest affected (the interest of a parent in keeping a child) was fundamental and the loss threatened was as grievous as could be imagined; (2) the provision of counsel would alleviate the risk of error in a significant way; and (3) the state's interest in saving money was not sufficient to override the protection to the liberty interest gained by the right to appointed counsel.⁹⁵

In an opinion written only a few months after *Davis*, the Supreme Court, in *Cassiter v. Department of Social Services*,⁹⁶ essentially disagreed and held, by a five to four margin, that the appointment of counsel in termination proceedings could be determined on a case-by-case basis.⁹⁷ The majority of the Supreme Court engaged in an analysis strikingly similar to the Fifth Circuit panel except for the conclusion. The major difference between these two opinions is that while the Fifth Circuit began by stressing the important liberty interest at stake and the important right to family integrity and autonomy, the Supreme Court majority began by stressing that the right to appointed counsel generally has been recognized only when the litigant may lose his physical liberty if he loses this litigation. The Supreme Court in its wisdom now decrees that a parent facing one day in jail on a simple traffic offense must have appointed counsel, but that a parent facing the loss of a child because of a termination proceeding has a right to appointed counsel only when a trial judge thinks it is important.

VI. EQUAL PROTECTION

The complex process of dismantling the dual public school system continues as we approach the thirtieth anniversary of *Brown v. Board of Education*.⁹⁸ Five cases during the survey period dealt with this problem, three from Texas and two from Louisiana.⁹⁹ In a classic understatement,

93. *Id.* at 604.

94. 424 U.S. 319, 335 (1976).

95. 640 F.2d at 603.

96. 101 S. Ct. 2153 (1981).

97. *Id.* at 2162.

98. 347 U.S. 483 (1954).

99. *Valley v. Rapides Parish School Bd.*, 646 F.2d 925 (5th Cir. 1981); *Taylor v. Ouachita Parish School Bd.*, 648 F.2d 959 (5th Cir. 1981); *United States v. Gregory-Portland Independent School Dist.*, 654 F.2d 989 (5th Cir. 1981); *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Tasby v. Estes*, 643 F.2d 1103 (5th Cir. 1981).

Judge Gee, speaking for the court in *Taylor v. Ouachita Parish School Board*,¹⁰⁰ wrote "As was not uncommon in this area and era, the command of *Brown v. Board of Education* . . . was slow to be heard in Ouachita Parish."¹⁰¹

The case of *Valley v. Rapides Parish School Board*¹⁰² can be read as a microcosm of the struggle for school integration in the southern states since *Brown v. Board of Education*.¹⁰³ The court began its decision with a sentence that poignantly illuminates the struggle: "Twenty-seven years after *Brown v. Board of Education* and sixteen years after the commencement of this litigation, we are confronted with yet another set of appeals arising from implementation of the command to desegregate public schools in Rapides Parish, Louisiana."¹⁰⁴

Eleven years after *Brown* the school system was "classically dual," with one school for whites and the other for blacks. In 1965, as a result of a law suit in federal court, a desegregation plan was instituted that relied on a "free transfer" plan. Following the Supreme Court's decision that those freedom of choice plans were unconstitutional when ineffectual in reducing present impact of several hundred years of the badges and incidents of slavery, plaintiffs in the case moved for supplemental relief. The district court found that the plan then in effect did create a real prospect of dismantling the school system, although virtually no integration had occurred by 1969. The court of appeals reversed, finding it "abundantly clear" that the plan was ineffectual. This reversal was the first of four reversals of the district court, resulting finally in a desegregation plan which was implemented in the early 1970s. Renewal of litigation in 1979 was based on claims that further relief was necessary. The district court then implemented a plan that promised more effective desegregation. The Fifth Circuit, in the appeal at hand, approved the need for further relief,¹⁰⁵ and approved the plan drawn by the district court.

Resistance to the plan was intense and resulted in a nationally publicized judicial power struggle between a state district judge¹⁰⁶ and the federal district court judge.¹⁰⁷ Whether such a struggle could ever be won by a state judge is problematic, but the outcome in this case was never in doubt. The Fifth Circuit summed it up this way:

100. 648 F.2d 959 (5th Cir. 1981).

101. *Id.* at 962.

102. 646 F.2d 925 (5th Cir. 1981).

103. 347 U.S. 483 (1954).

104. 646 F.2d at 928-29.

105. "[T]he maintenance of all-black schools . . . from 1965 through the spring of 1980 is glaring, and clearly requires further relief." 646 F.2d at 937.

106. Judge Richard E. Lee.

107. Judge Scott.

As Judge Lee flagrantly disobeyed the orders of a federal court issued within the bounds of jurisdiction and discretion, ignored the distinct contours of federal and state jurisdiction, disregarded the clear command of his own State Supreme Court, and blatantly overstepped his judicial role as mediator, choosing instead to act as advocate for a politically popular position, it is not at all strange that he wound up as a leader without troops, standing ineffectually at the school house door.¹⁰⁸

In *Tasby v. Estes*,¹⁰⁹ plaintiffs sought further relief under a desegregation order and, among other complaints, charged that the administration of student discipline in the Dallas school system unconstitutionally discriminated against black students. They alleged, and the court assumed for purposes of argument, that there was a statistically significant disparity in the frequency and the severity of punishment accorded to black and white students. The Fifth Circuit affirmed the district court's denial of relief, finding the statistical disparity to be of limited probative value. While evidence of disparate racial impact may provide an important starting point and can in some cases shift the burden to the state to demonstrate that no racially discriminatory purposes were operating, in the case of discipline, no such burden shift was required. Student discipline was viewed as fundamentally different from student assignments, faculty hiring, and so on. In student discipline, "[t]oo many legitimate, non-racial factors are involved to permit an inference of discriminatory purpose from a showing of disproportionate impact, even when it occurs in the context of on-going desegregation efforts."¹¹⁰

VII. PUBLIC EMPLOYEES' RIGHTS

The court dealt with several cases during the survey period that concerned dismissal or other lesser punishment of a government employee for allegedly unconstitutional reasons. Even when a nontenured employee can be fired for no reason whatsoever, that employee cannot be dismissed or downgraded for an unconstitutional reason. It is impermissible to deny a governmental benefit for a reason that infringes upon constitutionally protected interests.¹¹¹ The basic approach to this question was delineated in *Mt. Healthy City School District v. Doyle*,¹¹² which established a tripartite inquiry: (1) whether the activity or speech in question constituted a "substantial" or "motivating" factor in the determination to disadvantage the employee, (2) whether such activity or speech is

108. 646 F.2d at 943-44.

109. 643 F.2d 1103 (5th Cir. 1981).

110. *Id.* at 1108.

111. *See Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977).

112. *Id.*

constitutionally protected, and (3) whether, even if the activity or speech involved was protected, the employee would have been fired in the absence of such speech or activity.¹¹³ To put it another way, the plaintiff in such a case has the burden of proving that the activity or speech in question was constitutionally protected and that this conduct constituted a "substantial" or "motivating" factor in the decision to dismiss or disadvantage the plaintiff. Once that burden is carried, the employer still can escape liability by demonstrating by a preponderance of the evidence that the same decision would have been reached even in the absence of the protected conduct.¹¹⁴ The question of whether the speech or activity of the employee is constitutionally protected, according to the *Mt. Healthy* opinion, depends on striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹¹⁵ Judge Goldberg, writing for the majority in *Van Ooteghem v. Gray*,¹¹⁶ thought that the balancing approach of *Pickering v. Board of Education*¹¹⁷ had been changed by more recent cases. As Judge Goldberg said,

Although the Court in *Pickering* . . . pursued this inquiry in terms of whether the speech in question was, "on balance", "constitutionally protected", . . . subsequent cases have clearly established that the analysis is more properly phrased as to whether the government's regulation of constitutionally-protected speech is justified by a compelling state interest.¹¹⁸

Judge Reavley, concurring specially, objected to this increased scrutiny level and argued that although the government could not impair an employee's rights of belief or association absent a compelling interest, it could impair the right to speak by application of the *Pickering* balancing test.¹¹⁹ The court decided to rehear the case en banc to decide whether government regulation of constitutionally protected speech of public employees must be justified by compelling state interests. The court held, however, that this case involved such a clear example of protected speech that it was an improper vehicle to decide the appropriate standard.¹²⁰

113. *Id.* at 287.

114. *Id.*

115. *Id.* at 284 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)).

116. 628 F.2d 488 (5th Cir. 1980), *aff'd in part, vacated and remanded in part*, 654 F.2d 304 (5th Cir. 1981) (per curiam).

117. 391 U.S. 563 (1968).

118. 628 F.2d at 493 n.4 (citing *Branti v. Finkle*, 445 U.S. 507 (1980)); *Elrod v. Burns*, 427 U.S. 347 (1976); *Buckley v. Valeo*, 424 U.S. 1 (1976).

119. 628 F.2d at 498.

120. *Van Ooteghem v. Gray*, 654 F.2d 304, 306 (5th Cir. 1981).

In one case of interest, *Wilson v. Taylor*,¹²¹ plaintiff brought suit against various officials and alleged that he was discharged from the police department without procedural due process, in violation of his first amendment rights, and pursuant to vague and overbroad regulations. The district court found that plaintiff's due process rights had been violated and ordered a remedial hearing. After the hearing, the discharge was reaffirmed on the grounds that plaintiff had been associating with a known felon. The district court held that plaintiff had been deprived of procedural due process, that the remedial hearing had cured that violation, and that plaintiff was due only nominal damages. The Fifth Circuit vacated the judgment of the district court and found that there was a genuine issue of fact concerning why plaintiff was discharged and that, in any event, plaintiff was entitled to an opportunity to present evidence on his claims for compensatory damages and punitive damages resulting from the procedural due process violation. The overbreadth claim was dropped on appeal. The court remanded on the issue of why plaintiff was fired and ordered the district court to hold a hearing to accept evidence on damages arising from the denial of plaintiff's procedural due process rights at the time of the discharge. Relying on *Carey v. Piphus*,¹²² the court made it clear that a plaintiff can recover compensatory damages for a deprivation of procedural due process if he can prove actual damages. Relying on prior Fifth Circuit cases, the court found that punitive damages can be awarded in this type of case even without actual loss, despite local law to the contrary.¹²³ The panel read *Carey* as holding that claims for back pay and other benefits resulting from an employee's dismissal were improper and overruled several other panel decisions that had awarded back pay without referring to *Carey*. In other cases during the period, the court applied these tests to protect a university professor who had been denied a recommended salary increase,¹²⁴ a foreman who had been critical of the department,¹²⁵ and an admitted homosexual who had been dismissed after refusing to agree to curtail his discussions of the civil rights of homosexuals.¹²⁶

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

122. 435 U.S. 247 (1978).

123. See *McCulloch v. Glasgow*, 620 F.2d 47 (5th Cir. 1980).

124. *Allaire v. Rogers*, 658 F.2d 1055 (5th Cir. 1981).

125. *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980).

126. *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981).