Civil Rights and Constitutional Law

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The volume of civil rights and constitutional law cases decided by the United States Court of Appeals for the Fifth Circuit continues to rise steadily. This article is a selection of 1975 cases deciding substantive and procedural issues which, in the authors' opinion, are noteworthy for the general reader. The selection is by no means exhaustive.

I. DISCHARGE FROM PUBLIC EMPLOYMENT

Again this year, the Fifth Circuit decided a number of cases evolving from the discharge of non-tenured faculty members and other public employees without civil service protection. Perry v. Sinderman and Board of Regents v. Roth established the guiding legal principles when such employees claim that they are entitled to procedural due process prior to the employer's refusal to renew a contract. And the Fifth Circuit continues to be guided by its pre-Roth and pre-Sinderman decision of Ferguson v. Thomas. These decisions require that a non-tenured employee demonstrate that he has either a property or liberty interest in his specific public job before the fourteenth amendment requires procedural due process. Even if procedural due process is not required, however, a public employee may not be discharged for the exercise of substantive constitutional rights, and an administrative hearing may be ordered by the court to determine the employee's allegation that his dismissal was based on constitutionally protected activity.

In Kaprelian v. Texas Woman's University, a non-tenured professor was advised privately that she would not be rehired because of unprofessional conduct and disloyalty to the university. She rejected the university's offer that an ad hoc committee consider her case and filed a 42 U.S.C.A. §1983 complaint alleging that her contract was terminated because of allegations of unprofessional conduct and disloyalty. The lower court held that the allegations of the complaint established a "liberty" interest protected by

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* This survey does not cover constitutional criminal cases, which are included in the criminal law article, and Title VII cases, which are included in the labor law article. A section on practice and procedure in civil rights cases is included.

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1. 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972).
2. 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972).
3. 430 F.2d 852 (5th Cir. 1970).
4. 509 F.2d 133 (5th Cir. 1975).
the due process clause of the fourteenth amendment and ordered that a tribal, other than the ad hoc committee originally proposed by the school, hear the case. The Fifth Circuit reversed, holding that the plaintiff had established neither a liberty interest in her position nor any inherent defect in the ad hoc committee. The lower court had erred in finding a "liberty" interest based solely on the allegations in the complaint, all denied by the defendants. The court makes clear that a deprivation of a plaintiff's "liberty" requires public stigmatization apart from the defense of the lawsuit. Moreover, if the lower court finds that a hearing is required, it must order it conducted in accordance with the minimal procedures established by *Ferguson*, but the court cannot mandate the composition of the hearing body unless there is evidence in the record to support a finding of lack of impartiality. Suspicion is insufficient.

In *LaBorde v. Franklin Parish School*, the Fifth Circuit affirmed the summary judgment granted on the school board's motion. The case arose after a high school teacher was not granted tenure at the expiration of the statutory three-year probationary period. The teacher's federal complaint alleged both a property and liberty interest requiring a hearing. Relying on the Louisiana Supreme Court decision in *State ex rel Piper v. Baton Rouge Parish School Board*, the court found that a Louisiana teacher had no expectation of tenure where she was notified within a reasonable time after the end of the probationary period that tenure would not be granted. Therefore, *Roth* required the Fifth Circuit's holding that the plaintiff had no property interest. Likewise, no infringement of the plaintiff's liberty was shown. The defendant board had acted to minimize any possible adverse effects by notifying the plaintiff privately and by not communicating to other school boards.

*Roane v. Callisburg Independent School District* held that a former school superintendent did have an expectation of continued employment under state law, so procedural due process protection was required. The defendant school board had adopted a rule providing that after the first year a superintendent should be elected for a term of two to five years. Both the plaintiff's predecessor and his successor were treated in accordance with this policy, which was authorized by state law. Additionally, the court found that the board had acknowledged the applicability of this policy to the plaintiff by initially accepting his resignation to be effective at the end of the first two year period. Once the property interest is recog-

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5. Id. at 138.
6. Id. at 138-40.
7. 510 F.2d 590 (5th Cir. 1975).
8. 213 La. 885, 35 So.2d 804 (1948).
9. Markwell v. Culwell, 515 F.2d 1258 (5th Cir. 1975), and Moore v. Knowles, 512 F.2d 72 (5th Cir. 1975), also quickly disposed of "property" claims by untenured teachers.
10. 511 F.2d 633 (5th Cir. 1975).
nized, Perry v. Sinderman requires that a hearing be held to determine whether good cause exists for the dismissal. Because the defendant board had held two post-termination hearings, the district court examined the entire record to determine whether there was good cause for the discharge. That court found there was not sufficient reason for a dismissal and ordered plaintiff's reinstatement and a back pay award. The Fifth Circuit affirmed, finding that the reason for the discharge was the plaintiff's publicly expressed views concerning classroom construction which conflicted with the board's position, a constitutionally insufficient basis for discharge.12

Ortwein v. Mackey13 considered a claim that a non-tenured faculty member's liberty interest had been infringed by the manner of his termination. The plaintiff's personnel file showed that the non-renewal of his contract was based on "inadequate" and "incompetent" performance, an allegation which he denied. The Fifth Circuit decision was controlled by its very recent decision of Sims v. Fox,14 which held that liberty is not infringed by "the mere presence of derogatory information in confidential files."15 Ortwein held that Sims controlled even though the teacher refuted the charges.16 The court said, however, that in Sims the charges essentially had been admitted by the entry of a plea of nolo contendere to criminal charges. Public dissemination, or the likelihood of public dissemination, of damaging charges is an essential element of the claimed infringement of liberty. In both Sims and Ortwein, the public employers had written policies establishing the confidentiality of personnel files.

The Fifth Circuit held in Hander v. San Jacinto Junior College17 that a discharge of a college faculty member was unconstitutional where it was based on his wearing a beard in violation of a college grooming regulation. The court relied heavily upon Lansdale v. Tyler Junior College,18 which had held that colleges constitutionally could not establish regulations of hair length for students. The college could not even demonstrate any justification for the grooming standards. The court thus distinguishes college teachers from such positions as policeman or fireman, for which grooming standards have been sustained.19

Similarly, the court found in Andrews v. Drew Municipal Separate School District20 that a school district's prohibition of hiring unwed moth-

12. Id. at 640.
13. 511 F.2d 696 (5th Cir. 1975).
14. 505 F.2d 857 (5th Cir. 1974) (en banc).
15. Id. at 863.
16. 511 F.2d at 699.
17. 519 F.2d 273 (5th Cir. 1975).
18. 470 F.2d 659 (5th Cir. 1972).
20. 507 F.2d 611 (6th Cir. 1975).
ers had no substantial relation to educational objectives and thus violated both the due process and the equal protection guarantees of the fourteenth amendment. School administrators argued that unwed parenthood is prima facie proof of immorality. The court found that the asserted justification created an irrebuttable presumption violative of the due process clause under Cleveland Board of Education v. La Fleur,\(^\text{21}\) Vlandis v. Kline,\(^\text{22}\) and Stanley v. Illinois.\(^\text{23}\) Alternatively, the school district contended that unwed parents provided improper role models, but no evidence demonstrated students were ever aware of the marital or parental status of their teachers.\(^\text{24}\) Finally, there was no evidence that hiring unwed mothers would encourage school-girl pregnancies.\(^\text{25}\) Thus, the prohibition was not demonstrably related to any valid school objectives. The court suggested that the rule might establish an impermissible classification based on sex,\(^\text{26}\) but that ground was not explored since even the most lenient equal protection criteria was not met.

II. School Desegregation

In the main, the Fifth Circuit's decisions on school desegregation in the past year were applications of well-settled principles of law to various school systems.

Tasby v. Estes\(^\text{27}\) was a major decision covering many aspects of the mandated plan for a unitary school system in Dallas, Texas. The district court had approved the system's proposed "television plan" for elementary schools, which established interracial contact between classrooms with personal visits only once a week. Predictably, the Fifth Circuit held that the plan did nothing to convert the system to a unitary system, since dual classrooms were intentionally maintained. The approved plan for secondary schools set a goal of reducing minority student population to 90% in each school. Again the court found the remedy inadequate, since the setting of this limited goal indicated a lack of bona fide effort to desegregate fully.\(^\text{28}\)

The Fifth Circuit in United States v. Board of Public Instruction of Polk County,\(^\text{29}\) decided that school systems have an overriding affirmative duty to build new schools where they will promote desegregation. Since the district court's order in Tasby failed to include such a requirement, it was

\(^{22}\) 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973).  
\(^{24}\) 507 F.2d at 617.  
\(^{25}\) Id.  
\(^{26}\) Id.  
\(^{27}\) 517 F.2d 92 (5th Cir. 1975).  
\(^{28}\) Id. at 104.  
\(^{29}\) 395 F.2d 66 (5th Cir. 1968).
reversed in this respect as well.\textsuperscript{30} The district court order with respect to faculty and staff assignments was affirmed, however,\textsuperscript{31} after representations by the school system that faculty and staff would be assigned essentially in accordance with \textit{Singleton v. Jackson Municipal Separate School District}.\textsuperscript{32}

The Fifth Circuit's summary affirmance of \textit{Carr v. Montgomery County Board of Education}\textsuperscript{33} suggests a reluctance to require large-scale student transfers, at least where the district court finds that such transfers would be "disruptive to the educational processes and would place an excessive and unnecessarily heavy administrative burden on the school system."\textsuperscript{34} In dissent, Judge Goldberg stressed his view that \textit{Swann v. Charlotte-Mecklenburg Board of Education}\textsuperscript{35} required findings either that the failure to become unitary is not attributable to state action or that no further remedy is workable.\textsuperscript{36} The district court had found that any further desegregation beyond the board's proposal would not "accomplish any realistically stable desegregation."\textsuperscript{37} The majority appears tacitly to accept the proposition that the instability of a proposed desegregation plan, because of white flight as well as substantial increased cost, make further remedies unworkable and the remedies will not be ordered for elementary schools at least where all other Green\textsuperscript{38} requirements are met and the high schools are unitary.\textsuperscript{39}

In \textit{McNeal v. Tate County School District},\textsuperscript{40} the court ordered further relief even though the system was unitary in student assignment, faculty ratios, transportation and extracurricular activities. Within grades, how-

\textsuperscript{30} 517 F.2d at 105. \textit{See also} Lee \textit{v. Autauga County Bd. of Educ.}, 514 F.2d 646 (5th Cir. 1975).
\textsuperscript{31} 517 F.2d at 99.
\textsuperscript{32} 419 F.2d 1211 (5th Cir. 1969), \textit{rev'd and remanded in part on other grounds}, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970).
\textsuperscript{34} 377 F.Supp. at 1129.
\textsuperscript{35} 402 U.S. 1, 91 S.Ct. 1287, 28 L.Ed.2d 554 (1970).
\textsuperscript{36} 511 F.2d at 1380 (Goldberg, J., dissenting). \textit{See also} Keyes \textit{v. School Dist. No. 1}, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973).
\textsuperscript{37} 377 F.Supp. at 1132.
\textsuperscript{39} Student assignment was found constitutionally inadequate in the following cases: Boyd \textit{v. Pointe Coupee Parish School Bd.}, 506 F.2d 632 (5th Cir. 1974); United States \textit{v. Texas Educ. Agency}, 512 F.2d 896 (5th Cir. 1975); and United States \textit{v. Hinds County School Bd.}, 516 F.2d 974 (5th Cir. 1975). In contrast, in Pate \textit{v. Dade County School Bd.}, 509 F.2d 806 (5th Cir. 1975), the Fifth Circuit found that there had not been a sufficient showing to warrant supplemental relief where the record included evidence that the board voluntarily had undertaken desegregation measures not required by the court's original order. The court also affirmed the district court's holding that the Atlanta school system was unitary and that the remaining one-race schools were the product of the overwhelming numbers of minority students. Calhoun \textit{v. Cook}, 522 F.2d 717 (5th Cir. 1975).
\textsuperscript{40} 508 F.2d 1017 (5th Cir. 1975).
ever, students were assigned according to their predicted ability, with the result that some sections contained one race. While recognizing that ability grouping may be educationally sound, the court rejected it unless the system "has operated a unitary system without such assignments for a sufficient period of time to assure that the underachievement of the slower groups is not due to yesterday's educational disparities."

Several cases also presented the question of whether there had been unconstitutional de facto segregation which requires proof of segregative intent. The Fifth Circuit found such intent in Morales v. Shannon, United States v. Midland Independent School District, and Tasby v. Estes. In each case, the court found that there historically had been certain schools known as Mexican-American schools and the defendant school systems never took any steps to change the de facto segregation even when they had the opportunity, such as when new schools were needed. In Tasby, the court noted additionally that the school board had integrated Mexican-Americans with black students.

The 1975 decisions include several outlining faculty rights under school desegregation plans. Singleton v. Jackson Municipal Separate School District required that a reduction in the number of teachers or staff be based on published objective and nondiscriminatory criteria. The Fifth Circuit held that such a requirement continues until the school system becomes unitary. In the absence of such criteria, the school system may dismiss faculty and staff only for just cause, and just cause is limited to conduct which is "repulsive to the minimum standards of decency." In United States v. Coffeeville Consolidated School District, charges of incompetency, improper disciplinary measures, and failure to abide by school regulations of examinations were not just cause where the school board had failed to adopt objective criteria in accordance with Singleton.

Singleton criteria are not retroactive, however. Therefore, where a teacher was dismissed in accordance with Singleton's predecessor, United

41. Id. at 1021. See also Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975).
43. 516 F.2d 41 (5th Cir. 1975).
44. 519 F.2d 60 (5th Cir. 1975).
45. 517 F.2d 92 (5th Cir. 1975).
47. 419 F.2d 1211 (5th Cir. 1969).
50. 513 F.2d 244 (5th Cir. 1975).
51. Singleton also grants faculty and staff the right to recall, a right which the court found had been denied in Kelly v. West Baton Rouge Parish School Bd., 517 F.2d 194 (5th Cir. 1975).
52. Lee v. Macon County Bd. of Educ., 453 F.2d 1104, 1113 (5th Cir. 1971).
States v. Jefferson County Board of Education, reinstatement will not be ordered. Jefferson required that the school board compare a teacher's qualifications with those of all other teachers in the system if there was a staff reduction to comply with a desegregation plan. When the teacher cannot show that staff reduction is a result of desegregation, the court held, he is not entitled to Jefferson protection.

Cook v. Hudson held that in an effort to desegregate a public school system constitutionally could require its teachers to send their children to public schools. But two separate majority opinions and a dissent were filed, showing widely divergent views of the panel members. Judge Coleman would have sustained the regulation under the authority of United Public Works v. Mitchell and Pickering v. Board of Education, which recognized that the government has a more substantial interest in regulating speech and conduct of its employees than in regulation of the general public. For him, the obvious goal of inspiring public confidence in the public education system by requiring teacher loyalty to the system is sufficient to sustain the regulation without reference to the relationship of the regulation to the goal of desegregation.

For Judge Roney, however, the validity of the regulation was based, at least in this instance, on the fact that it was part of the school board's desegregation effort. Additionally, his concurring opinion noted that the court below, relying upon expert testimony, had found that the teachers' conduct in sending their children to private segregated schools adversely affected their performance in the public school system.

Judge Clark dissented. He found that the regulation lacked the necessary precision to override the teachers' fundamental right to choose the method of educating their own children. The dissent found that the board's justification for the regulation overemphasized the effect which this one decision by a teacher would have on his teaching ability, especially where there was no requirement that other teachers demonstrate any support for desegregation. Judge Clark would have held that the regulation violates the due process clause of the fourteenth amendment.

The varying opinions of the panel members in Cook v. Hudson suggest that this issue is very much alive in the Fifth Circuit; it certainly is left unsettled by the majority in the case.

53. 380 F.2d 385 (5th Cir. 1967).
54. 511 F.2d 744 (5th Cir. 1975).
57. 511 F.2d at 749 (Coleman, J., concurring).
58. Id. at 750 (Roney, J., concurring).
In two cases, the Fifth Circuit acted to thwart state interference with court-ordered desegregation. In *United States v. Texas,* the court affirmed the district court's preliminary injunction against the state's splintering school districts, which would have the effect of substantially increasing minority student population in the remaining system. In *Singleton VII,* the court affirmed an injunction against the state's withholding funds from the Jackson school district. The court did not find it necessary to rule on the constitutionality of a state statute prohibiting the expenditure of state funds for busing, because it affirmed the district court's finding that busing would be paid for entirely by local funds.

### III. Student Discipline

In *Jenkins v. Louisiana State Board of Education,* the court considered both substantive and procedural prerequisites to the imposition of sanctions on college students. The plaintiffs had been charged with instigating a boycott which led to property damage and disruption of the campus, but the plaintiffs themselves had not participated in the criminal activities. Several procedural points were decided. First, the court held that fair notice of the charges was required but that the charges "need not be drawn with the precision of a criminal indictment." By reference to the administrative record, the court found that the students had actual notice and that the defense was adequately prepared to attempt to refute the administration's case. Second, the fact that the members of the school's hearing board were school employees, appointed to the board by the college president, who was a chief witness against the students, was held not to injure the board's impartiality. The Fifth Circuit requires evidence of bias or prejudice, not conjecture.

The court also considered plaintiffs' substantive claims that their activity was constitutionally protected and not subject to disciplinary sanctions, even though the sanctions were imposed in accordance with procedural due process. The applicable constitutional standard is whether the proscribed conduct involves "material and substantial interference with the requirements of appropriate discipline in the operation of an educational institution." The students also challenged the college regulations.

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61. 508 F.2d 98 (5th Cir. 1975).
63. *Singleton v. Jackson Mun. Separate School Dist.*, 509 F.2d 818 (5th Cir. 1975). This case has become known as *Singleton VII* in a controversy spanning more than 11 years.
64. *Id.* at 819.
65. 506 F.2d 992 (5th Cir. 1975).
66. *Id.* at 1000.
67. *Id.* at 1003.
68. *Id.* at 1002. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d
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for vagueness and overbreadth. The Fifth Circuit, however, continued to uphold broadly worded school regulations giving administrators discretion in disciplinary matters as long as there is no evidence to show that the regulation is “in fact being used to infringe on first amendment rights.”\(^6\)

Since the appellants’ conduct was not itself constitutionally protected and they had had adequate notice of the charges against them in the disciplinary proceedings, the regulations were sustained. Judge Tuttle vigorously dissented,\(^7\) finding that appellants’ conduct was constitutionally protected since they did not personally participate in campus disruption. In his view, recent speech-conduct cases\(^7\) permit imposition of discipline only if the students’ own behavior is unprotected.

IV. ABORTION

Notwithstanding the dramatic effect of \*\*Roe v. Wade\*\*\(^2\) and \*\*Doe v. Bolton\*\*\(^3\), issues related to abortion remain to be decided. The Fifth Circuit considered several this year.

Not surprisingly, the court held in \*\*Spears v. Circuit Court\*\*\(^4\) that a state constitutionally may prohibit non-physicians from performing abortions, even in the first trimester, and that the meaning of “physician” was clear enough to notify the defendant that his conduct was proscribed.

In \*\*Greco v. Orange Memorial Hospital Corp.\*\*,\(^5\) the court refused to interfere with the policy of a private hospital prohibiting the performance of elective abortions. Although the hospital was built by the county on county land and was funded under the Hill-Burton Act,\(^6\) the court held that there was no state action involved, thus precluding a physician’s suit under 42 U.S.C.A. §1983.\(^7\) The court distinguished \*\*Burton v. Wilmington Parking Authority\*\*\(^8\) on two grounds: first, racial discrimination was not involved, and second, the county and hospital were not interdependent. Moreover, there was no evidence that the county had any role in the adoption or enforcement of the anti-abortion policy. The court’s reading of \*\*Jackson v. Metropolitan Co.\*\*\(^9\) requires that there be not only state regulation but also

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749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).
70. 506 F.2d at 1007.
71. Tinker, Blackwell and Burnside, supra note 68.
73. 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973).
74. 517 F.2d 360 (5th Cir. 1975).
75. 513 F.2d 873 (5th Cir. 1975).
77. An otherwise private act is “state action” if the state significantly involves itself in the activity or when the private entity has assured a public function. 513 F.2d at 878. See Comment, State Action and the Burger Court, 60 U. Va. L. Rev. 840 (1974).
a nexus between the state and the challenged action. As the opinion notes, this requirement probably constricts “state action” more than earlier racial discrimination cases. Judge Clark in his concurring opinion finds state action because of the “symbiotic relationship” between the county and hospital, which comes within Burton but he nevertheless agrees with the result, concluding that the Constitution does not require the county to furnish facilities for abortions.

In Poe v. Gerstein, the court held that the spousal consent and parental consent requirements of the Florida abortion statute were unconstitutional. While Roe and Doe left unresolved the issue of spousal consent, the rationale of those decisions certainly left slight hope for upholding such a requirement. Since Roe held that the challenged statute infringed a woman's right to privacy, the man appears to lack any legal standing to complain. The court rejected the state's argument that the statute preserved the marital relationship and found instead that the consent requirement was an intrusion into private decision. The court was sympathetic to the argument that the husband had an interest in the fetus, but it held that paternal rights have never extended to a fetus and that Stanley v. Illinois has not altered the father's status in this respect. Finally, the court concluded that the father's potential to procreate was constitutionally protected but that procreation could not be guaranteed by the state in contravention of the woman's right to abortion.

The constitutionality of parental consent, also decided in Poe v. Gerstein, was not forecast in Roe and Doe because different interests must be weighed. Although the Florida abortion statute challenged in Poe specifically required parental consent for an abortion, parental consent would be required for any surgical procedure absent a special exclusion for abortions, because a minor lacks the capacity to consent to surgery. The parental consent requirement, then, is no different for abortions than for other medical procedures which must be decided upon by the parent, the physician and the minor. The finding of unconstitutionality of the parental consent requirement is a step beyond the command of Roe that first trimester abortions be allowed on the same basis as other surgical procedures.

80. 513 F.2d at 881.
81. Id. at 882-83 (Clark, J., concurring).
82. 517 F.2d 787 (5th Cir. 1975).
83. Id. at 792-93.
84. 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972).
87. 517 F.2d at 794.
The Fifth Circuit's analysis began with the recognition that the fourteenth amendment is not for adults alone. Thus, the court looked at the minor vis-a-vis the state and found that the right to privacy, recognized in *Roe* to extend to the abortion decision, is a fundamental right for minors as well, and state interference therefore would be tolerated only upon the most compelling grounds. The court considered but rejected four justifications for the requirement. First, the court found no factual basis for the argument that the requirement deterred illicit sexual conduct. Second, despite its recognition that one justification for the statute was to prevent improvident decision-making, the court found the means used to achieve this aim questionable. According to the court, the physician is in a position to counsel the minor objectively, and, on the other hand, the parents might not be acting in the child's best interests. Fostering parental control and maintenance of the family unit were viewed by the Fifth Circuit as insufficient justifications for the requirement. The requirement was labeled "a blunt instrument" for maintaining parental control, since the minor's decision to abort despite her parent's expressed wishes indicated to the court that parental control already was diminished, if not evaporated. Similarly, the court concluded that the family unit would not be strengthened by the requirement in a family already fractured by a minor's pregnancy. The court also concluded that the parental consent requirement actually interfered with familial relationships and family privacy.

The parental consent issue is a particularly difficult one because previous Supreme Court decisions have not recognized the possibility of parent-child conflict and have not determined how the state must deal with this potentiality in family law. But the Fifth Circuit's analysis in *Poe* does not adequately recognize the impact of the holding on the parent-child relationships. At common law, parents were required to provide medical care and treatment for their children, and because of the child's lack of capacity to contract, the parent's consent was needed. *Poe* failed to acknowledge that legal incapacity reflects the scientific fact that children generally are incapable of making mature decisions. The maturation process varies widely among individuals, of course, but heretofore the state has not been precluded from protecting all children because some legal minors might be capable of independent decision making.

By invalidating the parental consent requirement for abortions, the
court distinguishes abortion from other medical and surgical procedures which will still require parental consent and thus elevates a minor's right to an abortion to a unique constitutional status. There are distinctions between abortions and other procedures because of the age of the minor and the high potential for parent-child conflicts. Whether these distinctions justify a different constitutional standard and diminution of the parent's role is questionable.

V. Elections

Most of the Fifth Circuit's work in the elections area focused on apportionment of local governmental bodies. Robinson v. Commissioners Court, Bradas v. Rapides Parish Police Jury, Gilbert v. Sterrett, Wallace v. House and Perry v. City of Opelousas scrutinized charges that minority voting strength was being diluted by apportionment plans. Resolution of a dilution challenge requires a detailed analysis of the history and present electoral patterns within the governmental unit.

Of the 1975 cases, Wallace v. House provides the most exhaustive review of the pertinent dilution cases. In Wallace and in Perry, the court upheld mixed apportionment plans providing for the election of one at-large member with the majority of members elected by district.

Bradas v. Rapides Parish Police Jury is one of a few Fifth Circuit cases reversing a finding of the dilution in all at-large systems. Following White, the court looked at the record to determine whether the challengers had produced evidence demonstrating that the minority lacked access to the political process. "The single glaring fact that no black has ever been elected to a parish office does not by itself support judicial nullification of a reapportionment plan." In Gilbert v. Sterrett, the challengers had alleged a gerrymander or dilution in the drawing of the lines of single-member districts. The contention was based primarily on the testimony of an analyst who predicted that minority growth would be primarily in a district with present low minority population so that there was little possibility of a minority candidate's being elected until 1985. The court concluded that the reapportionment need not, and probably should not, attempt to anticipate population

94. 505 F.2d 674 (5th Cir. 1974).
95. 508 F.2d 1109 (5th Cir. 1975).
96. 509 F.2d 1389 (5th Cir. 1975).
97. 515 F.2d 619 (5th Cir. 1975).
98. 515 F.2d 639 (5th Cir. 1975).
99. White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc); Turner v. McKeithen, 490 F.2d 191 (5th Cir. 1973). Zimmer has been argued before the Supreme Court, but no decision has been announced.
100. 508 F.2d at 1112.
shifts, because such a projection might raise one-man, one-vote problems.\footnote{The Voting Rights Act of 1965\footnote{42 U.S.C.A. §1973c (Supp. 1976).} requires that any civil action brought pursuant to the statute be determined by a court of three judges, so circuit courts rarely determine Voting Rights Act issues.\footnote{Sumer County Democratic Exec. Comm. v. Dearman, 514 F.2d 1168 (5th Cir. 1975).} \textit{Pitts v. Busbee}\footnote{511 F.2d 126 (5th Cir. 1975).} is an exception. The properly convened three-judge district court had enjoined a new apportionment plan for the Fulton County, Georgia, Board of Commissioners and had remanded the case to the originating district judge for resolution of the remaining issues, which included a constitutional attack on the earlier plan. The single judge held that the pre-1965 plan was not in effect because of repealing clauses in the new plan and adopted an interim plan for election which included suspension of the general majority vote requirement. The Fifth Circuit held that the district court had “addressed the wrong issue,”\footnote{Id. at 128.} since the Voting Rights Act froze new election laws in covered jurisdictions\footnote{See Georgia v. United States, 411 U.S. 526, 538, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1972).} and thus left pre-1965 laws unaffected. \textit{Pitts} was remanded for adjudication of the constitutionality of the at-large election system in accordance with the criteria of \textit{White v. Regester}.\footnote{412 U.S. 735, 93 S. Ct. 2332, 37 L.Ed.2d 314 (1972).}

A struggle between factions of the Mississippi Democratic Party reached the Fifth Circuit in \textit{Riddell v. National Democratic Party}.\footnote{412 U.S. 735, 93 S. Ct. 2332, 37 L.Ed.2d 314 (1972).} Pursuant to the state’s party registration statute, the “regulars” registered the name “Democratic Party of the State of Mississippi” in 1950. However, in 1968 and in 1972, the “loyalists” were recognized at the convention by the National Democratic Party. The “regulars” sued to enjoin the “loyalists” from using the name “Democratic Party,” and the “loyalists” counter-claimed, alleging that the registration statute was unconstitutional. The statute precluded a political party from using or registering “any name or part thereof which has already been registered. . . .”\footnote{See Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973).} The court recognized that the registration statute furthered the legitimate state interest of preventing voter confusion and deception but also impermissibly restricted the ability of new “Democratic” parties to gain popular support.\footnote{Miss. Code Ann. §3107-01 (1957).}

The statute was held unconstitutional to the extent it prohibited a new Democratic party from using the word “Democratic” in a way which would not be confusing to a majority of the voters. \textit{Adams v. Askew}\footnote{508 F.2d 770 (5th Cir. 1975).} held that candidate filing fees of 3% of the annual salary for the office for partisan candidates and 5% for non-partisan candi-
dates were not unconstitutional as applied to candidates able to pay such fees. Restrictions on candidates do not abridge fundamental rights unless they abridge the right to vote. Thus, where voters are unable to vote for serious but indigent candidates, the state’s interests are not sufficiently compelling to sustain the abridgment. But where the effect is only on the candidates, a reasonable filing fee is constitutional, according to the Fifth Circuit, because it helps discourage frivolous candidates and thus prevents voter confusion.

VI. OTHER DECISIONS

In *Tyler v. Vickery*, the court considered and rejected several challenges to the Georgia bar examination procedure in a suit which had been filed on behalf of the class of black applicants taking the examination. The court first affirmed the district court’s grant of summary judgment with respect to the claim of intentional discrimination. While recognizing that summary judgments seldom are appropriate in discrimination cases, the court concluded that the applicant-challengers had not met their burden of showing an opportunity for discrimination under Federal Rule of Civil Procedure 56(c).

The Fifth Circuit also rejected the contention that the bar examination should be judged by the criteria mandated by the Equal Employment Opportunity Commission when employment tests are challenged. Recognizing that some circuits had applied Title VII standards to public employment testing, the court decided that its decision in *Allen v. City of Mobile* foreclosed that argument in this circuit. The court found that *Geduldig v. Aiello* also supported the view that the fourteenth amendment is not coextensive with Title VII. The court then held that the appropriate equal protection test is the traditional rational basis test, since the disparity between passing and failing applicants was not based on race. The statistical disparity was insufficient to change the equal protection standard. Measured by the rational basis test, the Georgia bar exam, as administered, was found to have “rational connection with an

112. 517 F.2d 1089 (5th Cir. 1975).
113. Id. at 1093. The court found the plaintiffs’ contention that the examiners could detect “Black English” “unreasonable as a matter of law.” Id. at 1094.
115. 466 F.2d 122 (5th Cir. 1972).
Finally, the court rejected the appellants' claim that the due process clause required a hearing for a failing applicant. The court said re-examination more efficiently protected the interests of the examinees. Joining the overwhelming majority of courts to consider the issue, the Fifth Circuit upheld a city residence requirement for municipal firemen in Wright v. City of Jackson. The court applied the traditional equal protection standard after finding that there was no fundamental constitutional right of intrastate travel. The following interests among others were found sufficient as a rational basis for the restriction: promotion of ethnic balance, reduction of high employment rates, improvement of relations between residents and city employees, and increase in the employees' feeling of a personal stake in the city.

The traditional and less stringent equal protection standard was applied again in Parish v. National Collegiate Athletic Association, this time to the NCAA eligibility rule requiring that first-year students have a predicted average of 1.600. Under the rational basis standard, the rule was upheld. The due process challenge also was rejected; the court found that the prospect of playing in NCAA-sanctioned games was neither a liberty nor a property interest requiring procedural safeguards.

The only noteworthy case arising from the public accommodation provisions of the Civil Rights Act of 1964 was Rousseve v. Shape Spa for Health and Beauty, Inc. The only issue was whether the health and exercise clubs were "places of entertainment" and thus subject to the anti-discrimination requirement. A majority of the court concluded that the clubs, like YMCA facilities, were "places of entertainment" as that phrase had been interpreted by the Supreme Court in Daniel v. Paul. Judge Ainsworth, dissenting, thought that a health spa simply did not come within the commonly accepted definition of "place of entertainment."

In a case which the Fifth Circuit believes is of first impression among the circuit courts, Maker v. City of New Orleans, the court upheld the New Orleans regulatory scheme for buildings in the Vieux Carré (French Quarter) area.

119. 517 F.2d at 1101. Judge Adams dissented on the ground that the case should not have been decided on a motion for summary judgment.
120. 506 F.2d 900 (5th Cir. 1975).
123. 506 F.2d 1028 (5th Cir. 1975).
124. See Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974).
125. 506 F.2d at 1034.
127. 516 F.2d 64 (5th Cir. 1975).
129. 516 F.2d at 68 (Ainsworth, J., dissenting).
130. 516 F.2d 105 (5th Cir. 1975).
Quarter). The plaintiff wanted to raze the Victorian cottage which he owned in the Quarter, but an ordinance required a permit to perform construction, alteration or demolition work. Additionally, the ordinance imposed an affirmative duty on an owner to maintain the property.

The court began its substantive analysis by scrutinizing the legislative purpose for the ordinance, which was to preserve buildings which have "architectural and historical value." The police power, of course, includes "aesthetic as well as monetary" interests. The court also took note of "the nationwide sentiment for preserving the country's heritage." Having found these purposes constitutional, the court examined the means of pursuing them. The plaintiff complained that the ordinance lacked objective standards for the administrative agency, but the court determined that the expert members would be guided by historical records and a contemporary independent study. Moreover, the denial of a demolition permit was not found to be a "taking," since the property was not worthless as a result of the regulation—even though, as the court recognized, the ordinance could have been less harsh and still have achieved its purpose. Finally, the court held that it was not unreasonable to require owners in the French Quarter to maintain their buildings in accordance with the ordinance standards, although the court emphasized that the requirement might be oppressive as applied to different circumstances.

In Calley v. Callaway, the Fifth Circuit, sitting en banc, made several far-reaching decisions. William L. Calley, Jr., convicted in a military court martial of premeditated murder and aggravated assault with intent to commit murder in connection with the infamous My Lai massacre, was granted a writ of habeas corpus by the U.S. District Court for the Middle District of Georgia. The government appealed.

The first issue facing the Fifth Circuit in the Calley case was the proper scope of review to be given by a civil appellate court to a military court's decision, after that decision had been reviewed through the entire military justice system and eventually by the President of the United States. The Fifth Circuit faced the uncertain state of the law which had resulted from the decision in Burns v. Wilson, which recognized that, although civil courts could review decisions of military courts in a habeas corpus proceeding, the scope of that review was much narrower than in civil cases and

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131. There is also an explanation of the application of the principles of res judicata and collateral estoppel, since the plaintiff previously had presented his claims to state courts. Id. at 1055.


133. 516 F.2d at 1061.


135. 519 F.2d 184 (5th Cir. 1975). See a related discussion of Calley in Walls, Constitutional-Criminal Law in this volume, infra.

was limited to the determination of whether the military had given "fair consideration" to each of the claims of the petitioner.\textsuperscript{137}

Recognizing that cases interpreting the \textit{Burns} decision were in a fair state of disarray,\textsuperscript{138} the Fifth Circuit set a new standard for review by civil courts in habeas corpus review of military proceedings in which the petitioner claimed to have been deprived of due process of law.

In making this determination, four principal inquiries constitute the new standard delineated in \textit{Calley}: (1) the asserted error must be of a substantial constitutional dimension or so fundamental as to have resulted in a gross miscarriage of justice; (2) the issue must be one of law rather than of disputed fact already determined by military tribunals; (3) factors peculiar to the military or important military considerations require a different constitutional standard from that exercised in ordinary cases; (4) the military courts must have given inadequate consideration to the issue raised in the habeas corpus proceeding and have applied the proper legal standard to the issue.

During his trial, Lt. Calley had attempted to obtain, by subpoena, all of the evidence and testimony which had been secured during the independent hearings held before the U.S. House Armed Services Committee, headed by Congressman F. Edward Hebert. Those requests of the defense had been denied by the military judge hearing the original case. Pursuant to the rules of military procedure governing the original Calley trial, extensive discovery was extended to the defense in the case. The Fifth Circuit, in upholding this denial of additional discovery, rejected the defense suggestion that \textit{Brady v. Maryland}\textsuperscript{139} encompassed all material which might have led a jury to entertain a reasonable doubt as to a defendant's guilt. Since the defense was unable to make the necessary showing of materiality concerning all of the evidence presented to the Hebert committee and since the defense possessed essentially all the information available to the prosecution, the Fifth Circuit indicated, it was not unreasonable to require some showing of justification for Calley's assertion that the denial of this information deprived him of a fair trial. The Fifth Circuit went further and indicated that this denial of information was not in violation of the Jencks Act\textsuperscript{140} because that act does not in and of itself set forth constitutional requirements but sets forth merely rules of evidence. In addition, the Jencks Act refers only to civil tribunals. The Supreme Court decision in \textit{United States v. Augenblick}\textsuperscript{141} supports the proposition that failure to provide the defense with prior testimony of witnesses is not an error of constitutional proportions. On this basis, the Fifth Circuit ruled

\textsuperscript{137} 519 F.2d at 197.
\textsuperscript{138} The cases are discussed at 519 F.2d at 198.
\textsuperscript{139} 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
\textsuperscript{141} 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1968).
that the lower federal court had erred in indicating that denial by a military judge of this testimony to defendant Calley was reviewable by a federal civil court.

The third, and perhaps the most important, ruling made in the Calley v. Callaway case was on the issue of pre-trial publicity. The military court martial against Lt. Calley was one of the most publicized cases in recent times. In considering Calley's claims that pre-trial publicity deprived him of his right to an impartial jury and a fair trial, the Fifth Circuit reiterated the general rule that a defendant has the burden on appeal of proving actual jury prejudice if his conviction is to be reversed on grounds of prejudicial pre-trial publicity. The Fifth Circuit emphasized again its refusal to accept the position that "prominence brings prejudice" and indicated that the courts should not expect jurors to live in isolation from the events in their community. The court also said that the publicity surrounding the My Lai incident and the Calley trial was not of a virulent and oppressive nature but consisted of objective statements of facts and straight news stories concerning the incidents.

In determining whether or not actual prejudice existed on the bench of military officers who made the determinations in the Calley trial, the court determined from the record that the officers' statements that they would not be influenced in any way by the publicity with which they had been in contact should be accepted: The Calley ruling in this regard follows the earlier Fifth Circuit decision in Murphy v. Florida.\textsuperscript{142}

The Calley case is of particular interest in light of the recent three-judge Fifth Circuit opinion in the case of United States v. Williams.\textsuperscript{144} In Williams, the court stated that pre-trial publicity and the closing argument of the prosecutor did not individually constitute error but that the tandem effect of the two did constitute reversible error. The Fifth Circuit emphasized the pervasive nature of the publicity and its probable effect on the trial.

VII. Practice And Procedure

Procedural law continues to be increasingly important in the civil rights area. Many civil right actions in the last year turned on specialized procedural issues. While it is not possible to include all cases discussing procedural issues, this section attempts to highlight important procedural holdings.

In constitutional challenges to federal statutes, plaintiffs cannot rely on the usual statute\textsuperscript{145} conferring jurisdiction over challenges to state action.

\textsuperscript{142} 519 F.2d at 205.
\textsuperscript{143} 495 F.2d 553 (5th Cir. 1974), aff'd, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).
\textsuperscript{144} 523 F.2d 1203 (5th Cir. 1975). A petition for rehearing on behalf of the government is pending in the Williams case.
\textsuperscript{145} 28 U.S.C.A. §§ 1331(3) and 1331(4) (1966).
In Winningham v. HUD\textsuperscript{146} the Fifth Circuit held that 28 U.S.C.A. §1337 granted district courts subject matter jurisdiction over a suit alleging an equal protection challenge to 12 U.S.C.A. §1701s(c)(2)(D), which grants housing subsidies only to persons moving from substandard housing. The court held that § 1337 must be construed broadly to confer federal jurisdiction whenever the commerce clause is one of the bases for the statute. Since one purpose of the rent subsidies was to encourage housing construction, the district court had subject matter jurisdiction.\textsuperscript{147}

Where state statutes are challenged, the Supreme Court has developed the abstention doctrine to avoid needless federal-state conflict.\textsuperscript{148} In a case attacking state administrative orders, a majority of the Fifth Circuit found that abstention was not required because the state statute pursuant to which the orders had been entered had been construed on several occasions by the state court.\textsuperscript{149} Judge Dyer, in dissent, concluded that abstention was nevertheless appropriate, because, if the orders had been appealed to state courts, it was likely that they would have been overturned there, thus obviating the need for federal court action altogether. Judge Dyer concluded that lack of clarity in the controlling state statute was not necessarily a prerequisite to abstention if there was another way federal court litigation could be avoided.

The court decided in Korioth v. Briscoe\textsuperscript{150} that the taxpayer challenging a statute setting up state planning agencies lacked standing because he had shown no concrete injury.

District courts are prohibited by 28 U.S.C.A. §1341 from enjoining the assessment, levy or collection of state taxes where there is a state remedy. In Framel v. Schrader,\textsuperscript{151} landowners claimed that street improvement assessments were unconstitutional under both the due process and the equal protection clauses and argued that such an assessment was not a tax. Reviewing congressional intent in adopting §1341, the court found no basis for adopting a narrow construction of “tax.” It concluded that assessments for street improvements were taxes and affirmed the dismissal of the complaint.

Before the United States can file suit pursuant to the Fair Housing Act,\textsuperscript{152} the Attorney General must find reasonable cause to believe that the potential defendant is engaged in a pattern or practice of discrimination and that the case raises an issue of general public importance. In United States v. Northside Realty Associates,\textsuperscript{153} the court held that the
Attorney General was not required to review the facts after a suit was filed and that a determination of which facts raise an issue of general public importance was within the Attorney General’s discretion and was not reviewable by the court.¹⁵⁴

In Robinson v. Wichita Falls & North Texas Community Action Corp.¹⁵⁵ the plaintiff alleged pursuant to 42 U.S.C.A. §1983 that his discharge from a community action agency violated the due process clause. The defendant contended that it was a private corporation and therefore no claim had been stated under the Civil Rights Act. The court, however, suggested that not every community action agency was private and that the interrelationship with the state might subject such a corporation to 42 U.S.C.A. §1983. The issue was not authoritatively decided, however, because the court also concluded that there had been no deprivation of procedural due process in any event.¹⁵⁶

Private individuals are liable under §1983 if they act in concert with public employees to deprive a plaintiff of his civil rights.¹⁵⁷ Such concerted action was found in Smith v. Brookshire Bros., Inc.,¹⁵⁸ where the defendant department store was proved to have had a pre-arranged plan with local police to pick up alleged shoplifters without independent investigation by the police. Judge Gee dissented, finding that all the record demonstrated was that the police had agreed, in accordance with universal practice, to pick up shoplifters so that the victim would not have to bring them to the police station. Moreover, he warned that the majority position seemed to hold private citizens responsible for impermissible police action.¹⁵⁹

The Fifth Circuit in Westberry v. Gilman Paper Co.¹⁶⁰ held that 42 U.S.C.A. §1985(3) provides a federal claim against “purely private parties” for a conspiracy to deprive the plaintiff of his civil rights. Griffin v. Breckinridge¹⁶¹ had found a cause of action where black citizens had been stopped on a highway and beaten by white citizens, but the constitutional basis for federal jurisdiction was the thirteenth amendment. In Westberry,

¹⁵⁴. In Northside Realty Associates, the court suggests that Appellants’ Brief in Support of the Petition for Rehearing was almost contemptuous and makes it clear that certain arguments reached the outer limits of advocacy.

¹⁵⁵. 507 F.2d 245 (5th Cir. 1975).

¹⁵⁶. The most exhaustive discussion by the Fifth Circuit of the state action requirement during the last year was found in Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir. 1975). See text accompanying note 75, supra. See also Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975) (association acted under color of state law because state schools played a substantial role in the association’s program); Blouin v. Loyola Univ., 506 F.2d 20 (5th Cir. 1975) (university is not subject to a §1983 suit even though it received federal and state money, operated a radio station licensed by the Federal Communications Commission, and enjoyed federal and state tax exemptions).


¹⁵⁸. 519 F.2d 93 (5th Cir. 1975).

¹⁵⁹. Id. at 97 (Gee, J., dissenting).

¹⁶⁰. 507 F.2d 206 (5th Cir. 1975).

the plaintiff was white, and he claimed that the defendant conspired to kill him and did actually have him removed from his job because of his unpopular positions on environmental and taxation issues. The court characterized Westberry’s complaint as an allegation of a conspiracy to deprive him of first amendment rights. By reviewing the legislative history of the fourteenth amendment, the court concluded that section 5 was intended to authorize legislation reaching private acts. Support was also found in the Supreme Court’s decision in *United States v. Guest*, in which six justices had concluded that section 5 authorized remedies for purely private acts.

Citing the exhaustive opinion of the district court, Judge Morgan objected that the majority decision opened the door for a “general federal tort law.” While the majority found factors limiting the availability of the remedy which it had created, the recognition of a federal claim under the circumstances of Westberry suggests a fertile field for litigation.

Under §1983 there is a claim against any “person” acting under color of state law who deprives another of his civil rights. *Adkins v. Duval County School Board* held that a school board is not a person within the meaning of this section and affirmed a dismissal of a complaint. In reaching this conclusion, the court relied on *Kenosha v. Bruno*, which held that a municipality was not a person within the meaning of §1983. No legal distinction was found between school boards and municipalities.

In *Sweet v. Childs*, the court held that the defendant’s action (or inaction) of which plaintiff complains must be a proximate cause of the injury. The plaintiffs were suspended by a local school board, and the state school board took no remedial action. Relying on Florida cases, the Fifth Circuit found that discipline was a local matter and that the inaction of the state board defendants was not the cause for the deprivation alleged.

In *Sapp v. Renfroe*, the Fifth Circuit applied the standard announced by the Supreme Court in *Wood v. Strickland* for determining public officials’ liability for damages. The school board required ROTC before

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163. *See also Action v. Gammon*, 450 F.2d 1227 (8th Cir. 1971) (en banc), and *Richardson v. Miller*, 446 F.2d 1247 (3rd Cir. 1971).
165. 507 F.2d at 215.
166. 511 F.2d 690 (5th Cir. 1975).
168. 507 F.2d 675 (5th Cir. 1975).
169. Causation also was found lacking in *Palmer v. Hall*, 517 F.2d 705 (5th Cir. 1975), with respect to the liability of the mayor of Macon, Georgia, who had issued a shoot-to-kill order. The evidence in the record did not support a finding that there was a connection between the order and the shooting by a police officer about 20 months later. *See also Chestnut v. City of Quincy*, 519 F.2d 91 (5th Cir. 1975).
170. 511 F.2d 172 (5th Cir. 1975).
high school graduation, and the plaintiff sued to enjoin the requirement. Prior to the district court decision, he graduated from another school for which he had to pay tuition and claimed compensatory damages. The court found that the constitutionality of a ROTC requirement was not clear. Individual defendants therefore were not liable in damages for enforcing the ROTC policy, since Wood approved the imposition of damages only where "clearly established constitutional rights" are violated.

Judgments awarding damages against two colleges were affirmed in *Hander v. San Jacinto Junior College District* and *Schiff v. Williams*. In *Hander*, a teacher was ordered reinstated and back pay awarded. Back pay would not be authorized against a state under the eleventh amendment, as construed in *Edelman v. Jordan*. However, the Fifth Circuit found that a Texas college district does not stand in the shoes of the state but is a mere political subdivision without eleventh amendment protection. In reaching this conclusion, the court has ignored the preliminary question of whether the school district is a "person" within the meaning of §1983 so that it is a proper defendant. *Adkins v. Duval County School Board* would appear to answer that question negatively, thus precluding the imposition of damages.

A somewhat different issue is raised in *Schiff*, where the court specified that a judgment against an individual defendant was to be paid from a fund of student activity fees rather than from appropriated funds. The defendant, a college president, fired the three plaintiffs from positions at the college newspaper, an action which the court found violated the students’ first amendment rights clearly established, according to the court, in *Bazaar v. Fortune*.

The Fifth Circuit’s apparent interpretation of *Wood v. Strickland* is that a circuit decision clearly establishes the law, so personal liability may be predicated on failure to abide thereby. In view of the numerous significant constitutional issues on which the circuit courts disagree, this standard limits the immunity recognized by *Wood;* if the circuits disagree, then surely a constitutional right is not "unquestioned."

Thus in *Schiff* an award of nominal compensatory damages was affirmed, as was the back pay award which was to come from the activity fees. The court was of the opinion that since the back pay was not from the state treasury, *Edelman* did not preclude the award. Even though the
fund was handled differently from general revenue, it was public money, collected and disbursed in accordance with state law. Siphoning money from a special public fund has the same effect on that fund as an award against the general treasury. The distinction is whether the individual defendant or the state is expected to pay. If it is the state, as it was in Schiff, then the judgment should be precluded by Edelman.