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Civil Rights

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Civil Rights and Constitutional Law

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During the course of 1976, the U.S. Court of Appeals for the Fifth Circuit rendered approximately 125 opinions in cases dealing with the myriad ways in which the Constitution of the United States affects the civil relationships between citizens and their government and between each other. In view of the impossibility of going beyond a rather pointless two or three sentences per case, should it be attempted to cover all or even the bulk of these cases, I have once again selected but a few of those areas in which the Court has acted for a somewhat more detailed analysis.

The first area selected, "The Constitution and Minors," includes a consideration of five cases decided by the Fifth Circuit in connection with the extent and degree to which constitutional rights that apply to adults also apply to minors — both inside and outside of the "school" setting. Since the area is one whose unfolding is both of recent vintage and highly incomplete, examination of the Fifth Circuit's 1976 efforts would be facilitated by a brief review of some of the landmark decisions of the U.S. Supreme Court as well as of the treatment accorded to "minors' rights" in other jurisdictions. I hope this will place the Fifth Circuit's 1976 decisions in a somewhat clearer perspective than would be the case were we to confine our review strictly to the decisions of this circuit during 1976.

Following our venture into the unsettled and uncertain area of "minors' rights," we shall consider a number of the Fifth Circuit's 1976 decisions (along with a few recent Supreme Court decisions) under four separate but related topics. All relate to discrimination based upon a person's race, sex, religion and the like. These topics deal with: (1) racial discrimination and the public schools, (2) racial discrimination in connection with political appointments, (3) racial and religious discrimination by a private club (and the degree of state involvement necessary to trigger the Fourteenth Amendment), and (4) "Title VII." The article concludes with a few brief comments upon the Fifth Circuit's decisions in four or five miscellaneous areas.

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I. THE CONSTITUTION AND MINORS

Parental Rights

The earlier cases about children and the Constitution did not really involve *minors'* rights as much as they did parental rights. These decisions concerned themselves with the protection of these parental rights against unwarranted intrusions by government. In the leading case of *Meyer v. Nebraska*,[1] for example, the Supreme Court was faced with an attempt by Nebraska to outlaw foreign-language instruction in public, private and parochial schools prior to the eighth grade. Nebraska, along with a considerable number of other states during the period following the First World War, had become concerned about the fact that many foreign-born persons were educating their children in foreign-language schools. It was thought that the result might be a large number of native-born citizens whose mother tongue, sympathies and ideals would remain those of the old country rather than the new. The rationale of such legislation, based upon recognition of the obvious fact that one is hard put not to think, analyze, philosophize and dream in his mother tongue, was that it was within the police power of the state to advance the cause of enlightened American citizenship by attempting to insure that children brought up in this country were educated in its language, philosophy, ideals and dreams.[2] The few state supreme courts to pass upon the constitutionality of such legislation before *Meyer* had all upheld the legislation on the ground that it was a reasonable exercise of the state's police power in connection with the education of its youth.[3] The Supreme Court of the United States, however, thought otherwise. Although the Court in *Meyer* recognized that the purpose of the legislation was easy to understand, it held that the means chosen constituted too great an intrusion upon parental liberty to stand.[4] Recognizing that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment had not been precisely defined, the Court nonetheless concluded that it "without doubt" extended to the right of an individual "to marry, establish a home and bring up children," and that it was "the natural duty *of the parent* to give his children education suitable to their station in life."[5]

Two years later, an attempt of government to intrude even more harshly upon parental rights met a like fate in *Pierce v. Society of Sisters*.[6] Oregon

1. 262 U.S. 390 (1923).
2. *Id.* at 393-394, 397-398. *See also* State v. Bartels, 191 Iowa 1060, 181 N.W. 508, 531 (1921).
3. *See* Pohl v. State, 102 Ohio St. 474, 132 N.E. 20 (1921); State v. Bartels, 191 Iowa 1060, 181 N.W. 508, 531 (1921); Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie, 108 Neb. 448, 187 N.W. 927 (1922).
4. 262 U.S. at 401-402.
5. *Id.* at 399-400 (emphasis added).
6. 268 U.S. 510 (1925).

contended that a state's right to enact and enforce compulsory-attendance laws carried with it the right to insist upon attendance in public schools, as opposed to private and parochial schools. The state believed that it could in this manner avoid the social and religious divisiveness which it perceived would result from the separation of children along religious lines during the formative years of their education and lives.[7] The Supreme Court concluded that under its decision in *Meyer,* Oregon's legislation

> unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The fundamental theory of liberty upon which all governments in this Union repose excluded any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[8]

Of all the Supreme Court decisions regarding the high priority accorded to a parent's "liberty" to direct and control his child's upbringing and education in the face of governmental interference for purposes of "equality," "uniformity," "ending divisiveness" and the like, perhaps the most magnificent language seen is that contained in *Board of Education v. Barnett.*[9] At issue was a West Virginia statute making the Pledge of Allegiance and a flag salute obligatory in the public schools. A number of parents who were Jehovah's Witnesses, faced with prosecution for instructing their children, on religious grounds, not to participate, brought suit both in their own right and on behalf of their children to restrain enforcement of the law as it was applied to Jehovah's Witnesses. Affirming the district court's grant of the injunction, the Court said:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support for a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it neces-

7. It is interesting to note that this 1924 view of the State of Oregon is rather similar to the reported views of a number of members of the Labour Party in England today. Their avowed purpose in seeking to eliminate the nation's prestigious private schools is to end the social divisiveness of class which these world-renowned schools are perceived to engender.

8. 268 U.S. at 534-535.

9. 319 U.S. 624 (1943).

> sary to choose what doctrine and whose program public education officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.[10]

The high level of protection which the Court has accorded to the liberty of parents to direct their children's upbringing and education in *Meyers, Pierce v. Society of Sisters* and *Barnett* remains well secured by the First and Fourteenth Amendments today. This can be seen in the recent decision of *Wisconsin v. Yoder.*[11] Amish parents, opposed for religious reasons to the education of their children beyond the eighth grade, had been prosecuted and convicted under Wisconsin's compulsory-attendance law. Because of the Amish way of life and the manner in which their religion prevades their agrarian communities, the First-Amendment balancing of the right of the Amish parents to control the religious education and upbringing of their children against the state's interest in universal education was resolved in favor of the parents. The Supreme Court referred to *Pierce v. Society of Sisters* as authority for the great value which society accords to "the values of parental direction of the religious upbringing and education of their children in their early and formative years."[12]

This is not to say, on the other hand, that the state's interest in how children are reared invariably must fall by the wayside whenever they come into conflict with parental desires. In *Prince v. Massachusetts,*[13] for example, a Jehovah's Witness ran afoul of Massachusetts' child labor laws when a nine-year-old over whom she had custody sold "The Watchtower" on the public streets. This time the parental attack upon state control under the freedom of religion guarantee of the First Amendment and the substantive Due Process protection of parental rights under the Fourteenth did not prevail. The Court said once again that accommodation between parental rights in connection with household and child-rearing authority and the state's interest in the general welfare of children required a "balancing" of these sometimes conflicting interests:

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10. *Id.* at 640-641.
11. 406 U.S. 205 (1972).
12. *Id.* at 213-214.
13. 321 U.S. 158 (1944).

> [N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in a youth's well being, the state, as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting child labor and in other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.[14]

In answer to the argument that the Massachusetts legislation would concededly be unconstitutional if applied to the actions of *adults* on public streets, the Court observed that the mere fact that a state could not prohibit a specified activity by adults did not mean that it couldn't prohibit that activity by children. "The state's authority over children's activities is broader than over like actions of adults," the Court said. "This is particularly true of public activities and in matters of employment."[15]

Minors' Rights

Moving from the more settled concept of parental rights and authority to the nature, extent and degree of those constitutional rights (clouded and diluted though they might be) of an unemancipated minor, we find that the bulk of the law's develoment has taken place only within the past ten years or so.[16] *In Kent v. United States,*[17] the Supreme Court, perhaps for the first time, dealt with minors' rights in connection with legislation expressly designed to deal with juvenile problems. Invalidating an order of a juvenile court which had waived its own statutory jurisdiction over a 16-year-old and remitted him to the U.S. District Court for criminal prosecution, the Court held that the fact that the government was functioning under juvenile legislation as parens patriae in a civil proceeding rather

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14. 321 U.S. at 166-167.

15. *Id.* at 168. Justice Jackson, joined in dissent by Justices Roberts and Frankfurter, criticized the majority's view that "age" could be used to cut across a true exercise of religion and auxiliary secular activity. *Id.* at 178. The other dissent, by Justice Murphy, was predicated upon the view that the indirect restraint which the statute in question was imposing upon the free exercise by a minor of his religious convictions "through the parents and guardians" should not be allowed in the absence of some "grave and immediate danger" to the state or to the health, morals or welfare of the child. *Id.* at 172-174.

16. This development was to some extent presaged by Haley v. Ohio, 332 U.S. 596 (1948), in which the murder conviction of a 15-year-old boy was overturned on due-process grounds. An alleged "confession" following five hours of interrogation by relays of police officials between midnight and 5 a.m., while the boy was without the aid of counsel, was more than the Supreme Court could swallow. The Court said this sort of conduct would concern it even were the suspect an adult, since "neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." Certainly age was a factor to be considered—in the suspect's favor—when it came to withstanding a police inquisition of this nature, the Court said.

17. 383 U.S. 541 (1966).

than as a prosecutor in a criminal proceeding did not give it a license for procedural arbitrariness. While juvenile-court hearings need not conform with all of the requirements of a criminal trial, the Court said, juvenile court hearings must measure up to "the essentials of due process and fair treatment."[18]

The big breakthrough respecting the constitutional rights of minors in juvenile-court proceedings came fourteen months later in the landmark case of *In re Gault*.[19] The Court for the first time spelled out some of the "essentials of due process and fair treatment." Argument over labels — "civil" as opposed to "criminal" proceedings — was unrealistic, the Court said, when it was freely conceded that a juvenile proceeding which adjudicated "delinquency" could lead to a "deprivation of liberty" by incarceration just as surely as a criminal proceeding. The Court held that "due process" in juvenile proceedings embraced such things as adequate and timely notice in writing to the child and his parents of the specific charge against him or of the matter to be considered at the juvenile court hearing; the right to counsel and, if the juvenile were unable to afford counsel, to court-appointed counsel; and the usual criminal constitutional protections regarding self-incrimination, confrontation, and the right of cross-examination. In reaching this result, the Court, upon review of such cases as *Haley* and *Kent*, pointed out that "while these cases relate only to restricted aspects of the subject, they unmistakably indicate that whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[20] Subsequent decisions of the Court held that the criminal standard of proof, "beyond a reasonable doubt," rather than the civil standard, "preponderance of the evidence," applied to juvenile-delinquency proceedings when incarceration might result,[21] but that trial by jury is not among the "essentials of due process" required in such proceedings.[22]

This application of the due-process protections of our Constitution to governmental "punishment" of children, whether it is labeled "civil" or "criminal," has been carried over from delinquency proceedings in juvenile courts to other governmental activities affecting minors. In *Goss v. Lopez*,[23] for example, the Court held that public school authorities suspending a student for even a brief period of time should provide for at least some rudimentary hearing before, or in extreme situations shortly after, the

18. *Id.* at 562.

19. 387 U.S. 1 (1967).

20. *Id.* at 13.

21. *In re* Winship, 397 U.S. 358 (1970). The Court once again listened to and rejected the argument that delinquency hearings under juvenile acts do not require these constitutional safeguards because they are "civil," not "criminal," proceedings—designed to "save," not "punish," the child. *Id.* at 365-366.

22. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

23. 419 U.S. 565 (1975).

suspension. The Court indicated that for longer suspension a more formal procedure might be required by the Due Process Clause.[24]

In other areas, the constitutional rights of minors are much less settled. In *Ginsberg v. New York*,[25] the Court upheld the conviction of a stationery and luncheonette store operator who, in violation of New York's penal code, sold a "girlie" magazine to a 16-year-old. The magazines were not "obscene" for adults, and the legislation in question did not prohibit the store operator from stocking the magazines and selling them to persons 17 years of age or older. Rejecting the argument that it was not permissible for New York to draw a line at age 17 respecting the sex-related but not obscene magazines, the Court said: "That the State has the power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'"[26]

This dilution of the constitutional rights of children has been noted and applied by lower federal courts as well as by state courts in varied situations. In *Bykofsky v. Borough of Middletown*,[27] for example, a curfew ordinance was attacked by a mother both on her own behalf and on behalf of her 12-year-old son. The ordinance did not permit the boy to be on the streets of the Borough unaccompanied by a parent or a parentally authorized adult or not in accord with some other specified exception after 10:30 p.m. and before 6 a.m. The district court, while noting that the Supreme Court had recognized that minors are "persons" under the Constitution and possess fundamental rights which the state must respect, also referred to the fact that the Court had not yet "articulated the special factors that determine how existing frameworks for analyzing the rights of adults are applied to minors."[28] The district court observed that even with respect to First-Amendment guarantees, for which the *te Deums* of constitutional law are apt to ring at their loudest, the rights of minors have been declared by the Supreme Court *not* to be co-extensive with those of adults. The district court concluded that while the right of locomotion is a well recognized due-process right, it in that case weighed less than the Borough's interest in the welfare of minors, against which it had to be balanced. The curfew was consequently held not to violate the First-Amendment or Fourteenth-Amendment rights of either the mother or her son. Similarly, in holding that neither the Fourth Amendment nor the "exclusionary rule" was of-

24. *Id.* at 584. The Fifth Circuit had some fourteen years earlier held that a due-process hearing was necessary in school expulsion cases based on disciplinary grounds. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

25. 390 U.S. 629 (1968).

26. *Id.* at 638.

27. 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976).

28. 401 F. Supp. at 1253.

fended by searches of students by school officials without "probable cause," the Supreme Court of Georgia has noted that the constitutional rights accorded minor students by the U.S. Supreme Court are "a dilute version of those accorded adults."[29] Even if some infringement upon the outer bounds of the Fourth Amendment may exist, the Georgia Supreme Court said, it must be balanced against the school discipline which is required if schools and school administrators are to perform their proper functions.

As the law continues to unfold, it may reasonably be expected that the degree of "dilution" of a minor's constitutional rights will vary according to the situation and specific nature of the right asserted. The Supreme Court has, for example, already made it quite clear that in cases of the non-disruptive expression of political views or sentiment, a minor student's level of protection is probably little if anything less than that enjoyed by an adult. In *Tinker v. Des Moines Independent Community School District*,[30] school officials had attempted to prohibit three students' wearing black armbands to protest the war in Vietnam. The students had not in any way disrupted school operations. The Court said:

> First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights of speech or expression at the schoolhouse gate.[31]

The Court held that the students' freedom of speech outweighed the need for affirming the comprehensive authority of the states and of school officials to prescribe and control conduct within the schools. In the words of the Court:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[32]

Certainly one of the most sensitive and perhaps politically explosive aspects of the developing law of the constitutional rights of minors is the question of constitutional rights of the minor *in opposition to parental rights*. In his dissent in *Wisconsin v. Yoder*,[33] Justice Douglas expressed the

29. State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975), *cert. denied*, 423 U.S. 1039 (1975).

30. 393 U.S. 503 (1969).

31. *Id.* at 506. The Fifth Circuit earlier had used a "material and substantial interference" test in connection with student "speech" and "expression" in Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

32. *Id.* at 511.

33. 406 U.S. 205 (1972). See the text accompanying notes 11 and 12, *supra*, for a discussion of this case.

following viewpoint on the Amish view of compulsory education beyond the eighth grade:

> I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that . . . the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.
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> . . . .
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> If parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.
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> . . . .
>
> This issue has never been squarely presented before today.[34]

It would have been somewhat surprising for the majority to have allowed this view to pass uncommented upon when our history and tradition have so long viewed family integrity — a concept which would seem to presuppose parental control — as one of the highest values of our civilization. The not unanticipated rejoinder of the majority was that the notion of the existence of a minor's constitutional rights in opposition to parental authority

> would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in the Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparably to those raised here and those presented in *Pierce v. Society of Sisters* . . . . On this record we neither reach nor decide those issues.[35]

The issue and all that is at stake remains undecided. Even earlier, in *Rowan v. United States Post Office*,[36] Justice Douglas, along with Justice Brennan, had indicated that the age of the minor might be significant. While agreeing with the majority that a federal statute could constitutionally permit an addressee to require a mailer to remove his own name from its mailing lists, they questioned the purported reach of the statute to an addressee's request to the Postmaster General to include within the prohibitory order "the names of any of his minor children who have not attained

34. *Id.* at 241-243.
35. *Id.* at 231-232.
36. 397 U.S. 728 (1970).

their nineteenth birthday, and who reside with the addressee."[37] The two justices were concerned over the fact that, under the majority's rationale, "the possibility exists that parents could prevent their children, even if they are 18 years old, from receiving political, religious or other materials that the parents find offensive."[38] Both justices indicated that it was their view that the statute, if applied to prevent children "in their late teens" from an opportunity to receive such materials, would have constitutional difficulties.[39]

Probably the most significant enlargement of the constitutional rights of a minor in opposition to parental authority is in the emotional area of the killing of unborn children. While the initial abortion decision of the Supreme Court, *Roe v. Wade*,[40] expressly reserved the question of whether parental permission could be required when the pregnant woman is an unemancipated minor,[41] the answer was not long in coming. In *Poe v. Gerstein*,[42] the Fifth Circuit held that the "fundamental right" of a woman to an abortion, which the Supreme Court enunciated in *Roe v. Wade*, applied to minors as well as adults. Although parents have considerable authority over their children, there was no "compelling reason" for the state's statutory support of this parental authority when it came to their daughters' abortions. To the court's way of thinking, the statutory result would be that "parents would be able to overcome their daughter's fundamental rights for insubstantial personal reasons of their own."[43] This conclusion was ratified by the Supreme Court in *Planned Parenthood of Missouri v. Danforth*.[44] The Court observed: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors as well as adults, are protected by the Constitution and possess constitutional rights."[45] The Court held that parental-consent prerequisites of Missouri's abortion legislation were

37. *Id.* at 741.

38. *Id.*

39. *Id.*

40. 410 U.S. 113 (1973).

41. *Id.* at 165 n. 67.

42. 517 F.2d 787 (5th Cir. 1975), *aff'd*, ___ U.S. ___, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

43. 517 F.2d at 793. The Court's unspoken value judgment, of course, is that the parent's so-called "insubstantial personal reasons" (perhaps so "insubstantial" as viewing the "legal" extermination of unwanted children today as being little different morally from the extermination of unwanted ethnic groups in such places as Dachau and Belsen 35 years ago) is not entitled to any weight in comparison to the Supreme Court's "constitutional determination" that the ending of life (life which is now made to sound less than human by calling it "fetal tissue," just as the life terminations 35 years ago were perhaps made somewhat more palatable to those then performing the terminal operations by classifying the victims as less than human "untermensch") is not only permissible but a "fundamental right."

44. ___ U.S. ___, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976).

45. 96 S. Ct. at ___, 49 L. Ed. 2d at 808.

overly broad. While disclaiming an intention to suggest that any minor, regardless of age or maturity, could give effective consent to the termination of her pregnancy, the Court concluded that, in general, any independent interest the parent might have in the termination of the minor daughter's pregnancy "is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[46] Thus, in the eyes of the justices the defect of the Missouri legislation was that it imposed a special consent provision, exercisable by a person other than the pregnant woman and her physician, as a prerequisite to termination of the unborn child's life, and did so without "sufficient justification."[47] Relying upon that view expressed in *Danforth,* the Supreme Court summarily affirmed the Fifth Circuit's decision in *Poe v. Gerstein.*[48]

The Fifth Circuit's 1976 Contributions

Against this background the Fifth Circuit's 1976 contributions to the development of law regarding the constitutional rights of minors range from commonplace to significant. In *United States v. Cuomo,*[49] a case dealing primarily with federal juvenile legislation, the Fifth Circuit rejected the contention that the Sixth Amendment places stronger restraints upon the federal government than the Fourteenth does upon the states and requires a jury trial in federal juvenile-delinquency proceedings.[50] A second case dealing with juvenile proceedings, *Moss v. Weaver,*[51] held that a state practice of imposing pretrial detention upon minors accused of delinquency violates the Fourth Amendment unless "probable cause" is created by "facts and circumstances sufficient to warrant a prudent man in believing that the accused juvenile had committed the acts of delinquency."[52] The court further held, on the other hand, that since the Fourth Amendment's standard of proof of "probable cause" is low, not even reaching the "preponderance of evidence" level, the juvenile did not possess any constitutionally secured right to require the probable-cause determination to be made on "competent, sworn testimony" with witnesses subject to cross-examination. In reaching this conclusion, the court noted that a magistrate's decision whether to issue an arrest warrant even for adults is frequently based on hearsay and written testimony.

In *Mahavongsanan v. Hall,*[53] the Fifth Circuit drew a sharp line between

46. *Id.*
47. *Id.*
48. ___ U.S. ___, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).
49. 525 F.2d 1285 (5th Cir. 1976).
50. This contention was an effort to avoid the Supreme Court's holding in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), that a jury trial was not necessary in state juvenile proceedings.
51. 525 F.2d 1258 (5th Cir. 1976).
52. *Id.* at 1260, *quoting* Gerstein v. Pugh, 420 U.S. 103, 111 (1975).
53. 529 F.2d 448 (5th Cir. 1976).

disciplinary actions and academic decisions in determining the authority of courts to impose due-process requirements upon educational institutions. Mahavongsanan was a foreign graduate student who twice failed to pass a comprehensive examination, which had become a degree requirement after her matriculation. She contended that, having met all of the degree requirements which existed when she first matriculated, she was entitled to her graduate degree. The plaintiff claimed that in denying her the degree on the basis of a post-matriculation requirement, the university officials had violated her due-process rights and breached her contract with the institution. The Fifth Circuit disagreed. It said there is a "clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals." The court rejected the breach-of-contract claim on the ground that the rules and regulations of the university, with which a student agrees to comply when he matriculates, are subject to any modification that the university may in its discretion deem appropriate to properly discharge its educational responsibilities.

The First-Amendment right of student editors to decide what shall appear in a student newspaper is apparently greater than that of the sponsoring university officials, who not infrequently are responsible for the disbursement of university funding necessary to maintain the publication. The Fifth Circuit ruled in the 1973 case of *Bazaar v. Fortune*[54] that University of Mississippi officials, could not interfere with the distribution of a student magazine published "with the advice" of the English Department of the University and fiscally protected with university funds. (The officials thought the language of the issue in question was too "earthy" for university affiliated publication.) But in the 1976 decision of *Mississippi Gay Alliance v. Gaudelock*[55] the court concluded that the First Amendment gave the student editor the right to determine what would or would not be included in his publication and that, while university authorities could not have ordered him to refrain from publishing an off-campus homosexual group's advertisement in the university-sponsored and university-funded student newspaper, the editor was protected by that Amendment in *his* decision not to accept the advertisement.

Perhaps the most interesting contribution of the Fifth Circuit in the developing area of the constitutional rights of minors is *Ingraham v. Wright*.[56] This litigation, filed in the Southern District of Florida in 1971, is among the spate of recent "civil rights" actions which have attempted to persuade federal courts that the teacher who spanks an unruly pupil in the classroom is somehow launching an attack on the United States Con-

54. 476 F.2d 570 (5th Cir. 1973), *modified*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

55. 536 F.2d 1073 (5th Cir. 1976).

56. 525 F.2d 909 (5th Cir. 1976), *aff'd*, 45 U.S.L.W. 4364 (U.S., April 19, 1977).

stitution.[57] At issue was the administration of corporal punishment in the Dade County, Florida, school system, the nation's sixth largest school system, with approximately 12,500 teachers, 242,000 pupils and 237 schools.[58] The plaintiffs, who as a result of the corporal punishment had received bruising of such severity that medical treatment was necessary, filed not a tort action in the state courts but a federal civil-rights action seeking compensatory and punitive damamges for an alleged deprivation of *constitutional* rights and also seeking declaratory and injunctive relief against the use of corporal punishment throughout the county school system.[59] The constitutional provisions relied upon were the Eighth and Fourteenth Amendments — "cruel and unusual punishment" and "due process" — with the plaintiffs contending that Dade County's corporal-punishment policies were constitutionally deficient both facially and as applied.[60] From the plaintiff's evidence, the district court found that, with the exception of certain instances at one particular junior high school, the severity of the "paddling" administered in the school system did not appear to be remarkable and dismissed the action under Rule 41(b) of the Federal Rules of Civil Procedure.[61]

On appeal, a majority of the three-judge panel conceded, with lamentations, that in light of the rather widespread use of corporal punishment in public schools plus its repeated sanction by the courts, it would be difficult to hold it to be on its face so repugnant to contemporary society that it would fail to pass the "evolving standards of decency" test for an Eighth-Amendment violation.[62] The panel nonetheless reversed the district court. It did so on the theory that it was not, as the district court appeared to have thought, necessary to the existence of an Eighth-Amendment violation that the *application* of corporal punishment be excessive throughout the school system. The Amendment could be transgressed by misuse at *even a single* school, the court said. In the opinion of two of the three judges on the panel, the plaintiffs, whose evidence indicated that they had received physical injury of some severity at the school in question, had made out a prima facie case of "excessive" punishment and hence of an Eighth-

57. *See, e.g.*, Baker v. Owen, 395 F. Supp. 294 (M.D. N.C. 1975), *aff'd*, 423 U.S. 907 (1975); Bramlett v. Wilson, 495 F.2d 714 (8th Cir. 1974); Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd per curiam*, 458 F.2d 1360 (5th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); Sims v. Waln, 388 F. Supp. 543 (S.D. Ohio 1974); Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973); Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972); Whatley v. Pike County Bd. of Educ., No. 977, (N.D. Ga. 1971) (three-judge court).

58. See Ingraham v. Wright, 498 F.2d 248, 253-254 (5th Cir. 1972).

59. *Id.* at 250, 255-259.

60. *Id.* at 259-261, 266-269.

61. Rule 41(b) authorizes a district court to dismiss actions upon motion in non-jury cases when, upon completion of a plaintiff's evidence, it appears to the court that the plaintiff has now shown that upon the facts and the law he has a right to judicial relief.

62. 498 F.2d at 260-261.

Amendment violation. The two judges similarly concluded that while they were unwilling, from a due-process viewpoint, to say that mild or moderate corporal punishment was unrelated to the achievement of any legitimate educational purpose, the harshness of the punishment actually administered at the junior high school was in "shocking disparity" to the offenses and hence violated the Due Process Clause as well as the "cruel and unusual punishment" prohibition of our Constitution.[63] Judge Morgan dissented on the ground that in a school system of 12,500 teachers, 242,000 pupils and 237 schools, a disciplinary event in one school could not give rise to a constitutional question calling for federal judicial intervention.[64]

This original panel decision was discussed in a previous Fifth Circuit Survey, which, noting that a rehearing en banc had been granted, expressed the hope that Judge Morgan's dissent and not the original panel decision would prevail.[65] This hope has now been fulfilled. Speaking this time for a majority of the court en banc, Judge Morgan said that the Eighth Amendment applied only to punishment invoked as a sanction of *criminal* conduct and did not apply in a *civil* context such as the maintenance of school discipline.[66] Saying that the proper remedy for excessive or unreasonably severe corporal punishment was a civil or even criminal action in the state courts for tortious conduct by the offending teacher, the court en banc concluded: "We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended scope to encompass an action which is essentially based on the commission of a battery."[67] The court en banc also rejected the contention that there were violations of substantive and procedural due process. Substantive due process was rejected on the ground that maintenance of discipline in the public schools is a legitimate governmental end to which corporal punishment reasonably relates; procedural due process was rejected on the ground that the notice and hearing procedures insisted upon by plaintiffs (with right to counsel and cross-examination of witnesses) were simply not appropriate to such routine school disciplinary actions as keeping a disobedient child after school or spanking him, since those disciplinary actions were not only not serious enough to require the prerequisites of a formal hearing, but would in fact dilute the value of corporal punishment for all concerned.

The dissenting judges in essence adhered to the views expressed by the majority in the original panel decision: (1) the Eighth Amendment is not limited in its scope to "a criminal setting" and school children have a

63. *Id.* at 269.
64. *Id.* at 271.
65. Evans, *Constitutional Law, 1974 Fifth Circuit Survey*, 26 MER. L. REV. 1153, 1176-1177 (1975).
66. Ingraham v. Wright, 525 F.2d 909, 913-914 (5th Cir. 1976), *aff'd*, 45 U.S.L.W. 4364 (U.S. April 19, 1977).
67. 525 F.2d at 915.

constitutional right to freedom from cruel and unusual punishment; (2) arbitrary, excessive and severe corporal punishment is a denial of *substantive* due process of law; and (3) the circumstances and severity of the beatings were sufficiently serious to call for the protection of procedural due process.

Conceptually, the dissent in *Ingraham* would on its face seem to have much merit. Yet considering the forseeable consequences of the adoption of the dissenters' position upon the use of corporal punishment as an effective tool for the maintenance of classroom discipline, one can only hope that for the sake of public education practicality will continue to be given precedence over mere conceptual symmetry of the law. The idea of a pre-spanking "hearing" with all of the procedural due process paraphernalia which would attach if lawyers got into the act (with cross-examination and so forth, as the *Ingraham* plaintiff asked for) seems in particular to rest somewhere between silliness and insanity. More than 80 years ago, a learned English jurist, upholding a headmaster's use of what may be the earliest and best mode of "behavior modification," said: "The first observation that occurs to one to make is that one of the greatest advantages of any punishment is that it should follow quickly on the offense."[68] The teacher who determines that classroom disruption, and its accompanying interference with the rights of the twenty or thirty other pupils in the room to an education, can most promptly and effectively be ended with a sharp rap on the knuckles (or on some other portion of the unruly child's anatomy) needs to do the rapping now, not hours, days or weeks later.

After the survey period ended, the Supreme Court affirmed the Fifth Circuit's en banc decision and held that the Eighth Amendment does not apply to school-children.[69]

II. Racial Discrimination and the Public Schools: "Nuts and Bolts" Plus a Straw in the Wind

Almost 25 years, not to mention reservoirs of ink, tons of paper, and legal fees adequate to send a generation of lawyers' children through college, have elapsed since the Supreme Court decided its "case of the century," *Brown v. Board of Education.*[70] Yet many of the questions about what school officials must do, what they cannot do, and what they may do if they choose to, in connection with race and public education, are still with us, still unresolved.

This is not to say that the form that the bulk of the litigation takes has not changed. It has. In place of the sweeping class actions of the middle to late 1960's and early 1970's to desegregate entire school districts, current

68. Cleary v. Booth, 1 Q.B. 465, 467 (1893).
69. 45 U.S.L.W. 4364 (U.S., April 19, 1977).
70. 347 U.S. 483 (1954).

litigation, with some very important exceptions, has to a large extent settled down to such "nuts and bolts" matters as whether an *individual* teacher or pupil (or perhaps a small number of either or both) has been discriminated against on the basis of race or ethnic background. Thus, most of the Fifth Circuit's 1976 decisions relate to such matters as whether the ending of a particular teacher's employment was based upon race rather than legitimate academic grounds, when the strict standards of *Singleton*[71] have to be applied to dismissals or demotions, and what constitutes a "demotion." In *Adams v. Rankin County Board of Education,*[72] for example, the court of appeals concluded that the evidence supported the district court's finding that, as to three particular teachers who were not reinstated along with others in the wake of staff reductions following implementation of a unitary school system, the basis of their particular dismissals had been incompetency rather than race.

In *Pickens v. Okolona Municipal Separate School District,*[73] the plaintiff, a black teacher, claimed that the nonrenewal of his employment contract was impermissible because school authorities had used "nonobjective evaluative criteria" in making their decision. The Fifth Circuit, however, said that the purpose of *Singleton* was not one to grant a black teacher a job in perpetuity and that the case proscribed dismissals of black teachers in the absence of previously published "objective" standards only when the dismissal was in connection with a reduction in teaching staff brought about by desegregation. The court of appeals agreed with the district court that *Singleton* did not apply if, as in the case before it, the evidence indicated that there was no overall reduction in the teaching staff and that it was the plaintiff and not his position which had been terminated. The district court's decision that the termination had been based not on the plaintiff's race but upon his substantial deficiencies as a teacher was consequently affirmed.

Questions involving principals at all-black elementary schools who were reassigned to positions of assistant principal at high or middle schools in the course of a school system's conversion to a unitary system were presented to the court in a number of its 1976 cases. In *Roper v. Effingham County Board of Education,*[74] a high school assistant principal conceded that his move from elementary principal to high school assistant principal was *not* a "demotion," but alleged that the school board's *failure to promote* him to the office of principal was racially discriminatory. The Fifth Circuit affirmed the district court's conclusion that the school

71. Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir. 1970) (en banc).

72. 524 F.2d 928 (5th Cir. 1976), *petition for cert. filed,* 45 U.S.L.W. 3057 (U.S., May 21, 1976).

73. 527 F.2d 358 (5th Cir. 1976).

74. 528 F.2d 1014 (5th Cir. 1976).

board's decision to promote others rather than the plaintiff to principalships was based upon the plaintiff's personal lack of merit and not upon his race.

A similarly transferred plaintiff in *Campbell v. Gadsden County District School Board,*[75] however, achieved better results by avoiding the mistake of conceding that the reassignment from elementary principal to high school assistant principal was not a demotion. The reassigned plaintiff, although he had intially received a salary increase in connection with his new position, submitted evidence to show that, as high school assistant principal, he was no longer responsible for selecting and hiring faculty and making teacher assignments, and that in general his new position was not as prestigious as his former elementary school principalship. Observing that *Singleton* defined "demotion" as a reassignment under which the staff member (1) received less pay, *or* (2) *had less responsibility, or* (3) *needed less skill,* the court of appeals concluded, as had the district court before it, that the plaintiff had indeed been "demoted" within the meaning of *Singleton* and that the strict standards of that case consequently were applicable. The school board had failed to develop and publicize the written, objective, nonracial criteria required by *Singleton* in connection with the "demotion" or "dismissal" of school personnel. The plaintiff had 30 years' exierience as a school administrator, in contrast to the far more limited experience of the most recently employed white principals. The order of the district court requiring that the plaintiff be placed in an elementary school principalship was therefore affirmed. The plaintiff was also awarded back pay and attorney fees.

The same Gadsden County School Board suffered another defeat in virtually the same situation in *United States v. Gadsden County School District.*[76] This time it was the reassignment of a black former principal of an elementary school to assistant principal of a middle school. Pointing out that reassignment from principalship of a very small elementary school to the higher-salaried position as assistant principal of a considerably larger middle (or high) school could still be a "demotion" when overall responsibilities and authority were reduced, the court of appeals reversed the district court's holding that the reassignment wasn't a demotion. It was the Fifth Circuit's view that the evidence submitted by the former principal concerning his reduced responsibilities as "assistant principal" (for example, loss of supervisory authority over teachers and curricula, lack of responsibility concerning school programs and finances) had in fact not been contradicted by the school board's contention that he hadn't been demoted. The case once again demonstrates that in considering whether a reassignment is a "demotion" that triggers application of the strict

75. 534 F.2d 650 (5th Cir. 1976).
76. 539 F.2d 1369 (5th Cir. 1976).

Singleton standards, the mere fact of a higher salary is not controlling, and the overall duties and responsibilities of a new position will also be considered.

Even such subjects as "busing" can be of the "nuts and bolts" variety rather than part of a massive desegregation plan. *Stout v. Jefferson County Board of Education*[77] was an appeal by the United States in connection with the existence of two all-black schools and one all-white school in an otherwise fully desegregated, 80% white school district. The United States contended that the situation could be alleviated by busing students between the black schools and the essentially all white school facilities about 10 or 11 miles away. The fly in what would have seemed to be an easy-to-apply ointment was a chain of small mountains between the black area and the white area. It was traversed by but two roads. One, a major truck route, produced more accidents than any similar stretch of road in the state. The other, steep and winding, was also dangerous and carried a heavy volume of automobile traffic. Under these circumstances, the Fifth Circuit agreed with the district court that "busing" to eliminate the three remaining one-race schools need not be required. In its discussion of the situation, the court of appeals also rather significantly noted that the existence of the two all-black schools was the result of geography and demography alone rather than the segregative act of any authority whatsoever, and that, under *Swann*,[78] the Constitution does not require racial quotas or balancing to remedy racial or ethnic concentrations that are not imposed by government. In connection with the problem of "white flight," the court of appeals pointed out that while it was quite true that fear of this not infrequent phenomenon of school desegregation could not be accepted as a reason for achieving anything less than the complete uprooting of the racially segregated school system, it quite properly could be considered by a court in connection with its weighing of alternative *permissible* desegregation plans.

The "straw in the wind" is not so much the Fifth Circuit's decision in *United States v. Texas Education Agency*,[79] as it is the Supreme Court order vacating the decision and remanding the case for reconsideration.[80] This case grew out of the use of a neighborhood assignment policy by the Austin Independent School District (AISD) in view of the existing residential concentrations of Mexican-Americans in Austin. The district court had held that while its past findings regarding intentional segregation of *blacks* constituted a prima facie case of intentional segregation of Mexican-Americans, the AISD had successfully rebutted this prima facie case by

77. 537 F.2d 800 (5th Cir. 1976).
78. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
79. 532 F.2d 380 (5th Cir. 1976).
80. *Sub. nom.* Austin Ind. School Dist. v. United States, ___ U.S. ___, 97 S. Ct. 517, 50 L. Ed. 2d 603 (1976).

showing that its past racial practices had not related to Mexican-Americans. This lack of "segregative intent" on the part of AISD toward the Mexican-Americans obviated the necessity of "all-out desegregation" of Mexican-Americans in Austin's schools, the district court said.

The Fifth Circuit essentially agreed with the district court that, under *Keyes*,[81] proof of "segregatory intent" was necessary to convert the factual condition of ethnic concentrations in schools into a constitutional violation calling for equitable relief. It also recognized that the cause-and-effect test for "state action," which it had previously employed in such cases as *Austin I*[82] and *Cisneros*,[83] had been superseded by *Keyes*. The Fifth Circuit nonetheless reversed the district court's conclusion that the evidence did not show this "intent." The basis of the reversal was the court's incorporation into school segregation law of the ordinary rule of tort law that "a person intends the natural and foreseeable consequences of his actions."[84] On this basis, of course, the result was preordained. Since Austin, like most American cities, does indeed have ethnically concentrated residential patterns, the "foreseeable consequence" of a neighborhood school assignment policy is a reflection of the ethnic residential concentrations in the public schools.[85] Having found "segregatory intent" by applying the customary "foreseeable consequences" rule of tort law, the court of appeals proceeded to direct adoption of the sort of large-scale busing remedy which the Supreme Court had approved in *Swann*. Under a proposed plan whose general format the court agreed with, somewhere between 32% and 42% of Austin's students would have had to have been "bused."[86]

AISD filed its petition for certiorari on August 11, 1976. It asked the Supreme Court to review the questions: (1) whether the Fifth Circuit had erred in holding that school districts are constitutionally prohibited from using a neighborhood school assignment policy when ethnically concentrated residential areas exist, even if the policy is shown to have been adopted for non-discriminatory educational purposes, and (2) whether extensive busing would be a proper remedy in the face of the district court finding — not held by the court of appeals to be clearly erroneous — of

81. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

82. United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972).

83. Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142 (5th Cir.) (en banc), *cert. denied*, 413 U.S. 920 (1973).

84. 532 F.2d at 388. The court recognized the need to conform *Austin I* and *Cisneros* to *Keyes*. In analyzing *Austin I*, the court concluded that this could be done by interpreting the earlier cases as having inferentially incorporated the ordinary rule of tort law concerning "foreseeable consequences" and thus meeting the Keyes requirement of "segregative intent."

85. The court of appeals also expressed its opinion that "refusal of school authorities to take affirmative action that would desegregate the school system may be probative of the segregative intent underlying various actions by those officials." 532 F.2d at 389.

86. 532 F.2d at 395 n. 22.

adverse consequences for the health, safety and education of the children.[87]

In December, 1976, the Supreme Court vacated the judgment of the Fifth Circuit and remanded the case for reconsideration in light of *Washington v. Davis*.[88] It is difficult to construe this as anything other than a rejection of Fifth Circuit's view that the "segregatory intent" necessary to authorize judicial relief in a school segregation case can be shown solely through the "foreseeable consequences" rule of tort law. In *Washington v. Davis* black plaintiffs seeking to become police officers in Washington, D.C., contended that certain written tests for "verbal skills," which they had failed to pass, were unrelated to job performance and in fact intended to exclude black applicants. The Supreme Court flatly rejected the notion that the racial "impact" of the tests (manifestly a "foreseeable consequence" of their usage) was adequate to condemn their use as a matter of *constitutional* law. "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact," the Court said.[89] The Court also referred specifically to school desegregation when it observed:

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of law claimed to be racially discriminatory must alternately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is "a current condition of segregation resulting from intentional state action . . . . The differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate."[90]

In the Supreme Court's remand of the *Austin* decision itself, a concurring opinion of Justice Powell, joined in by Chief Justice Burger and Justice Rehnquist, may be significant. After expressing his view that the Fifth Circuit had perhaps erred in its readiness to impute to school officials a segregative intent "far more pervasive than the evidence justified,"[91] Justice Powell said he thought the court had further erred by ordering a desegregation plan far exceeding that which might conceivably be necessary to eliminate the effect of any *official* acts or omissions. After pointing out that the principal cause of racial and ethnic imbalance in urban public schools across the country was imbalance in residential patterns, which is

87. 45 U.S.L.W. 3172 (U.S., Aug. 31, 1976).

88. *Sub nom.* Austin Indep. School Dist. v. United States, ___ U.S. ___, 97 S. Ct. 517, 50 L. Ed. 2d 603 (1976). The case of Washington v. Davis, upon which the vacating of the judgment was predicated, is reported at 426 U.S. 229 (1976).

89. 426 U.S. at 239.

90. *Id.* at 240.

91. 97 S. Ct. at 517, 50 L. Ed. 2d at 603-604.

typically beyond the control of school authorities, Justice Powell continued:

> [T]he limitation repeatedly expressed by this Court [is] that the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation. Thus, large scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary age children. A remedy simply is not equitable if it is disproportionate to the wrong.[92]

In *Keyes* Justice Powell had been rather critical of such cases as *Swann* precisely because the remedies approved had required school districts to eliminate conditions of racial concentrations or imbalance in the schools to an extent which went far beyond the degree of racial separation or imbalance which could reasonably be attributed to *state* action rather than to normal ethnic concentrations brought about by choice, economic pressures and various other factors over which government (at least in a free society) has no control.[93] Justice Powell's view in *Keyes* has now been joined in by Chief Justice Burger and Justice Rehnquist in the *Austin* case. If it represents, or comes to represent, the prevailing view of the Court, the "winds of change" will indeed be blowing in a different direction — a direction which may make school bus manufacturers unhappy but which certainly will cheer those who want to avoid wasteful consumption of our energy resources (oil and gasoline) and probably will delight most parents, black and white.

III. Racial Discrimination in Discretionary Political Appointments

Current instances of judicial reluctance to act when it appears that public officials may have acted in a racially discriminatory manner are unquestionably few and far between. One of these sparse preserves upon which the courts have refused to poach is the discretionary political-appointment power of elected executive officers. In *James v. Wallace,*[94] the plaintiffs attempted to end alleged racial discrimination by the Governor of Alabama in his appointment of persons to virtually all state boards and commissions. The plaintiffs presented what in most other racial discrimination cases would have been overwhelming statistical evidence. In a state in which the general citizenry is about 28% black, the Governor, out of

92. 97 S. Ct. at 519, 50 L. Ed. 2d at 605. *See also* Milliken v. Bradley, 418 U.S. 720, 738, 744 (1974).

93. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 217-254 (1973) (concurring opinion of Justice Powell).

94. 533 F.2d 963 (5th Cir. 1976).

1,556 political appointments, had named only 8 blacks (about one-half of one percent of all appointments). Yet the Fifth Circuit held that the statistical evidence was not enough to establish a prima facie case. The court conceded that its assessment was "influenced" by the fact that the alleged discrimination related neither to employment in general nor to governmental functions which were devoid of political or policy-making content, but related instead to the exercise of a "discretionary power" vested by state law in its chief executive officer.

While the decision may seem incongruous when viewed in connection with the Fifth Circuit's steadfast efforts to end the slightest tinges of racial discrimination in virtually all other areas of governmental activity, the result in *James v. Wallace* would nonetheless seem compelled by the decisions of the U.S. Supreme Court in *Carter v. Jury Commission of Greene County*[95] and *Mayor of Philadelphia v. Educational Equality League.*[96] Both of these cases noted the serious problems which would be presented were a federal court to attempt to interfere with the discretionary appointment power of an elected executive officer. In each case the Supreme Court declined to wrestle with the bear. It decided each case instead upon the premise that the "evidence" presented in the context of what the case involved — exercise of discretionary appointment powers by an elected executive official — was insufficient to make out a case for the aggrieved plaintiffs. It is unlikely that the point was lost on the Fifth Circuit that in the *Greene County* case, the Supreme Court's "want of evidence" adjudication was in the face of evidence showing a flat zero appointment rate for blacks to the jury commission in a county which was 75% black. Obviously the burden of proof which a plaintiff will have to bear if he is ever to get an adjudication on the merits of the underlying issue is considerable.

IV. Racial and Religious Discrimination in Private Clubs: State Action and the Fourteenth Amendment

It is clear that the membership policies of a genuinely private club are not of federal constitutional concern. This is so notwithstanding the fact that it may receive state-furnished services such as electricity, water, police and fire protection, or the fact that it may be subject to some state regulation and licensing, such as a permit to serve alcoholic beverages.[97] It is equally clear, on the other hand, that it is possible for the state to be so "significantly" involved in private conduct that it becomes in effect a

95. 396 U.S. 320 (1970).

96. 415 U.S. 605 (1974).

97. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972). The Court pointed out that a contrary holding "would utterly emasculate the distinction between private as distinguished from state conduct" to which it had adhered ever since The Civil Rights Cases, 109 U.S. 3 (1883).

partner or even a joint venturer. When the state is that involved, the otherwise "private" conduct can be reached by the Fourteenth Amendment.[98] The difficulty in any case is to determine, "by sifting facts and weighing circumstances,"[99] how much involvement by the state is enough to be "significant."

This was the problem which faced the Fifth Circuit in *Golden v. Biscayne Bay Yacht Club*.[100] The yacht club, which predated the City of Miami, commenced leasing bay bottom land under its dock facilities from the city at one dollar per year after Miami asserted title to the bottom land in 1962.[101] It was this "involvement" of government which the plaintiffs thought was sufficient to bring the club's racially and religiously discriminatory membership policies into conflict with the Fourteenth Amendment. The district court concluded that while the Biscayne Bay Yacht Club was a genuinely private club, performing no public function and receiving no public funds, the dollar-a-year lease of the bay bottom land from the city was sufficient official involvement with the club's discriminatory membership policies to cause the policies to run afoul of Fourteenth Amendment and "civil rights" shoals. This was affirmed by a panel of the Fifth Circuit, Judge Coleman dissenting.[102] Upon rehearing en banc, the Fifth Circuit, with five dissents, reversed. It held that this very limited official involvement

> [a]s a matter of law and race . . . fall[s] short of establishing that the City of Miami has so far insinuated itself into a position of interdependence with the club that it must be recognized as a joint participant in the internal membership policies of the club. The City of Miami has not significantly involved itself in those membership policies. The lease does not provide a sufficiently close nexus between the city and the club so that the action of the club may be fairly treated as that of the city.[103]

The Supreme Court denied certiorari on October 4, 1976, with Justices Brennan and Marshall announcing that they would have granted the writ.[104]

V. TITLE VII: A CONTEMPORARY HORROR STORY

One might think that elementary fairness would require that, before one

98. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

99. 407 U.S. at 172.

100. 530 F.2d 16 (5th Cir. 1976), *cert. denied*, ___ U.S. ___, S. Ct. 186, 50 L. Ed. 2d 152 (1976).

101. Miami's claim of title to the bay bottom was not litigated, the matter being instead resolved by the lease.

102. Golden v. Biscayne Bay Yacht Club, 521 F.2d 344 (5th Cir. 1975).

103. 530 F.2d at 22.

104. Golden v. Biscayne Bay Yacht Club, ___ U.S. ___, 97 S. Ct. 186, 50 L. Ed. 2d 152 (1976).

can be punished — indeed punished quite severely[105] — for having discriminated upon such impermissible grounds as race, religion, sex and the like in his employment of others, it ought to be shown that he *knowingly* and *purposefully* discriminated on one of those grounds. Certainly this is the *constitutional* standard. In *Washington v. Davis,*[106] the Supreme Court flatly rejected the notion that employment standards or tests which were on their face non-discriminatory and not shown to have been used for purposes of discrimination, could nonetheless be constitutionally objectionable simply because their application was shown to have had a greater "impact" upon one racial or ethnic group than it did on another.

The world of Title VII[107] is something else, and current decisions in the area are best not read on a full stomach or at bedtime. In *Griggs v. Duke Power Co.,*[108] the Supreme Court held that Title VII could be violated by employment practices which tended to exclude more blacks than whites even if the practices were neutral on their face and even if discriminatory intent on the part of the employer was absent. Since that case, in which the possession of a high school diploma *or* the passing of a standardized general intelligence test was the condition of employment that was successfully attacked, it has been strictly downhill from the viewpoint of attempting to maintain quality standards for personnel. The Supreme Court did give lip service in *Griggs* to the proposition that the Congress had not commanded that the less qualified be preferred over the more qualified because of minority origins and that Congress had not precluded the use of tests or similar employment standards,[109] but the Court pointed out that if an employer does utilize such tests or quality standards as a condition of employment, promotion or like opportunities, he bears the burden of proving that the requirement has a "manifest relationship to the employment in question."[110] The Court further made it quite clear that the sort of "relationship to job performance" it had in mind was not merely some loose connection, but was justification by a showing of "business necessity." As the Court put it:

> The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. *The touchstone is business necessity.* If an employment practice which operates to exclude Ne-

105. In United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 835 (5th Cir. 1975), the settlement order included payment of $30,940,000. It would be logical to assume that one way or another, these huge corporate losses are ultimately borne by the ultimate citizen-consumer of the corporation's products or services (*i.e.*, all of us) through higher prices in the market place.

106. 426 U.S. 229 (1976). See the text accompanying notes 89 and 90, *supra,* for a discussion of this case.

107. Civil Rights Act of 1964, tit. VII, 78 Stat. 253 (1964), 42 U.S.C.A. §2000e (1974).

108. 401 U.S. 424 (1971).

109. *Id.* at 436.

110. *Id.* at 432.

> groes cannot be shown to be related to job performance, the practice is prohibited.
>
> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted . . . without meaningful study of their relationship to job performance. Rather a vice president of the Company testified, *the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.*[111]

The heavy burden which faces the employer seeking to validate tests or qualify standards was subsequently enunciated by the Supreme Court in *Albemarle Paper Co. v. Moody.*[112] Following EEOC guidelines, the Court indicated that testing or the imposition of like quality standards was impermissible unless shown "by professionally acceptable methods" to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[113]

Thus, it comes as no surprise that testing for purposes of employment or promotion did not fare well in the Fifth Circuit during 1976. In *Watkins v. Scott Paper Co.,*[114] the court of appeals reversed the district court's finding that a prerequisite of a high school education was justified because new and more sophisticated equipment was coming into use. In the words of the court of appeals:

> If Scott wishes to validate any barrier to the advancement of affected class members to their rightful places, it has the burden of showing business necessity. Then, even assuming that non-high school graduates do not perform *as well as* high school graduates, the question should be whether non-high school graduates perform *adequately.* For only if the diplomaless individual is not adequate to a job may his exclusion from that job be deemed a business necessity. Next, the fact that lack of a diploma may be a "serious obstacle" to an individual learning a job . . . does not show that the diploma is a business necessity.[115]

The sort of showing which an employer must make if he is daring (or

111. *Id.* at 431 (emphasis added). One may well ponder about the status of our "free-enterprise" system when a businessman, without so much as a suggestion of any intent to discriminate for ethnic, religious, sexual or other forbidden reasons, can get himself and his company into such deep trouble with government for attempting to "improve the overall quality of the work force."

112. 422 U.S. 405 (1975).

113. *Id.* at 431, citing 29 C.F.R. §1607.4(c) (1976). The typical businessman might well say that while he doesn't understand the "fine print" of this rather wretched example of bureaucratic mumbo-jumbo, he does get the "message" which is: Don't use testing procedures or similar quality control standards.

114. 530 F.2d 1159 (5th Cir. 1976).

115. *Id.* at 1180-1181 (emphasis in original).

foolhardy) enough to persist in the use of tests or similar quality standards in the attempt to obtain a *superior* rather than merely adequate work force is also seen in the court's commentary upon what it means by the requirement that the tests or standards be justified by "business necessity." According to the court, "business necessity" means more than a showing that the test, standard or practice serves legitimate management functions; necessity connotes an "irresistible demand" and must not only foster safety and efficiency of a plant, but must be *essential* to those goals.[116] Needless to say, in light of these standards, Scott Paper Company's aptitude tests were found wanting, although the tests were remanded for further validation study rather than stricken outright.

In *Robinson v. Union Carbide Corp.*,[117] the court reviewed both hiring and promotional practices. While the company's hiring practices were approved because of evidence that its overall employee racial breakdown was approximately the same as that of the work force in the surrounding area, the company did not pass the Fifth Circuit's review of its promotion policies. Noting that the percentage of blacks in supervisory or salaried positions was considerably lower than the overall percentage of black employees, the court of appeals concluded that plaintiffs had made out a prima facie case. The burden of persuasion thus was shifted to Union Carbide, which had to show that the statistical discrepancy resulted from causes other than racial discrimination. The company's attempt to make such a showing was found inadequate by the court. In connection with the promotion of hourly wage employees, which was based upon seniority plus successful completion of comprehensive tests designed and administered by the employer, the court found that Union Carbide had failed to show that there was a correlation between test scores and actual job performance. With respect to the promotions to supervisory positions, the company did not use testing procedures that were so difficult to sustain, but instead relied upon evaluations by top management officials, who considered such things as "adaptability," "bearing," "demeanor," "maturity," "drive" and "social behavior." Instead of applauding this seemingly quite rational approach to the selection of supervisory personnel, the court of appeals was agitated by the fact that it was a "subjective" evaluation. "Such high-level subjectivity subjects the ultimate promotion decision to the intolerable occurrence of conscious or unconscious prejudice," the court said.[118]

116. *Id.* at 1168.

117. 538 F.2d 652 (5th Cir. 1976).

118. *Id.* at 662. One might well ask whether what really is "intolerable" about the situation is the court's telling top management not to make precisely the sort of "subjective" opinions which top management is required to make if it is performing its customary and proper function of evaluating persons for supervisory and managerial advancement. The thought crosses one's mind about how much fun it would be to cross-examine the judges about the criteria they use in selecting their law clerks.

When the Supreme Court rejected the use of Title VII standards to determine whether employment tests are *constitutionally* objectionable when shown to have an impact greater upon one race than another, and instead approved the use of reasonable tests whatever their "impact" as long as no racially discriminatory purpose is shown, Justice Brennan, dissenting, expressed the following concern: "Today's result will prove particularly unfortunate if it is extended to govern Title VII cases."[119] One can only hope that Justice Brennan's expressed fear will one day come to fruition.

VI. BANKRUPTCY IS A "CIVIL RIGHT"

After a discussion of Title VII and the severe obstacles it presents to the businessman who desires to have something more than an "adequate" work force, it is fitting to point out that some consolation does exist for the businessman who finds his back to the wall as a result of too many merely "adequate" employees. The case of *McLellan v. Mississippi Power & Light Co.*[120] advises him that "bankruptcy" is a "civil right."

This case was brought by an employee against both his employer and his union. The employee contended that the defendants had conspired to deprive him of his civil right to avail himself of the federal bankruptcy laws. He had been discharged by his employer, a public utility, on the ground that he had violated company policy by filing a voluntary petition in bankruptcy. The court of appeals concluded that while his complaint did not state a cause of action under 42 U.S.C.A. §1983 because there was no "state action," it did under the conspiracy provisions of 42 U.S.C.A. §1985(3).

VII. THE FIRST AMENDMENT AND PUBLIC EMPLOYEES

The fact that one has a "constitutional" right to say something doesn't mean that he cannot be evaluated or judged upon the content of his speech.[121] To put it another way, the fact that a public employee may have a constitutional right to make irresponsible or foolish statements doesn't necessarily mean that his administrative superiors are constitutionally prohibited from evaluating that employee as irresponsible or foolish, even to the point of dismissing him from his employment, if these defects go to his competency to carry out his responsibilities in a satisfactory manner.

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119. Washington v. Davis, 426 U.S. 229, 270 (1976) (dissenting opinion of Justice Brennan).

120. 526 F.2d 870 (5th Cir. 1976).

121. This point was made — concededly on the basis of a paucity of decisions on the matter — in a detailed discussion of the relationship between the First Amendment and public employees in a 1974 survey article. *See* Evans, *Constitutional Law, 1974 Fifth Circuit Survey*, 26 MER. L. REV. 1153 (1975).

The Fifth Circuit appears to have recognized this principle in *Megill v. Board of Regents.*[122] Five of the six reasons relied upon by the Board of Regents for terminating a university professor's employment related to some form of "speech."[123] The Fifth Circuit concluded, however, that the plaintiff had not had any of his First Amendment rights violated. As to speech which was clearly public — a "press conference" — and hence on its face presumably "protected" despite the court's contrary dicta,[124] the Fifth Circuit said: "The Board found such remarks evidenced Megill's tendency to make untrue and misleading public statements. It was this and not the fact that Dr. Megill made public statements that guided the Board."[125] The Court went on to make the following observations concerning other "speech" on the part of Dr. Megill which led to his dismissal:

> This conduct can appropriately be used by the Board to evaluate the competency of a teacher without violating any First Amendment right.
>
> . . . .
>
> Out of necessity, an academic board, in deciding whether or not to grant tenure, must consider an instructor's communications both in the classroom and outside.[126]

In a more typical "balancing" case, *Abbott v. Thetford,*[127] the Fifth Circuit held that the chief probation officer's "right to file a lawsuit" — a lawsuit which he had brought on behalf of three dependent and neglected black children to integrate public all-white child care institutions — was protected by the First Amendment and, in the circumstances, outweighed a juvenile court judge's oral directive to members of his staff (including all probation personnel) not to file lawsuits without his knowledge and approval. As is so often the case in First-Amendment "balancing," the result is apt to depend upon who assigns the "weights" to the factors tossed upon the scales. A vigorous dissenting opinion thought that the interests of a state court judge in controlling his own court and its staff should have outweighed the staff member's disobedience.[128]

The big news in the area of the First Amendment and public employees, however, occurred at a higher level. In *Mt. Healthy City School District*

122. 541 F.2d 1073 (5th Cir. 1976).

123. *Id.* at 1081.

124. While the court at several points seems to take the view that "none of the speech-related activity of Dr. Megill was constitutionally protected," *Id.* at 1082, this is faulty analysis, as is indeed shown by the fact that elsewhere in the same opinion the Fifth Circuit is critical of the district court's failure to engage in the typical First-Amendment "balancing process" respecting the competing interests of the public employee and his employer. *Id.* at 1081. Obviously if the speech in question is not "protected," there is no need for any "balancing."

125. *Id.* at 1083.

126. Id. at 1084, 1085.

127. 529 F.2d 695 (5th Cir. 1976).

128. *Id.* at 702-709 (dissenting opinion of Judge Gewin.)

Board of Education v. Doyle,[129] the Supreme Court rejected the view that if a public employee is fired partially because of constitutionally protected activities, the dismissal is totally defective and the employee is entitled to reinstatement.[130] The district had concluded that a non-permissible reason, the exercise of "free speech" rights, had played "*a substantial part*" in the decision not to renew the teacher's contract, and hence "even in the face of other permissible grounds — the decision may not stand."[131] The district court thereupon ordered the teacher's reinstatement with back pay, and the Sixth Circuit affirmed.[132]

Vacating the district court's judgment and remanding for further proceedings, the Supreme Court explained:

> We are thus brought to the issue whether, even if the board would have reached the same decision regarding plaintiff's employment on other grounds], the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.
>
> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.
>
> . . . The constitutional principle at stake is vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.[133]

The "principle at stake," of course, is that equitable relief is remedial, not punitive, and ought not to go beyond placing the plaintiff in the same position he would have occupied if it had not been for the defendant's wrongful conduct.

VIII. Conflict Between "Religious Belief" and "Agency Shop"

With the general proliferation of all manner of federally enforceable legal rights for everyone, it is not surprising that such rights will sometimes come into conflict. In *Cooper v. General Dynamics,*[134] the plaintiffs, Seventh Day Adventists, had objected to the provisions of a collective-bargaining agreement between the company and the union, which pro-

129. ___ U.S.___, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

130. This view seems to have prevailed in the Fifth Circuit as well as elsewhere. *See* Megill v. Board of Regents, 541 F.2d 1073, 1081 (5th Cir. 1976); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 210 (5th Cir. 1971).

131. ___ U.S. ___, 97 S. Ct. at 574, 50 L. Ed. 2d at 482.

132. Doyle v. Mt. Healthy City School Dist. Bd. of Educ., 529 F.2d 524 (6th Cir. 1975).

133. 97 S. Ct. at 575, 50 L. Ed. 2d at 482-483.

134. 533 F.2d 163 (5th Cir. 1976).

vided for an "agency shop." It was their position that either joining or financially supporting a labor union was sinful, because the "neighbor" whom one is commanded to love includes one's employer, and that by supporting the union they would be placing their souls in jeopardy. The legal foundation of the plaintiff's case was Title VII's prohibition against depriving persons of employment opportunities because of their religion,[135] coupled with EEOC guidelines calling upon employers to accommodate employee's religious needs if this could be done without undue hardship to the business operation.[136] The defense, not surprisingly, was the National Labor Relations Act's recognition of the propriety of "agency shop" provisions to further legitimate labor-union interests (in the absence of contrary state "right to work" laws).[137] The temporary solution of the Fifth Circuit was to reverse the district court's decision in favor of the defendants — a decision which had apparently been based in part upon the district court's rejection of the plaintiff's religious belief, however sincerely held, as being irrational and specious[138] — with direction to the lower court to conduct further proceedings to ascertain whether the plaintiffs' religious beliefs could reasonably be accommodated by the employer and the union without undue hardship to the conduct of the employer's business or to the union.

IX. Section 1983 Liability of a Supervisor

While the doctrine of respondeat superior ordinarily has no application to civil-rights actions,[139] a supervisor may be within the reach of 42 U.S.C.A. §1983 even though his "personal participation" is not shown. In *Sims v. Adams*,[140] the Fifth Circuit held that while §1983 does require a degree of causation as an element of individual liability, the plaintiff had stated a claim when he alleged that the supervisory defendants — the Mayor, the Chief of Police, and police committee members of the Board of Aldermen of Atlanta — knew or should have known of a particular police officer's prior violent misconduct against black citizens. Complaints against the officer were pending, and the defendants had failed to discipline him. The court's rationale was that a supervisor's breach of duty imposed by state or local law through improper performance of training and supervisory duties could cause a plaintiff's constitutional injury and subject the supervisor to §1983 liability even in the absence of "personal participation."

135. 42 U.S.C.A. §2000e-2 (1974).
136. 29 C.F.R. §1605.1(c) (1976).
137. 29 U.S.C.A. §158 (1970).
138. 1533 F.2d at 166 n.4.
139. *E.g.*, Lathon v. Parish of Jefferson, 358 F. Supp. 558, 559 (E.D. La. 1973).
140. 537 F.2d 829 (5th Cir. 1976).

X. THE ELEVENTH AMENDMENT VS. THE FOURTEENTH AMENDMENT

In *Fitzpatrick v. Bitzer,*[141] the U.S. Supreme Court held that the Eleventh Amendment and the principle of sovereign immunity it embodies are subject to the limitation of the enforcement provisions of §5 of the Fourteenth Amendment, which gives Congress the authority to enforce the Amendment "by appropriate Legislation." Encouraged, no doubt, by that decision, the plaintiffs in *Jagnandan v. Giles,*[142] sought reimbursement of tuition fees which the district court found they had unconstitutionally been required to pay.[143] The plaintiffs contended that the Eleventh Amendment, adopted in 1798, must give way to the Fourteenth, adopted 70 years later, and to its protection of the individual's right not to have his due-process and equal-protection rights trespassed upon by the states. Noting that no congressional "enforcing legislation" of the *Fitzpatrick v. Bitzer* sort was present in the case before it, the court of appeals rejected the plaintiffs' argument.[144] The court held in effect that until the Supreme Court holds that the Eleventh Amendment was modified by the Fourteenth to fully effectuate the sweeping mandate of the latter, it was bound by what the Supreme Court had said in *Edelman v. Jordan,*[145] and the latter amendment did not constitute a pro tanto repeal of the former.

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141. ___ U.S. ___, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976).

142. 538 F.2d 1666 (5th Cir. 1976).

143. The plaintiffs were alien students who, while bona fide residents of Mississippi, were nonetheless classified as non-residents for tuition and fee purposes. The district court concluded that the state statute mandating this result was violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

144. 538 F.2d at 1182.

145. 415 U.S. 651 (1974).