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Constitutional Law: Fourteenth Amendment: Due Process: Availability of Federal Remedies: Reputation as a Protected Interest. (Paul v. Davis)

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problems which face the courts in deciding cases under section 1983. The statute for all practical purposes is overly broad. In response to this, the courts have given the section such restrictive interpretation as to render it ineffective. Only through a redrafting of section 1983 or through additional definitive legislation can an equitable balance be struck between the conflicting policies of just compensation for those genuinely deprived of protected rights and freedom from undue burdens on efficient performance by public officials.

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Constitutional Law—Fourteenth Amendment Due Process—Availability of Federal Remedies—Reputation as a Protected Interest—In *Paul v. Davis*,[1] the United States Supreme Court considered whether a person's reputation was a liberty interest protected by the fourteenth amendment.[2] In holding that the scope of 42 U.S.C. section 1983[3] does not extend to defamation by a municipal police department, the Court has significantly changed its approach to civil liberties questions and has restricted the availability of federal forums for the litigation of those questions. *Paul v. Davis* contradicts many well established principles of civil liberties law. Numerous weaknesses appear in the Court's discussion of (1) the relationship of state tort remedies to federal remedies, (2) the nature of the interest in reputation, and (3) the source of the rights protected by the fourteenth amendment. This article will examine the Court's rationale and its implications.

Paul v. Davis arose when the police chiefs of the City of Louisville, Kentucky, and surrounding Jefferson County distributed a flyer to local merchants containing the names and

1. 96 S. Ct. 1155 (1976).

2. The Court also considered Mr. Davis's right of privacy, a question that will not be dealt with here.

3. Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

photographs of those whom the police department considered "active shoplifters" to enable the merchants to detect the presence of such persons in their stores. Edward Davis's picture was included in the flyer because in the summer of 1971 he had been arrested for shoplifting. Although at the time of the distribution of the circular the action against him was still pending, it was soon to be dismissed.

After the dismissal, Davis commenced an action under 42 U.S.C. section 1983, alleging that the distribution of the circulars by the police chiefs violated the due process clause of the fourteenth amendment. Davis alleged that the circular injured his liberty or property interest in his good name and that the injury was inflicted under color of state law without notice and an opportunity to be heard. The district court dismissed the complaint on the grounds that no right protected by the United States Constitution was asserted. On appeal the United States Court of Appeals for the Sixth Circuit reversed,[4] holding that the Supreme Court's previous decision in *Wisconsin v. Constantineau*[5] made a person's reputation a constitutionally protected interest, the violation of which would result in a section 1983 action. The United States Supreme Court disagreed and reaffirmed the district court.

In the majority opinion, written by Justice Rehnquist, the Court held that the scope of section 1983 must be viewed in light of state tort law. The Court stated that the availability of a state remedy is a significant consideration in determining whether the plaintiff should be afforded an opportunity to litigate his claim in federal court. But, as the dissent pointed out,[6] the availability of a state remedy had previously been considered irrelevant in determining whether a claim might be brought under section 1983. This was the long standing mandate of *Monroe v. Pape*.[7] That decision recognized that the enactors of section 1983 intended that the statute provide a remedy for the deprivation of federal constitutional rights supplemental to any remedy available to a litigant in a state court.[8] By considering the availability of a state remedy, *Paul*

4. 505 F.2d 1180 (6th Cir. 1974).

5. 400 U.S. 433 (1971).

6. Brennan, J., in which Marshall, J., joined, and in which White, J., joined in part.

7. 365 U.S. 167 (1961).

8. *Id.* at 183. *See also, e.g.*, McNeese v. Board of Education, 373 U.S. 668, 671-72 (1963).

implicitly subverts the holding of *Monroe*.

The Court in *Paul* assumed that the federal remedy will supplement an adequate state remedy without considering whether one of the three long-recognized aims of that statute are present. As set out in *Monroe*, those three aims include:[9] (1) providing a remedy when state law infringes upon a person's constitutional rights, (2) providing a remedy when state law is inadequate to protect constitutional rights, and (3) providing a remedy when there exists a state remedy in theory, unavailable in practice. Instead of focusing on whether Davis should be afforded a federal forum because of the inadequacy of the state remedy, the *Paul* Court merely mentioned that imputing criminal behavior is actionable per se and then dropped the matter. But an investigation of Davis's underlying claim reveals that the Court's assumption that Davis's state remedy was adequate is unreasonable. Davis actually had little chance of success in a state court.

The imputation of criminal behavior is slander per se in Kentucky.[10] An allegation of slander per se has the effect of dispensing with the need for the plaintiff to show that the defendant acted with malice and that actual pecuniary damage resulted.[11] If, however, a prima facie defense of privilege is established, the presumption disappears, and malice must be proven if the defense is to be overcome.[12]

In Kentucky, a peace officer is privileged to make defamatory statements without malice and within the scope of his official duties.[13] If the act of distribution of the flyers is within those duties, malice must be proven before the plaintiff can recover. Given the fact that the list of shoplifters was compiled without any wrongful intent to include Davis, malice simply did not exist. In addition, there are other privileges that arguably could be asserted by the police chiefs. Communications made in the interest of the public with a reasonable belief in their truth and made without malice are conditionally privi-

9. 365 U.S. at 173-74.

10. Templin v. Cornelius, 232 Ky. 94, 22 S.W.2d 421 (1929).

11. Massengale v. Lester, 403 S.W.2d 701, 702 (Ky. 1966); Tucker v. Kilgore, 388 S.W.2d 112, 114 (Ky. 1964).

12. Tucker v. Kilgore, 388 S.W.2d at 114; *see generally* Annot., 51 A.L.R.2d 552 (1957).

13. *See* Catron v. Jasper, 303 Ky. 598, 198 S.W.2d 322 (1946).

leged.[14] Similarly, a conditional privilege exists for defamatory communications made in good faith by one having an interest or a duty to another person who has a corresponding interest or duty.[15] Davis had no effective remedy in state court. He simply could not allege a claim that could overcome the privileges assertable by the Kentucky police.

By stating that this is a typical defamation action except that the act was that of a state officer,[16] the majority implied that the consequences are the same whether the actor is a state officer or a private individual. In the Court's opinion, the mere fact of the actor's status as a state official does not create the opportunity to litigate in a federal forum. But such a statement loses sight of the nature of section 1983. A person has a right to a federal forum if he shows that he is deprived of a constitutionally protected interest and that the deprivation occurred under color of state law without due process of law. The "under color of state law" provision imposes a requirement that the act could not have been done except for the cloak of state authority of the actor.[17] The state action requirement is a distinct requirement for section 1983 actions. The Court's statement cannot be interpreted to mean that an actor's official status creates no right to litigate in a federal forum, for this ignores the plain language of the statute. Thus, only if the act has occurred as a result of that "official" status is a claim cognizable under section 1983. By acting "under color of state law," the police chiefs invoked the protections of those offices. The Court may have meant merely that Davis's constitutional rights are not to be enlarged by the status of the actor; but the status of the actor should not limit the constitutional protection afforded the victim. This writer agrees with Justice Brennan's anguished response in dissent that the majority has imposed on the first requirement for a section 1983 action, *i.e.*, the deprivation of a substantive constitutional right, elements of the second requirement, *i.e.*, that the deprivation occur "under color of state law."[18]

14. Weinstein v. Rhorer, 240 Ky. 679, 42 S.W.2d 892, 894-95 (1931); Annot., 29 A.L.R.3rd 961, 977-78 (1970).

15. *See* Wolff v. Benovitz, 301 Ky. 661, 192 S.W.2d 730, 733 (1945). For another possible privilege *see* KY. REV. STAT. § 411.060 (1974).

16. *See, e.g.*, Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970).

17. *See, e.g.*, United States v. Classic, 313 U.S. 299, 326 (1941).

18. 96 S. Ct. at 1158 n. 2. Justice Brennan discussed and rejected three possible menaings of this argument. At one point he remarked:

The majority stated that no great harm is done to persons in situations similar to Davis's by denying them access to the federal courts. Closer inspection reveals that that assertion lacks substance. Acts of state officers *are* treated differently than those of private individuals and that difference may be such as to deprive a person of an adequate remedy. The very purpose of section 1983 was to provide a forum for precisely these claims.[19] Yet this purpose escapes the Court in its preoccupation with the problem of the over-burdened federal courts. Its reasoning ignores the fact that arbitrary and capricious acts of state officers are very often protected by common law doctrines followed in many states.

The Court also addressed the limitations on the federal remedy. It concluded that the procedural guarantees of the due process clause were not meant to be a source of general federal tort law. But this distinction between section 1983 actions and tort actions further conflicts with *Monroe*. There the Court stated that the actor need not intend to deprive the victim of a federal right.[20] His act may be tortious at common law, or only analogous to a tort, but in perpetrating it he must deprive his victim of a constitutionally protected right. Section 1983 is to "be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[21] Thus, a person's liability under section 1983 for deprivation of a constitutionally protected liberty interest in reputation under color of state law may be analogous to the tort liability for libel, but the limitations on the federal liability are not to be determined by tort theory. What is a cognizable section 1983 claim is limited only by the "Constitution and laws."[22] Tort concepts are not to be used to limit section 1983.

> In short, it is difficult to believe that the Court seriously suggests . . . that there is some anomaly in the distinction, for constitutional purposes, between tortious conduct committed by a private citizen and the same conduct committed by state officials under color of state law.

Id. at 1168.

19. *See* note 8 *supra*.

20. 365 U.S. at 187.

21. *Id.*

22. Bristow, *Section 1983: An Analysis and Suggested Approach*, 29 ARK. L. REV. 255 (1975); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974). For various applications of these concepts *see generally*, Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967); Tenny v. Brandhove, 341 U.S. 367 (1959); Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971); Madison v. Manter, 441 F.2d 537 (1st Cir. 1971); *see also* Comment, *Edelman and Scheuer: The Relation-*

By holding that tort concepts are not to enlarge the scope of section 1983, the Court merely inverted the reasoning without changing the effect.

The majority stated that the Supreme Court has never recognized injury to one's reputation, of itself, as a protected interest. But reputation has heretofore only been discussed in conjunction with the liberty interest one has in remaining free from certain stigmas that foreclose future employment opportunities or with a property right. The Court cited a number of cases that have dealt with stigmatization as illustrations that the Court has consistently refused to recognize an independent liberty interest in one's good name. But that rule was actually the holding of the Court in only one of four opinions cited.[23]

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ship Between the Eleventh Amendment and Executive Immunity, 58 MARQ. L. REV. 741 (1975).

23. United States v. Lovett, 328 U.S. 303 (1946), decided the issue of whether Congress could deny government employment to three persons without affording them notice and a hearing as required by the due process clause. The Court held that future government employment is a protected liberty interest. However, the Court did not consider whether reputation, of itself, is constitutionally protected. The Court's passing reference to the effect of the congressional act on the plaintiff's good name is not support for holding that reputation by itself is not a protected interest. *Id.* at 314.

Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951) involved an administrative determination that certain organizations were "subversive." The case contains six opinions expressing the views of eight sitting justices. *Paul* states that in that case six justices held that reputation alone is not a protected interest. However, the *Paul* majority misunderstood two of the opinions. Justice Douglas's concurring opinion stated that the determinative issue was the loss of status and the consequential damage to a property interest in receiving contributions resulting from the imputation of subversion by the state. *Id.* at 175. This holding cannot be interpreted to exclude reputation as a liberty interest. Similarly, the opinion of Justice Jackson (concurring), which stated that an organization has no assertable interest in its reputation alone, does not preclude his view that an individual has such a constitutionally protected right. *Id.* at 186. Actually, the *McGrath* Court addressed this very issue in a decision handed down the same day as *McGrath*. An equally divided Court refused to hear an individual's petition alleging that the labeling of the organization of which she was a member as "subversive" resulted in an injury to her reputation. Bailey v. Richardson, 341 U.S. 918 (1951) (per curiam).

The *Paul* Court also relied on Wieman v. Updegraff, 344 U.S. 183 (1952), as precedent for holding that reputation is an unprotected interest. But the Court ignored the fact that the vague language of *Wieman* can be just as easily interpreted to support the view that reputation is constitutionally protected. For example, compare the use of *Wieman* by both the majority and the dissent in Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961), also cited in *Paul*. There the majority cited *Wieman* to support the view that reputation alone is not a protected interest (367 U.S. at 898), while the dissent cited *Wieman* to support their view that it was (367 U.S. at 902).

Thus the *Paul* Court's statement that precedent existing at the time of Wisconsin v. Constantineau demanded that the plaintiff must allege injury to another liberty or a property interest, in addition to injury to reputation, is clearly misleading. Only the very divided *McElroy* Court had so held.

In fact, the decision of *Wisconsin v. Constantineau*[24] had previously been considered precedent for the view that reputation was a protected interest.[25] That case dealt with a Wisconsin state "posting" law which allowed state officials to prohibit liquor retailers from selling their stock to persons known to be excessive drinkers. Violations of these laws resulted in fines. To carry out the aims of the statute, the names and pictures of abusers of alcohol, as determined by police officials, were posted in the local stores and remained there for one year. The plaintiff was one of the persons whose name and picture was posted. The Court ruled that this procedure, which did not provide an opportunity for the person whose name was posted to challenge the classification, was a deprivation of a constitutionally protected interest.

The *Paul* majority held that the real interest the *Constantineau* Court sought to protect was the property interest of the plaintiff to purchase alcohol. In *Paul* the Court conceded that Ms. Constantineau's reputation was injured, but interpreted the *Constantineau* decision to afford no constitutional protection to that interest. However, in *Constantineau* the Court stated:

> The only issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.[26]

The *Paul* majority based its distinction on the following passage: "While [*sic*] a person's good name, reputation, honor or integrity is at stake *because of what the government is doing to him*, notice and an opportunity to be heard are essential" (emphasis in the original).[27] The majority maintained that the *Constantineau* Court referred merely to the governmental deprivation of the right to purchase alcohol. The rest of the paragraph from which this quotation was taken leaves no doubt

24. 400 U.S. 433 (1971).

25. *See* Lipp v. Board of Education, 470 F.2d 802, 805 (7th Cir. 1972); Dale v. Hahn, 440 F.2d 633, 636 (2nd Cir. 1971).

26. 400 U.S. at 436.

27. 96 S. Ct. at 1164, *citing* 400 U.S. at 437.

that the *Constantineau* Court was not discussing merely the right to purchase liquor:

> "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.[28]

Nothing is said, either expressly or by implication, of a property right to purchase liquor. Rather, the passage makes it clear that the Court considered reputation of itself a protected interest.

As a result of the *Paul* holding, an injury to one's reputation must be tied to either a liberty interest in being free from the foreclosure of employment opportunities by stigmatization or a property interest before it is cognizable under section 1983. The Court stated that the *Board of Regents v. Roth*[29] decision is in accord. In contrast, the circuit court of appeals held that *Roth* commanded the opposite result.[30]

In *Roth*, the plaintiff, a nontenured teacher at a Wisconsin state university challenged the state's refusal to rehire him. Roth alleged that his fourteenth amendment rights had been violated when the university at which he taught did not afford him a hearing after refusing to renew his one-year contract. The *Roth* Court first addressed the teacher's interest in his reputation. Roth claimed that a state officer had made charges against him that were defamatory. The Court concluded that the act of terminating the teacher's employment at the expiration of his contract was not in itself defamatory. But if some charge had been made against his competency or integrity, the Court felt that Roth should be afforded the protections of due process.[31] The Court here referred precisely to the interest a person has in his good name. Moreover, this position follows naturally from the Court's view that the term "liberty" in the

28. 400 U.S. at 437.
29. 408 U.S. 564 (1972).
30. 505 F.2d at 1182-83.
31. 408 U.S. at 574; *see* Greenhill v. Pauley, 519 F.2d 5, 8 (8th Cir. 1975).

fourteenth amendment must be given a broad definition.[32]

The *Roth* Court focused on a second liberty concept, holding that every state employee has an interest in his future employment opportunities which is injured if the acts of a government official have an adverse effect on his chances of obtaining employment in the future. An employee must be afforded procedural safeguards before employment opportunities are significantly reduced by action under color of state law.[33]

Roth also discussed those property interests which require due process. These interests, if not incorporated into the Bill of Rights, are created by independent sources such as state law. Where the property interest has so definite a character that the claimant has an absolute entitlement to it, due process concepts apply.[34] The Court held that because Roth was not a tenured professor, he did not possess such a property interest. Indeed, the Court previously held that a tenured professor does possess such a property interest in maintaining his future employment with the state.[35] Thus the Court in *Roth* did not imply that the interests that are constitutionally protected liberty or property interests must be confined to similar factual contexts. Rather, the Court emphasized the broad nature of liberty and property rights and rejected pro forma distinctions.[36] Courts must not look to the weight of the right sought to be protected, but to the nature of that right and to what is at stake if that right is not afforded protection.[37]

But in *Paul*, the Court excluded reputation as a constitutionally protected liberty interest because it did not have the weight of the liberty interests recognized in *Constantineau* and *Goss v. Lopez*.[38] Reputation is not a tangible right in the nature of one's right to purchase alcohol or a student's right to contest temporary school suspension. But the Court cannot equate purely tangible interests with those which require constitutional protection; to so equate them would be to deny constitu-

32. 408 U.S. at 572; *cf.*, Lipp v. Board of Education, 470 F.2d at 805.

33. 408 U.S. at 574-75; *see* Tyler v. Vickery, 517 F.2d 1089, 1105 (5th Cir. 1975); *compare* Birnbaum v. Trussell, 371 F.2d 672, 677 (2nd Cir. 1966), *with* Newcomber v. Coleman, 323 F. Supp. 1363 (D. Conn. 1970).

34. 408 U.S. at 577; *see* McNeil v. Butz, 480 F.2d 314, 319 (4th Cir. 1973); Lipp v. Board of Education, 470 F.2d at 805.

35. Slochower v. Board of Education, 350 U.S. 551 (1956).

36. 408 U.S. at 572.

37. *Id.* at 571; *see, e.g.*, Goss v. Lopez, 419 U.S. 565, 576 (1975).

38. 419 U.S. 565 (1975).

tional protection to most liberty interests. In 1923 in *Meyer v. Nebraska*, the Court delineated the concept of liberty:[39]

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Reputation is an intangible interest similar to those catalogued by the Court in *Meyer* which relates to standing and assocation in the community; it is the way one is perceived by others which greatly affects the course of one's life. One who has been labeled a criminal by his peers is not to be placed in a position of trust or confidence. To cast doubt on a person's integrity or good character is to limit the ways in which others will react to him and how he in turn can react to them. Further, defamation of a person, regardless of whether or not he is a civil employee, affects employment opportunities.[40] As a result of the distribution of the circular, Davis's assignments as a photographer were limited. Had he sought other employment, he would have been hampered by the stigmatization. If liberty is to be given a broad definition, the consequences of the acts of the police chiefs must be viewed as infringing on a privilege essential to the orderly pursuit of happiness.

The *Paul* majority briefly touched on the notion of property interests by stating that since reputation is not guaranteed by the Bill of Rights, the only other source from which Paul might derive that interest is state law.[41] *Roth*, however, held that property interests are derived from sources other than state law. The interest may be protected, for example, by federal law.[42]

A major point of the dissent is the majority's disregard for the presumption of innocence inherent in our judicial system. The police chiefs labelled Paul a "criminal" without allowing him an opportunity to contest that determination. This act was

39. 262 U.S. 390, 399 (1923).

40. *See* the Sixth Circuit Court of Appeals discussion, 505 F.2d at 1183.

41. *See* note 34 *supra*.

42. 96 S. Ct. at 1169 n. 10 (Brennan, J., dissenting).

all the more injurious because it was done with the prestige, authority, and power of a government position. Thus, the defamation suffered by Paul was much more devastating than the same defamation inflicted by a private individual.

Justice Brennan in his dissent compared the majority view with *Jenkins v. McKeithen*.[43] In that case a state agency determined whether a person was guilty of violating certain criminal laws. The Court held that the acts of the agency so nearly branded the claimant a criminal in the public eye that he should have been afforded substantial procedural safeguards before such a determination was made.[44] In *Jenkins* the Court implicitly recognized reputation as a protected interest by focusing on the sufficiency of process afforded. In *Paul*, where the police officials engaged in essentially the same conduct, the Court determined that the interest is not protected.[45]

The *Paul* majority was obviously concerned with creating limitations on access to federal courts. The majority twice refers to the innumerable claims that would result if Davis is granted a forum. A major motive for the Court's holding was the underlying fear of an additional burden on the federal courts. But the same fear of burdening the courts was also raised after the Court's decision in *Monroe v. Pape*.[46] In view of the minimal additional burden on the courts that in fact resulted from *Monroe's* expansive holding,[47] it is highly unlikely that *Paul* could have imposed any significant burden on the courts.

The inadequacies of the *Paul* decision are both methodological and substantive. The Court's analysis of the legal issues is nothing more than an accumulation of tendentious distinctions between cases such as *Constantineau, Roth*, and *Joint Anti-Fascist Committee v. McGrath*,[48] that more appropriately support the proposition that reputation deserves constitutional protection. *Paul* contradicts the rules of many of those cases and cites no affirmative precedent for its result. The court did

43. 395 U.S. 411 (1969).

44. *Id.* at 424-25.

45. 96 S. Ct. at 1166.

46. Justice Brennan thought the majority confused the sufficiency of the form of due process allotted with whether the interest should be afforded due process. 96 S. Ct. at 1173-74.

47. *See* 83 HARV. L. REW. 1352 (1970).

48. *Id.*

not determine what makes reputation different from other liberty interests, nor did it state how its violation of the presumption of innocence differs from other such violations which have been declared unconstitutional. Moreover, the obvious importance of one's good reputation is simply ignored.[49]

The substantive inadequacy of *Paul* is the harm it does to the concept of section 1983. Section 1983 was enacted to be the procedural mechanism for litigating questions arising out of the fourteenth amendment, and its purpose is to protect a person's rights, privileges, and immunities without the restrictions of other state remedies. The Court has emasculated section 1983 by imposing upon it the limitations of tort law and the necessity of a particular relation to state remedies. Persons with legitimate claims such as Davis's are now left without a remedy or an impartial forum.

GEORGE S. BARANKO

Constitutional Law—Due Process—Non-retrogressive Reapportionment Plan Upheld—In the recent decision of *Beer v. United States*[1] the plaintiffs, six city council members,[2] on behalf of the City of New Orleans, sought a judgment from the District Court for the District of Columbia declaring that neither the intent nor the effect of a proposed plan for the apportionment of the councilmanic districts, which had been challenged twice by the Attorney General of the United States,[3] would abridge the right to vote on account of color or race.[4] A

49. *See* W. SHAKESPEARE, OTHELLO, Act III, Scene 3, Lines 155-60. Who steals my purse steals trash. . . . But he that filches from me my good name [r]obs me of that which not enriches him, [a]nd makes me poor indeed.

1. 425 U.S. 130 (1976). Justice Stewart delivered the opinion of the Court in which Chief Justice Burger and Justices Blackmun, Powell and Rehnquist joined; Justice White filed a dissenting opinion; Justice Marshall filed a dissenting opinion, in which Justice Brennan joined. Justice Stevens took no part in the decision.

2. The action was brought by six of the seven incumbent councilmen.

3. The guidelines established by the Attorney General for the preclearance procedure of § 5 of the Voting Rights Act of 1965 are contained in 28 C.F.R. § 51.1 *et seq.* In order to prevent new forms of racial discrimination these guidelines require the submission and subsequent approval by the Attorney General of all changes in a jurisdiction's voting laws.

4. The action for declaratory judgment was brought under § 5 of the Voting Rights