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Ninth Circuit Review—Developments in Constitutional Law in the Ninth Circuit, 1978: A Survey

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DEVELOPMENTS IN CONSTITUTIONAL LAW IN THE NINTH CIRCUIT, 1978: A SURVEY

CONTENTS

I. PROCEDURAL MATTERS

A. Justiciability

The concept of justiciability involves the appropriateness of judicial action[1] and provides justification for refusals to exercise jurisdiction. Various aspects of nonjusticiability have developed into identifiable categories; these include advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions and administrative questions.[2] The Ninth Circuit dealt with two of these categories, mootness and standing, during the survey period.

1. Mootness

It is the duty of a federal court "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."[3] "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[4]

The existence of a claim for more than minimal damages is generally sufficient to prevent a finding of mootness.[5] Thus, a damage claim may protect a suit for injunctive relief against a finding of mootness and prompt the court to consider the merits of plaintiff's entire complaint.[6]

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1. The power of the federal courts derives from U.S. CONST. art. III, which states in pertinent part: "The judicial Power shall extend to all Cases . . . [and] to Controversies . . . ."

2. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3529, at 146 (1975)[hereinafter cited as WRIGHT].

3. Mills v. Green, 159 U.S. 651, 653 (1895).

4. Powell v. McCormack, 395 U.S. 486, 496 (1969). *See generally* Kates, *Mootness in Judicial Proceedings: Toward a More Coherent Theory*, 62 CALIF. L. REV. 1385 (1974); *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672 (1970). For a discussion of various categories of mootness that have been considered by the courts, see *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974). Cases are not likely to be considered moot if they involve the possibility of future adverse effects or the possibility of recurrence of the dispute at issue. *See, e.g.*, Carafas v. LaValle, 391 U.S. 234 (1968) (although petitioner had been released before appellate review, as a result of his conviction he was unable to engage in certain businesses, to serve as a union official for a specified time, to vote, or to serve as a juror; these were considered the collateral consequences of his conviction); United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (case not moot where there is a danger of recurring violation; resignation of the individual defendant from the boards of the three corporate defendants did not moot an interlocking directorate charge since there was the possibility that the defendant might regain his positions with the same corporations). *But cf.* Golden v. Zwickler, 394 U.S. 103 (1969) (claim that prohibition against anonymous handbilling was unconstitutional was rendered moot when candidate against whom challenger intended to campaign assumed fourteen-year judicial post).

5. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969).

6. Abrams v. Hills, 547 F.2d 1062, 1067 (9th Cir. 1976) (questions as to the obligation of

In *Moore v. Johnson*,[7] veterans who were receiving care at a certain Veterans Administration facility sought injunctive relief and damages in connection with a proposal to move them to another facility.[8] The court held that the actual relocation of the veterans would not render the case moot since the complaint contained a prayer for damages.[9] Consequently, the court considered both the request for injunctive relief as well as the claim for damages.

Cases generally will not be held moot if they are "capable of repetition, yet evading review."[10] The two aspects of this doctrine, repetition and evasion, may be considered separately.[11] When the controversy has ceased to exist and there is little or no possibility that it will be repeated, it is moot.[12] On the other hand, a controversy which has

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the Secretary of Housing and Urban Development to implement an operating subsidy program to reduce rentals of tenants in a low-income housing project were not rendered moot by reduction of the rents to the same level as under other programs, since the district court had ordered retroactive payments); Bartenders & Culinary Workers Union Local 340 v. Howard Johnson Co., 535 F.2d 1160, 1162 n.3 (9th Cir. 1976) (expiration of a collective bargaining agreement did not moot a suit for enforcement since damage claims remained); Ash v. Cort, 496 F.2d 416, 419 n.2 (3d Cir. 1974), *rev'd on other grounds*, 422 U.S. 66 (1975) (controversy concerning an election not moot after election has occurred where plaintiff also sought damages for violation of state law).

7. 582 F.2d 1228 (9th Cir. 1978).

8. *Id.* at 1231.

9. *Id.* at 1232.

10. This phrase had its genesis in Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 514-15 (1911) (short-term ICC order that had expired before the case reached the Supreme Court). *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546-47 (1976) (case not moot simply because an order restraining news media from publishing or broadcasting accounts of confessions or admissions made by the accused to law enforcement officers had expired, since the controversy was capable of repetition yet, if jurisdiction was not exercised, evading review); Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (case challenging actions of parole board members in considering respondent's eligibility for parole rendered moot by respondent's parole, since it was not demonstrated that respondent would be subject to the parole system again); Roe v. Wade, 410 U.S. 113, 125 (1973) (natural termination of pregnancy did not render moot an action challenging state-imposed restrictions on abortions, since issue was capable of repetition yet evading review); Dunn v. Blumstein, 405 U.S. 330 (1972) (class action challenging durational residency requirements for voting not mooted when the named plaintiff became eligible to vote).

11. *See* Williams v. Alioto, 549 F.2d 136, 142 (9th Cir. 1977) (case seeking to enjoin San Francisco Police Department from stopping, frisking and questioning black males meeting the general description of the "Zebra Killer" held moot when four defendants were convicted and the homicides ceased).

12. *Id. See also* Board of School Comm'rs v. Jacobs, 420 U.S. 128, 129 (1975) (purported class action challenging the constitutionality of certain school rules and regulations rendered moot when all members of the class graduated); SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 406 (1972) (case seeking to require Dow Chemical Company to include a resolution in the company's proxy statement prohibiting the use of napalm against human beings, held moot when Dow voluntarily included the proposal and less than three percent of the voting shareholders supported it); Hall v. Beals, 396 U.S. 45, 49-50 (1969) (class action

ceased to exist will not be held moot if it is of a type which "in its duration is too short to be fully litigated prior to its cessation or expiration."[13]

In considering a challenge to a state statute prohibiting corporations from participating in ballot issues, the Ninth Circuit, in *C & C Plywood Corp. v. Hanson*,[14] held that the case was not moot even though the election process being contested had been completed. The governing factors were the impossibility of complete judicial review within the time period for a similar ballot measure and the likelihood that a similar measure would appear on the ballot in the future.[15]

In *Allen v. Monger*,[16] an attack on military regulations which required prior approval for petitioning activity was not moot despite the fact that one of the ships involved was no longer in service, the petitioners had been discharged and it was highly unlikely that any of the petitioners would be confronted with the problem again. The probability that other military enlistees would seek similar judicial review and find it unavailable before their terms of enlistment expired, coupled with the seriousness of the questions raised, were the decisive factors in permitting review.[17]

2. Standing

The issue of standing is one aspect of the "case or controversy" requirement of article III.[18] In order to have standing to sue, the plaintiff must have a "personal stake" in the case[19] and be able to demonstrate

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challenging voting residency requirements rendered moot when the requirement was changed from six months to two months and all named plaintiffs met the new residency requirement).

13. Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

14. 583 F.2d 421 (9th Cir. 1978). Other constitutional aspects of this case are discussed at notes 29-32 & 76-85 *infra*.

15. *Id.* at 423. The court in Ash v. Cort, 496 F.2d 416 (3d Cir. 1974), *rev'd on other grounds*, 422 U.S. 66 (1975) (dictum), considered a suit involving the election process and noted that

> election controversies almost always are spawned shortly before the election, seek prospective relief directed to the election, and reach the appellate courts only after the election. Where the basis of such a controversy remains after an election and where the dispute is likely to recur, the case will not be found moot, even where prospective relief alone is sought.

Id. at 419.

16. 583 F.2d 438 (9th Cir. 1978). Other constitutional aspects of this case are discussed at notes 133-41 *infra*.

17. 583 F.2d at 440.

18. *See* U.S. CONST. art. III, § 2.

19. Baker v. Carr, 369 U.S. 186, 204 (1962). It is not sufficient for plaintiff to have merely a grievance common to the public at large. United States v. Richardson, 418 U.S. 166, 176-

that the litigation, if successful, will likely provide him with the relief sought.[20]

The standing rules framed by the Supreme Court in *Warth v. Seldin*[21] require that the plaintiff allege "specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention."[22] In order to give effect to this requirement, the Ninth Circuit, in *Bowker v. Morton*,[23] developed a three-part test for standing under which "the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought."[24]

In *De La Cruz v. Tormey*,[25] the court applied the *Bowker* test to allegations that plaintiffs had been injured by defendant college district's refusal to provide child-care facilities. The plaintiffs included one high school student who wished to attend college in the future[26] and three college students currently attending classes in the district. Reasoning

77 (1974); Frothingham v. Mellon, 262 U.S. 447, 488 (1923). The harm alleged need not be economic. United States v. SCRAP, 412 U.S. 669, 685-86 (1973) (sufficient to allege direct harm to plaintiffs in their use of the natural resources of the region); Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society. . . . But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

Another aspect of the standing requirement, which was not considered by the Ninth Circuit during the survey period, is the ability of one who is injured to assert the rights of third parties. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (doctor permitted to assert the constitutional rights of his patients in a criminal prosecution involving contraceptives); Pierce v. Society of Sisters, 268 U.S. 510, 532 (1925) (parochial school permitted to assert the constitutional rights of students in a suit attacking a statute requiring public education for all children).

For a further discussion of the standing doctrine, see Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard*, 20 ST. LOUIS U.L.J. 663 (1976); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973).

20. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976). In *Simon*, several organizations and individuals challenged a ruling of the Internal Revenue Service which granted charitable tax exemptions to non-profit hospitals that did not offer free or reduced cost service to the poor. The Court held that they had not alleged specific injury.

21. 422 U.S. 490 (1975). The individual plaintiffs in *Warth*, low and moderate income members of certain racial minorities, were held to have no standing to challenge an allegedly discriminatory zoning law. Although the law was assumed to prohibit the building of low and moderate cost multi-family residences in the town, the Court found no indication that plaintiffs could afford such dwellings even if built. *Id.* at 494-95, 502, 506-07.

22. *Id.* at 508 (emphasis in original).

23. 541 F.2d 1347 (9th Cir. 1976).

24. *Id.* at 1349.

25. 582 F.2d 45, 62 (9th Cir. 1978). *See also* text accompanying notes 339-60 *infra*.

26. By the time of the appellate decision plaintiff had acquired her high school

that the high school student had suffered a "particular injury" by being denied access to higher education, the court held that she had sufficient standing to sue.[27] Additionally, the three undergraduate plaintiffs also were found to have satisfied the standing requirement—even though they were receiving a college education and had made alternative arrangements for child care during school hours. The court reached this conclusion after noting that these plaintiffs still "alleged burdens and uncertainties they claim to suffer as a result of the challenged policy."[28]

In *C & C Plywood Corp. v. Hanson*,[29] the plaintiffs challenged a statute prohibiting corporate participation in nonpartisan elections. The defendant argued that plaintiff corporations lacked standing since they, as corporations, had no first amendment rights to assert.[30] The Ninth Circuit summarily rejected this argument by noting that the Supreme Court, in *First National Bank v. Bellotti*,[31] had recently disposed of a similar contention.[32]

In *Bellotti*, the Supreme Court suggested that the freedom of speech issue had been improperly posed. "The proper question . . . is not whether corporations have First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether . . . [the challenged statute] abridges expression that the First Amendment was meant to protect. We hold that it does."[33] Reasoning further that the first amendment would protect noncorporate plaintiffs who wished to comment on similar ballot issues, the *Bellotti* Court concluded that speech protected by the first amendment does not lose its protection simply because the speaker is a corporation.[34] Thus, an interest in preserving the integrity of the electoral process will not justify the infringement of a corporation's right to speech absent the showing of a "more imminent danger to the public interest."[35] The Court also noted that the legislature may not dictate "the subjects about which persons may speak and the speakers who

equivalency diploma and claimed she could not attend college because of the lack of available child care. 582 F.2d at 62 n.17.

27. *Id.* at 62.

28. *Id.*

29. 583 F.2d 421 (9th Cir. 1978).

30. The reasoning of the court involved, in part, a discussion of the type of first amendment protection to be granted to commercial speech. *Id.* at 423. *See* text accompanying notes 76-85 *infra*.

31. 435 U.S. 765 (1978).

32. 583 F.2d at 423.

33. 435 U.S. at 776.

34. *Id.* at 781-84.

35. *Id.* at 788-92.

may address a public issue."[36]

B. Abstention

When issues presented by the litigants depend on unsettled questions of state law, the federal court may choose to abstain from the decision-making process until the state court has resolved the contested state questions.[37] This procedure, known as "Pullman-type" abstention,[38] has two primary goals: authoritative answers to state questions (rather than forecasts of state interpretation), and possible avoidance of constitutional issues.[39]

Since abstention merely involves the postponement, rather than the abdication, of federal jurisdiction,[40] the federal court should retain jurisdiction of the federal issues pending the outcome of the state court proceedings.[41] In such a situation the court may grant any interim relief needed to protect the plaintiff during the period of abstention.[42]

The Ninth Circuit invoked the abstention doctrine in *Sederquist v.*

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36. *Id.* at 785.

37. *See* 17 WRIGHT, *supra* note 2, § 4241, at 433; Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 590 (1977) [hereinafter cited as FIELD].

38. The traditional abstention doctrine had its genesis in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). It has been asserted that other forms of abstention have at times been invoked to avoid decisions which would needlessly conflict with state activity, to permit states to resolve unsettled questions of state law, and to ease the congestion of federal court dockets. Hall v. Garson, 430 F.2d 430, 437 n.12 (5th Cir. 1970) (citing C. WRIGHT, FEDERAL COURTS § 52 (2d ed. 1970)). Additionally, the special nature of eminent domain proceedings, combined with difficulties in ascertaining the state law, may permit abstention even though neither circumstance individually would suffice. *See* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

39. 17 WRIGHT, *supra* note 2, § 4241, at 433. The federal court often invokes Pullman-type abstention in cases where individuals attack state statutes as being violations of their civil liberties. FIELD, *supra* note 37, at 602 n.52.

40. American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973) (per curiam) (dismissal to permit a state court to pass on an issue of state law must be without prejudice); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 417 (1964) (a party has the right to return to district court following state court action unless he foregoes this right by freely submitting his federal claims to state court for decision); Harrison v. NAACP, 360 U.S. 167, 179 (1959) (district court instructed to retain jurisdiction while plaintiffs sought construction of state statutes in state court).

41. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 512-13 (1972); Zwickler v. Koota, 389 U.S. 241, 244 n.4 (1967); Doud v. Hodge, 350 U.S. 485, 487 (1956).

42. *See, e.g.*, Alexander v. Thompson, 313 F. Supp. 1389, 1398-99 (S.D. Cal. 1970) (district court issued temporary restraining order to preserve the status quo while plaintiff sought state court resolution); Sherwood v. Bradford, 246 F. Supp. 550, 552 (S.D. Cal. 1965) (district court permitted temporary restraining order to remain in effect while plaintiffs exhausted administrative remedies).

City of Tiburon.[43] Plaintiffs contended that the city's general land use plans constituted a taking of their property within the meaning of the fifth amendment.[44] The court used a three-pronged test to determine whether the requirements of the Pullman doctrine had been satisfied.[45] The court declared that the Pullman doctrine may be invoked where: (1) the issue involves a sensitive area of social policy of a type which the federal courts should resolve only when there is no alternative means of adjudication available; (2) a constitutional adjudication can be avoided by a definitive ruling on the state issue; and (3) the state issue is of doubtful resolution. Examination and assessment of these three factors enable the court to determine whether the benefits of an appropriate resolution in state court outweigh the burden suffered by the plaintiff in instituting a separate action in state court.[46]

In evaluating the district court's decision to abstain, the Ninth Circuit in *Sederquist* relied on *Rancho Palos Verdes Corp. v. City of Laguna Beach*,[47] a case in which the decision of the district court to abstain was affirmed. In both cases, the court reviewed the great complexity and recent character of the numerous California land use statutes,[48] concluding that land use planning indeed involved a "sensitive area of social policy." The first prong of the analysis was thus satisfied.

The court next determined whether the constitutional issue could be avoided through abstention.[49] It noted the similarity between the fifth

43. 590 F.2d 278 (9th Cir. 1978).

44. *Id.* at 279-80. The fifth amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

45. 590 F.2d at 281. The test was first formulated by the Ninth Circuit in Canton v. Spokane School Dist. No. 81, 498 F.2d 840, 845 (9th Cir. 1974), and it was applied in Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092, 1094 (9th Cir. 1976).

46. 590 F.2d at 281. *See* Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943) (difficulty in determining state law is not by itself a sufficient reason for the federal court to abstain).

47. 547 F.2d 1092 (9th Cir. 1976). The complaint in *Rancho Palos Verdes Corp.* alleged that the imposition by the municipality of a moratorium on development, and the adoption of an interim open-space element in the city's general plan, denied the land owner equal protection and due process of law and constituted a taking of property without just compensation. In that case, the district court's decision to abstain was affirmed. The court in *Sederquist* cited extensively to the *Rancho Palos Verdes Corp.* decision.

48. 590 F.2d at 281-82; *Rancho Palos Verdes Corp.*, 547 F.2d at 1095. The federal court was concerned about the possible stifling of innovative steps which the state might take in attempting to solve the complex problems associated with land use.

49. Although it did not reach the merits of the underlying conflict, the court indicated that the enactment of a general plan for development of an area which specifies potential public uses of privately owned land does not amount to inverse condemnation of that land. *See*

amendment and the California constitutional prohibition against uncompensated takings,[50] and concluded that a resolution under state constitutional grounds would obviate the necessity of deciding the federal question.

Finally, the court reviewed the status of the state law.[51] Because the California Supreme Court in *HFH, Ltd. v. Superior Court*[52] had specifically declined to decide "the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the land in question,"[53] the resolution of the state issue was uncertain. The appellate court thus concluded that the three-pronged test had been satisfied and that the district court had not abused its discretion in abstaining.[54]

II. FIRST AMENDMENT

A. Election Process

"Fundamental rights" are those interests identified by the Supreme Court as demanding special protection.[55] This category of protected

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also Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 119, 514 P.2d 111, 117, 109 Cal. Rptr. 799, 805 (1975) (discussing the cause of action for inverse condemnation).

50. CAL. CONST. art. I, § 19 states in pertinent part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."

51. 590 F.2d at 282-83.

52. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

53. *Id.* at 518 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16 (emphasis in original).

54. 590 F.2d at 282-83. The court concluded that although the plaintiff would be burdened as a result of the abstention, the burden was not substantial enough to render the district court's action improper. It was observed that the appropriate state proceedings had been commenced within the statutory period, and the federal court had retained jurisdiction over any federal questions that might remain after the conclusion of the state court proceedings. *Id.*

55. It has also been suggested that extraordinary constitutional protection is warranted in areas with potential for "prejudice against discrete and insular minorities." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). This principle is discussed in Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933 (1973).

For discussion of the standards of review employed by the Supreme Court, see Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

In holding that education is not a fundamental right, the Supreme Court succinctly described the process of review generally followed in equal protection cases:

> We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme

rights has grown to include the right to privacy,[56] the right to interstate travel,[57] the right to freedom of association,[58] the right of access to the criminal justice system,[59] and the right to vote.[60]

The practical consequence of designating an interest as "fundamental" is that the courts must strictly scrutinize those laws or governmental practices which infringe upon the exercise of such rights. In order for the restriction to withstand such scrutiny, the state must demonstrate both that the challenged practice is justified by a compelling state interest and that there exists no less intrusive method of furthering that interest.[61]

The Supreme Court has held that because

> the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. . . . '[T]he political franchise of voting . . . [is] a fundamental political right, because preservative of all rights.'[62]

In spite of the characterization of voting as a fundamental right, however, courts have not applied the strict scrutiny test consistently in cases involving infringements upon that right.[63]

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must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (Texas school financing plan held not to operate to disadvantage of a suspect class, nor to infringe on fundamental rights).

56. Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy falls within penumbra of guarantees found in Bill of Rights).

57. Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (although not mentioned in Constitution, right to interstate travel is fundamental).

58. Buckley v. Valeo, 424 U.S. 1, 15 (1976).

59. Douglas v. California, 372 U.S. 353 (1963). *But cf.* Ross v. Moffitt, 417 U.S. 600, 611-16 (1974) (indigent criminal defendant does not have a right to state-appointed counsel on discretionary appeal to state supreme court).

60. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). Other important interests have not been elevated to the level of fundamental rights. *See, e.g.*, San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Dandridge v. Williams, 397 U.S. 471, 485 (1972) (welfare).

In Bradshaw v. Zoological Soc., 569 F.2d 1066 (9th Cir. 1978), the right of admission to a zoo was held not to be a fundamental right. The zoo was therefore permitted to charge $14 for a single membership and $18 for a dual membership (granted to two adults living in the same household) because there was a rational basis for the difference in cost of membership. *Id.* at 1069.

61. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting) (overcoming the "compelling state interest" test "demands nothing less than perfection").

62. Reynolds v. Sims, 377 U.S. 533, 562 (1964) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

63. For a discussion of the confusion surrounding the determination of the appropriate test, see Comment, *A Case Study in Equal Protection: Voting Rights Decisions and a Plea for*

1. Access to the Ballot

The Ninth Circuit acknowledged the difficulty in determining the appropriate test to apply to restrictions upon franchise rights in *Socialist Workers Party v. Eu.*[64] While the exclusion of certain classes of voters will be found to substantially burden the right to vote,[65] the Supreme Court in *Bullock v. Carter*[66] indicated that some burdens on the exercise of voting rights might not be subject to a "stringent standard of review."[67] Cases considering a candidate's right to a place on the ballot are more likely to be evaluated on the basis of a less-demanding standard than are cases limiting the right of a voter to cast his ballot.[68] In such situations the state is attempting to balance the public's interest in having an opportunity to vote for a candidate closely approximating

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Consistency, 70 NW. U.L. REV. 934 (1976); Comment, *Equal Protection: Analyzing the Dimensions of a Fundamental Right—The Right to Vote*, 17 SANTA CLARA L. REV. 163 (1977); Note, Adams v. Askew: *The Right to Vote and the Right to be a Candidate—Analogous or Incongruous Rights?*, 33 WASH. & LEE L. REV. 243 (1976).

Professor Gunther suggests that the Court avoid the standard of scrutiny analysis and focus instead on the factual nexus between the law and the state's interest. Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972).

64. 591 F.2d 1252 (9th Cir. 1978). The *Eu* court explained that

> [t]he methodology of the Supreme Court in analyzing statutes affecting voting rights to determine their constitutionality is not easily discerned . . . . As we read its opinions, a statute may impose more than insubstantial burdens on constitutionally-protected voting rights before a close scrutiny standard is required . . . . An insubstantial impingement on a "fundamental right" should be scrutinized no more closely than a substantial burden on a "not fundamental right."

Id. at 1261 n.5.

65. *See* Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (state residency requirement of one year not necessary to promote any compelling state interest); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (annual poll tax of $1.50 or less invalid); Carrington v. Rash, 380 U.S. 89, 96 (1965) (denial to military personnel of right to vote invalid); Reynolds v. Sims, 377 U.S. 533, 561 (1964) (apportionment of legislative districts must comply with one person, one vote requirement).

66. 405 U.S. 134, 143 (1972) (when a regulation appreciably impacts the right to vote, it must be strictly scrutinized).

67. *Id.*

68. *See, e.g.*, American Party v. White, 415 U.S. 767, 786 (1974) (55-day period for circulating supplemental petitions not unduly burdensome); Storer v. Brown, 415 U.S. 724 (1974) (conditioning ballot position for independent candidate on affiliation with a qualified political party held a valid means of assuring the integrity of election process); Lubin v. Panish, 415 U.S. 709 (1974) (statute denying indigents access to the ballot through the use of filing fees invalid for lack of a reasonable relationship to state's legitimate interest in election process); Jenness v. Fortson, 403 U.S. 431, 442 (1971) (statute requiring independent candidates to obtain signatures of 5% of voters by June of election year held valid; Court did not indicate the test that was used). *But cf.* Bullock v. Carter, 405 U.S. 134 (1972) (filing fees for party primary elections ranging up to $8,900 held invalid); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (compelling state interest test used to invalidate statute requiring independent presidential candidates to obtain signatures of 15% of voters by February of election year).

individual views against the state's interest in attempting to provide the electorate with a ballot that can be understood, that will promote compromise, and that will maintain political stability.[69]

The plaintiffs in *Eu* sought to invalidate a section of the California Elections Code[70] which requires candidates qualifying for the ballot by means of the independent petition procedure to be identified on the ballot by the term "Independent."[71] The court was unable to cite any authority holding that "candidates have a right to have specific information identifying their associates placed on the ballot,"[72] and concluded instead that the statutory burden limiting the candidate's ability to describe himself was insubstantial and thus permissible.[73]

The court noted that plaintiff had not been denied a place on the ballot. Rather, the limitation was on the ability of the party to describe itself.[74] This was considered an insubstantial burden on the right to vote,[75] and the state was found to have a legitimate interest in regulating its electoral process.

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69. Storer v. Brown, 415 U.S. 724, 729 (1974).

70. CAL. ELEC. CODE § 10210 (West 1977).

71. 591 F.2d at 1256. There are three methods by which candidates for partisan office in a general election can receive votes. First, candidates whose political parties meet the requirements of CAL. ELEC. CODE § 6430 (West 1977) and who win their party's primary election automatically are entitled to a ballot position. Second, candidates can receive votes by a write-in campaign. Third, a candidate not associated with a party, or associated with a party that cannot meet the requirements of CAL. ELEC. CODE § 6430 (West 1977), can attain general ballot status by using the independent nomination procedures set forth in CAL. ELEC. CODE §§ 6830-6920 (West Supp. 1978). 591 F.2d at 1254-55. When a candidate qualifies by the third method, CAL. ELEC. CODE § 10210 (West 1977) requires that "[i]f a candidate has qualified for the ballot by virtue of an independent nomination, the word 'Independent' shall be printed instead of the name of a political party . . . ."

72. 591 F.2d at 1260.

73. *Id.* at 1262.

74. *Id.* at 1261.

75. *See* Storer v. Brown, 415 U.S. 724, 729 (1974) ("[S]ubstantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest."). The court in *Eu* relied on this language in concluding that an *insubstantial* burden on the right to vote would not be strictly scrutinized. 591 F.2d at 1261. The court acknowledged that the proper test to apply was not easily discernible from the Supreme Court cases and reasoned that restricting the description of a candidate's party on a ballot was less burdensome than other statutory restrictions on the electoral process to which strict scrutiny apparently had not been applied. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 23-38 (1976) (statutory limitations on contributions by individuals and groups to candidates and authorized campaign committees sustained); Rosario v. Rockefeller, 410 U.S. 752 (1973) (statutory requirement that voters enroll in party of their choice at least 30 days before general election held not an arbitrary time limit); McDonald v. Board of Election, 394 U.S. 802 (1969) (restrictions on availability of absentee ballots were not arbitrarily made).

2. Corporate Contributions to Ballot Issues

In another case related to the electoral process, *C & C Plywood Corp. v. Hanson*,[76] the Ninth Circuit considered the right of a corporation to make contributions to promote or defeat ballot issues. The threshold questions were whether corporate speech is afforded first amendment protection and whether a corporation may assert first amendment rights on its own behalf. Although commercial speech has in the past been considered to be unprotected by the first amendment,[77] the more recent analysis has focused upon whether the content of the speech was of public interest and merited first amendment protection.[78] Finding that the commercial speech involved related to governmental issues,[79] the *Hanson* court concluded that the speech was entitled to first amendment protection. The court agreed with the plaintiffs, various Montana corporations and associations, that the portion of a Montana statute[80] prohibiting corporations or banks from making contributions to promote or defeat any ballot issue was unconstitutional.[81]

The Ninth Circuit relied on the recent Supreme Court holding in *First National Bank v. Bellotti*,[82] that the rights of corporations to express their views on issues of general public interest could not be

76. 583 F.2d 421 (9th Cir. 1978).

77. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (ordinance regulating distribution of commercial advertising by handbills found to be reasonable). *See generally* Comment, *Commercial Speech and the First Amendment: An Emerging Doctrine*, 5 HOFSTRA L. REV. 655 (1977); Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975).

78. *See* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (advertising of prescription drug prices cannot be forbidden in view of interest of consumers and society in general in free flow of commercial information). The decisions considering commercial speech have moved gradually toward finding no distinction based on the type of speech involved. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975) (advertising that conveys information to a potential audience is protected by the first amendment); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (measure whether commercial speech is protected by its content); Cammarano v. United States, 358 U.S. 498 (1959) (test depends upon the general public interest in the content of the speech); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (focuses on the primary object of the communication).

79. 583 F.2d at 423.

80. MONT. REV. CODE ANN. § 23-4744 (Supp. 1977) states that "[n]o corporation . . . shall pay or contribute . . . in order to aid or promote the interests, success or defeat of any ballot issue. No person shall solicit or receive such payment or contribution from such corporation."

81. Only that aspect of the Montana statute relating to ballot issues was considered; the prohibition against corporate contributions to partisan elections remains in effect. 583 F.2d at 425.

82. 435 U.S. 765 (1978).

abridged by the state without a showing of a compelling state interest.[83] In an initiative process the corporations are seeking to influence the electorate rather than an individual candidate. Since it is unlikely that any political debts are created by corporate contributions in an initiative campaign, the state's interest is said to be minimal.[84] The state in *Hanson* was not successful in asserting a sufficiently compelling reason for the total abridgement of the first amendment rights involved.[85]

B. Conflicts Between Free Speech Rights and Specific Constitutional Powers

1. Copyright

In two recent cases the Ninth Circuit attempted to balance the first amendment right of free speech against the regulatory authority of the federal government.

Walt Disney Productions v. Air Pirates[86] involved a suit for infringement of several Disney copyrights protecting famous cartoon characters.[87] The defendants claimed that the first amendment limited the scope of the plaintiff's copyright protection.

The first amendment states that "Congress shall make no law . . . abridging freedom of speech, or of the press."[88] Yet the Copyright Act,[89] which grants an author or originator of a work the exclusive right to publish and sell the work, was passed pursuant to the copyright clause of the Constitution.[90] This creates a paradox, as the first amend-

83. *Id.* at 795.

84. *See, e.g.*, Schwartz v. Romnes, 495 F.2d 844, 853 (2d Cir. 1974) ("The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights.").

85. The Ninth Circuit indicated that the state might be justified in regulating corporate contributions to the initiative process by requiring specific disclosures, highly visible identification of the source of funds in advertising, and limitations on the amounts that could be spent. A complete prohibition of corporate contributions, however, as existed in the statute, was overbroad. 583 F.2d at 425.

86. 581 F.2d 751 (9th Cir. 1978).

87. The characters, depicted in adult "counter-culture" comic magazines, were similar to Disney's figures and had the same names. The themes involved, however, were markedly different from Disney's family-oriented presentations. *Id.* at 753.

88. U.S. CONST. amend. I. *See generally* 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.10[A] (1978) [hereinafter cited as NIMMER]; Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1183 (1970).

89. 17 U.S.C. §§ 101-810 (1976).

90. U.S. CONST. art. I, § 8, cl. 8 provides that Congress shall have power "To promote the Progress of Science and useful Arts, by securing for limited Times to authors and inventors the exclusive Right to their respective Writings and Discoveries."

ment and the copyright clause cannot both be followed literally.[91] The problem then is one of balancing the need of free speech against the desire to protect the copyrighted expression of ideas. Striking this balance is necessary in order to determine what types of speech cannot be copyrighted due to first amendment protection of speech.[92] Professor Nimmer has suggested[93] that a definitional balancing approach (as opposed to an ad hoc approach) be utilized to define the forms of speech that are protected by the first amendment and the types that are not so protected.[94] As noted by Professor Nimmer, this technique has been employed in the areas of obscenity,[95] privacy,[96] and libel.[97]

The reasons for preserving free speech are to allow meaningful public dialogue, to act as a safety valve against violent acts, and to preserve free speech as an end in itself.[98] The purposes of the copyright system are to preserve economic incentive for creators and to protect the privacy of unpublished works.[99] Professor Nimmer suggests that the proper balance lies between the first amendment protection of ideas and the copyright protection of the expression of ideas.[100] The Ninth Circuit has endorsed Nimmer's idea-expression line as an accommodation of the tension between free speech and copyright interests.[101] The

91. The literal approach of Mr. Justice Black, *see, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting), has not been followed in the first amendment area. Professor Nimmer identifies several abridgements of speech not protected by the first amendment, including perjury in the course of a judicial proceeding, agreements in restraint of trade in violation of the antitrust laws, fraudulent statements, and the passing of "top secret" material by an individual to unauthorized persons. *See* NIMMER, *supra* note 88, at § 1.10[A].

92. For a complete discussion of the conflict between the copyright clause and the first amendment, see NIMMER, *supra* note 88, at § 1.10[A]-[D]. Preliminary to a discussion of the first amendment conflict, in *Walt Disney Productions* the court considered the questions of the copyrightability of the cartoon characters and whether the defendants infringed those copyrights. 581 F.2d at 754-58. *See also* Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) (dicussion of elements necessary to establish copyright infringement).

93. NIMMER, *supra* note 88, at § 1.10[B].

94. *Id.*, § 1.10[A], at 1-66 to 1-69.

95. *See* Memoirs v. Massachusetts, 383 U.S. 413, 418 (1976) (citing Roth v. United States, 354 U.S. 476 (1957)).

96. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967).

97. *See* New York Times v. Sullivan, 376 U.S. 254, 268-70 (1964).

98. NIMMER, *supra* note 88, § 1.10 [B][1], at 1-72. *See* Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

99. NIMMER, *supra* note 88, § 1.10[B], at 1-72.

100. *Id.* at 1.10[B][2]. *See also* Chaffee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513 (1945).

101. 581 F.2d at 758-59. The Court's approach to this problem is discussed in greater detail in Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977).

distinction must be drawn, for example, between the political views of a public figure, which can be considered and commented upon by all, and the expression of those views in a speech which may be protected by the copyright laws.[102]

Once the idea-expression distinction is articulated, it becomes apparent that conflict between copyright law and the first amendment is minimal.[103]

Only infrequently must a copyrightable work be limited by first amendment considerations.[104] The Ninth Circuit in *Walt Disney Productions* concluded that since the defendants "could have expressed their theme without copying Disney's protected expression," the first amendment guarantees of free speech did not protect them from the restrictions of the copyright law.[105]

2. FTC Rulings

The Ninth Circuit considered a similar conflict in *Standard Oil Co. v. FTC*.[106] There the FTC issued a cease and desist order based on its finding that Standard Oil and its advertising agency, Batten, Barton, Durstine & Osborn, Inc. (BBD&O), had broadcast false, misleading and deceptive advertising.[107] The Commission's order related to "*any*

The Copyright Act expressly provides that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, . . . concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1976).

102. *See, e.g.*, Marvin Worth Prods. v. Superior Films Corp., 319 F. Supp. 1269, 1272 (S.D.N.Y. 1970) (comedian may copyright jokes that do not involve stock situations); Public Affairs Assocs., Inc. v. Rickover, 268 F. Supp. 444, 450 (D.D.C. 1967) (government official may copyright speeches not concerned with official duties which were prepared and delivered on his own time and do not form part of his official duties); Holdredge v. Knight Pub. Corp., 214 F. Supp. 921, 923 (S.D. Cal. 1963) (although facts concerning actual life of historic character cannot be copyrighted, the association, arrangement and combination of ideas and their particular form of expression may be protected).

103. *See* Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977).

104. *See, e.g.*, Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (public's interest in being fully informed on assassination of President Kennedy justified historian's use of Zapruder home movies previously purchased and copyrighted by Time, Inc.). Professor Nimmer cites the photographs of the My Lai massacre as illustrative of the types of "news photographs" that should be protected by first amendment consideration. NIMMER, *supra* note 88, § 1.10[c][2].

105. 581 F.2d at 759.

106. 577 F.2d 653 (9th Cir. 1978). It should be noted that here the plaintiff did not argue that the Commission's power was in total conflict with the first amendment, but rather that the order as promulgated was overbroad.

107. The Commission found both defendants to be in violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1973).

product" and enjoined both parties from "all advertising which creates a misleading impression by use of tests or demonstrations or by visual means generally."[108]

Although the court found the Commission's conclusion that the subject advertising was misleading to be supported by the evidence,[109] it held that the particular cease and desist order abridged petitioners' speech in violation of the first amendment.[110] The conflict here was between the Commission's broad power to structure remedies for practices violating the Act[111] and the restraint which the Commission must exercise when "formulating [a] remedial order which may amount to a prior restraint on protected commercial speech."[112] Because the purpose of the commercial speech curtailed by the order was to aid society in the decision-making process,[113] and rigorous enforcement by the Commission might discourage advertising without any concommitant gain in accuracy and truthfulness,[114] the order was held to be overly broad.

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108. 577 F.2d at 660.

109. *Id.* at 659.

110. *Id.* at 663. Reasoning that Standard Oil had never been accused of false advertising, that BBD&O had but one previous adverse FTC consent order, that there was no showing of blatant disregard of the Act and that petitioners had made good faith attempts to eliminate misstatements, the Ninth Circuit found the scope of the order to be overly broad and hence modified it to refer only to advertising of the single product of this case. The court distinguished the facts of this case from those which previously have justified broad orders, *e.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392-95 (1965) (defendant's use of three television commercials employing deceptive techniques easily transferable to other products justified FTC cease and desist order directed at such practices with respect to any product advertised); Resort Car Rental System, Inc. v. FTC, 518 F.2d 962 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975) (defendant's trade name, "Dollar-A-Day" was deceptive and justified an FTC order prohibiting use of name even though customers were informed of true price before contracting).

111. *See* FTC v. National Lead Co., 352 U.S. 419, 428-29 (1957); Carter Prods., Inc. v. FTC, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959). Even the FTC's broad powers must be exercised with discretion, particularly in assuring that the remedy be reasonably related to the unlawful practice. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965).

112. 577 F.2d at 662. *See also* Beneficial Corp. v. FTC, 542 F.2d 611, 619 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (since commercial speech is not excepted from first amendment protection, prior restraints on such speech can go no further than reasonably necessary to accomplish remedial objective of preventing the violation). The reference to commercial speech assumes that it is protected by the first amendment and also acknowledges that false commercial speech may be prohibited. *See* text accompanying notes 77 & 78 *supra*.

113. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 362, 384 (1977) (commercial speech, which serves individual and societal interests in assuring informed and reliable decision-making, is entitled to some first amendment protection; state may not prevent truthful newspaper advertisement "concerning the availability and terms of routine legal services").

114. 577 F.2d at 66.

C. *Prior Restraints*

1. Broadcasting

Regulations on the publication,[115] broadcast, or presentation[116] of general interest material curtail the right of the press and of individuals to free speech, but such prior restraints[117] are not per se unconstitutional.[118] There is, nevertheless, "a heavy presumption against [their] constitutional validity."[119] The underlying assumption is that it is preferable "to punish the few who abuse rights of speech *after* they break the law rather than to throttle them and all others beforehand."[120]

This principle was applied in *Goldblum v. National Broadcasting Corp.*,[121] where the plaintiff attempted to prevent the broadcast of a television film based on the activities of the Equity Funding Corporation. The plaintiff, a former officer of the corporation,[122] argued that

115. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (trial judge's order restraining news media from publishing or broadcasting accounts of confessions or admissions adduced at an open preliminary hearing was an invalid prior restraint); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (government may not interfere with editorial process by regulations which infringe free exercise of editorial control and judgment); Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971) (injunction preventing Los Angeles Times from modifying advertising copy prior to acceptance for publication invalid).

116. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (rejection of application to use public auditorium for presentations of theatrical "Hair" was unlawful prior restraint); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (ordinance conferring upon city commission virtually absolute power to prohibit parades, processions or demonstrations on streets or public ways held unconstitutional since ordinance lacked narrow, objective and definite guidelines).

117. For a discussion of the application of the doctrine of prior restraints to laws and regulations governing other activities, see Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 898 (1976).

118. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 n.10 (1963).

119. *Id.* at 70. The Supreme Court in Freedman v. Maryland, 380 U.S. 51 (1965) (state statutory censorship scheme invalidated as failing to provide adequate protection against undue inhibition of protected expression), listed three safeguards that must be provided if a system of prior restraints is to be constitutional: (1) the censor must have the burden of instituting judicial proceedings and proving that the material is unprotected; (2) the restraint may be imposed prior to judicial review for only a brief period and only to preserve the status quo; and (3) there must be a prompt judicial determination. *Id.* at 58-59. The *Freedman* Court differentiated films from other forms of expression, noting that because most films are available long before scheduled exhibition, a requirement of prior submission to a censor is less burdensome than in other media.

120. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (emphasis in original).

121. 584 F.2d 904 (9th Cir. 1978).

122. *Id.* at 905-06. Although Goldblum's name and that of Equity Funding Corporation were used in the "docu drama," Goldblum alleged that the presentation was a fictionalized treatment of the subject.

the film would retard his chances for parole and would erode his right to an impartial jury trial in possible future criminal or civil actions involving the corporation.[123] The district judge ordered that the film be produced in court to be viewed for "inaccuracies."[124] NBC refused to produce the film, and the court of appeals convened to consider the company's "Emergency Petition for Mandamus."[125]

The court recognized that the press may be required to justify or defend what it says only after the expression has occurred[126] and found that the district court had interfered with the editorial process by requiring pre-broadcast censorship. This constituted an invalid prior restraint that served to chill speech and threaten expression.[127] The order to produce the film was therefore vacated.

2. Military

The members of the military, while certainly not excluded from the free speech guarantees of the first amendment, are often subject to a different application of its protection.[128] Additional controls have been justified both to preserve discipline and order[129] and to control speech which threatens proper civilian control of the military.[130] In the area of discipline and order particularly, the military has sought to diminish

123. *Id.* at 905.

124. The complaint requesting injunctive relief was brought little more than 24 hours before the scheduled telecast. *Id.*

125. *Id.* Counsel for NBC had been ordered imprisoned by the district court judge for contempt until he provided the court with the film.

126. *Id.* at 907. *See* Near v. Minnesota, 283 U.S. 697 (1931) (statute permitting abatement, as a public nuisance, of malicious, scandalous, and defamatory newspapers, magazines and periodicals declared an unconstitutional prior restraint).

127. 584 F.2d at 907.

128. *See* Parker v. Levy, 417 U.S. 733 (1974). *See generally* Zillman, *Free Speech and Military Command*, 1977 UTAH L. REV. 423.

129. Parker v. Levy, 417 U.S. 733, 758 (1974) (refusal of physician to follow orders to establish training program, making public statements urging Negro enlisted men to disobey orders to go to Viet Nam); Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975) (collecting signatures for a petition in a military combat zone; field commander's decision to suppress public speech in a combat zone virtually unreviewable); Dash v. Commanding General, 307 F. Supp. 849, 851 (D.S.C. 1969), *aff'd per curiam*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971) (fighting, disobedience of officers, and loss of disciplinary control resulted from speech); United States v. Priest, 21 C.M.A. 564, 45 C.M.R. 338 (1972) (conviction for publication of underground newspaper urging disobedience).

130. Greer v. Spock, 424 U.S. 828, 839 (1976) (this country has a tradition of civilian control of a military which is politically neutral).

Both the civilian and military population have been subject to controls for reasons of security. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (while the government has the power to preserve government secrets, this action to enjoin publication of the Pentagon Papers was improper).

the problem by the prior restraint of speech.[131] Many military regulations exist, for instance, to limit the distribution of published material both on and off base by requiring prior administrative review.[132]

In *Allen v. Monger*[133] and *Glines v. Wade*,[134] the Ninth Circuit invalidated, as prior restraints on free speech, regulations restricting the rights of military personnel to circulate petitions to be sent to government officials. The court in *Allen* considered the extent to which a prior restraint limited a statutory right.[135] Congress enacted section 1034 of the Armed Forces Act[136] to guarantee the right of members of the armed forces to communicate with the members of Congress. When crew members of the U.S.S. Hancock and Midway attempted to gain signatures for a petition to their Congressmen[137] they were required to seek the prior approval of the commanding officer.[138] The Ninth Circuit found that the petitions were clearly within the protection of section 1034 and that only compelling reasons of national security would permit prior restraints in these situations.[139] Thus although military regulations requiring prior approval for distribution of political materials are not per se invalid,[140] they require a showing of neces-

131. *See* Note, *Prior Restraints in the Military*, 73 COLUM. L. REV. 1089 (1973).

132. *See, e.g.*, Naval Instruction 1620.1 which requires prior approval for the distribution of printed materials; permission may be denied by the commander if the materials present "a clear danger to the loyalty, discipline, or morals of military personnel" or if the distribution "would materially interfere with the accomplishment of a military mission." *See also* text of Air Force regulation 30-1(9) set out in note 143 *infra*.

133. 583 F.2d 438 (9th Cir. 1978).

134. 586 F.2d 675 (9th Cir. 1978).

135. 583 F.2d at 440. Because the rights of the military personnel were protected by a statute, *see* note 136 *infra*, the court did not reach the question of how the prior restraint impacted on the constitutional right to free speech.

136. 10 U.S.C. § 1034 (1975) provides: "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." *See* 583 F.2d at 440-41.

137. The petition circulated on the Hancock questioned the necessity of making another West Pacific cruise; the U.S.S. Midway petition opposed a change in home ports. 583 F.2d at 439 nn. 1 & 2.

138. Both ships had instructions based on Naval Instruction 1620.1. *See* note 132 *supra*.

139. 583 F.2d at 442. In Huff v. Secretary of Navy, 413 F. Supp. 863 (D.C. Cir. 1976), the court distinguished between on-base and off-base petitioning. It held regulations requiring prior approval of on-base distribution to be unconstitutional and a violation of § 1034. It applied a different standard, however, to off-base petitioning in a foreign country. Prior approval was held to be reasonable in view of an international agreement restricting political activities. *Id.* at 870.

140. *E.g.*, Carlson v. Schlesinger, 511 F.2d 1327, 1333 (D.C. Cir. 1975) (dangers to discipline and morale in combat zone justified prior approval requirement for circulation of petitions).

sity not present in this case.[141]

The court in *Glines* considered whether the prior approval requirement abridged plaintiff's first amendment right to free speech; the protections of section 1034 did not apply to petitions addressed to the Secretary of Defense.[142] An Air Force regulation specifically required prior authorization by the base commander to collect signatures on a petition.[143] Although such a regulation clearly would be unconstitutional if applied to the general public,[144] "[s]peech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."[145] Thus, although the military may on occasion justify restrictions on speech, the Air Force regulation in question was held to be unconstitutionally overbroad.[146] Less restrictive alternatives were available to the Air Force in *Glines* in the form of time and place restrictions, for example, which would have adequately met the military need for obedience and discipline.[147]

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141. 583 F.2d at 442.

142. 586 F.2d at 679.

143. The regulation evaluated by the Ninth Circuit provides:

> 9. Right of Petition. Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander.

586 F.2d at 677 n.2 (quoting AFR 30-1(9)).

144. The opinion in *Glines* placed heavy reliance on cases involving prohibitions against prior restraints of civilians, emphasizing the critical nature of this protection. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (prior restraints on speech and publication are most serious and least tolerable infringement as first amendment rights); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (imposition of prior restraint carries "heavy burden" of justification); Near v. Minnesota, 283 U.S. 697, 717 (1931) (liberty of the press originally intended to prevent previous restraints on publication).

145. Parker v. Levy, 417 U.S. 733, 759 (1974) (quoting United States v. Priest, 21 C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972)).

146. 586 F.2d at 681. The Ninth Circuit noted that the Air Force regulation dealt with "protected expression" and was "valid, if at all, only in the limited setting of the combat zone." *Id.*

147. *Id.* at 680. "The Supreme Court insists on less restrictive alternatives to prior restraints when they are available . . . ." *Id.* (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-70 (1976)).

III. DUE PROCESS

A. Preliminary Matters

1. Personal Jurisdiction

A court's exercise of personal jurisdiction over a nonresident defendant must be consistent with the defendant's rights under the due process clause of the fourteenth amendment.[148] Generally, the court must analyze two independent aspects of personal jurisdiction.[149] First, the state in which the district court sits must have asserted personal jurisdiction over the defendant.[150] Second, such assertion of jurisdiction must accord with constitutional principles of due process.[151]

Since California's statutory exercise of jurisdiction[152] has been interpreted to be "coextensive with the outer limits of due process,"[153] an analysis of California jurisdiction focuses on those limits.[154] The starting point is *International Shoe Co. v. Washington*,[155] in which the Court stated the basic rule that the defendant must have certain minimal contacts with the forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[156]

148. International Shoe Co. v. Washington, 326 U.S. 310 (1945). The Court has stated:

> [W]hether due process is satisfied must depend . . . upon the quality of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

Id. at 319.

149. Data Disc, Inc. v. Systems Technology Assocs., 557 F.2d 1280, 1286 (9th Cir. 1977); Amba Marketing Systems, Inc. v. Jobar Int'l, Inc., 551 F.2d 784, 786 (9th Cir. 1977); Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 489 (5th Cir. 1974); Arrowsmith v. United Press Int'l, 320 F.2d 219, 222-23 (2d Cir. 1963).

150. *See* FED. R. CIV. P. 4(e).

151. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

152. CAL. CIV. PROC. CODE § 410.10 (West 1973) provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

153. Threlkeld v. Tucker, 496 F.2d 1101, 1103 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974).

154. *See* Data Disc, Inc. v. Systems Technology Assocs., 557 F.2d 1280, 1286 (9th Cir. 1977); Republic Int'l Corp. v. Amco Engr's, Inc., 516 F.2d 161, 167 (9th Cir. 1975).

155. 326 U.S. 310 (1945).

156. *Id.* at 316, 320. *See* Hanson v. Denckla, 357 U.S. 235 (1958) (unilateral act by the settlor of a trust which had been created in another state did not subject the trustee to personal jurisdiction in the settlor's new state of domicile); McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (solicitation of insured and subsequent sale of single policy constituted sufficient contacts to permit exercise of jurisdiction over foreign insurance company in suit arising under the policy); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) (foreign corporation carrying on continuous and systematic activity in a state could be subjected to jurisdiction on a cause of action arising outside the state and unrelated to the

A defendant may be subject to either the general or the specific jurisdiction of the court. General jurisdiction exists when the defendant's contacts with the forum state have been "substantial . . . continuous and systematic."[157] In such a case, the court may exercise jurisdiction over *all* causes of action, whether or not "the specific cause of action alleged be connected with the defendant's business relationship to the forum."[158]

Subjecting a defendant to the jurisdiction of the court for a specific cause of action requires an evaluation of the "quality and nature of his activity in the forum in relation to the particular cause of action."[159] The Ninth Circuit has identified three factors which should be considered in determining whether an exercise of specific jurisdiction is justified:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. (2) The claim must be one which arises out of or results from the defendant's forum-related activities. (3) Exercise of jurisdiction must be reasonable.[160]

This approach leads the court to consider issues of reasonableness and fairness on a case-by-case basis.[161]

During 1978, the Ninth Circuit considered two cases in which the

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corporation's activities in the state); Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950) (company selling health insurance to state residents solely through the mail subject to state jurisdiction for failure to comply with state's "Blue Sky Law").

157. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-48 (1952).

158. Cornelison v. Chaney, 16 Cal. 3d 143, 147, 545 P.2d 264, 266, 127 Cal. Rptr. 352, 354 (1976).

159. *Id.* at 148, 545 P.2d at 266, 127 Cal. Rptr. at 354.

160. Forsythe v. Overmyer, 576 F.2d 779, 782 (9th Cir.), *cert. denied*, 99 S. Ct. 188 (1978) (quoting Data Disc, Inc. v. Systems Technology Assocs., 557 F.2d 1280, 1287-88 (9th Cir. 1977) (jurisdiction reasonable where defendant participated in contract negotiations in the forum state)). *See* Amba Marketing Systems, Inc. v. Jobar Int'l, Inc., 551 F.2d 784, 789 (9th Cir. 1977) (in an action for trademark infringement, jurisdiction was unreasonable when plaintiffs could not show that imitations were sold in the state or to state consumers); Aanestad v. Beech Aircraft Corp., 521 F.2d 1298, 1299-1300 (9th Cir.), *cert. denied*, 419 U.S. 998 (1974) (jurisdiction unreasonable where airplane involved in accident had never been in forum, manufacturer was not licensed to do business there and had conducted no activities there); L.D. Reeder Contractors v. Higgins Indus., Inc., 265 F.2d 768, 773-75 & n.12 (9th Cir. 1959) (jurisdiction unreasonable where defendant's forum-related activities were not extensive and the cause of action arose from a contract in another state).

161. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 426 (9th Cir. 1977); Wright v. Yackley, 459 F.2d 287, 290-91 & n.7 (9th Cir. 1972).

defendant objected to the exercise of jurisdiction by the forum.[162] In each case, the court summarily dismissed the possibility of subjecting the defendant to general jurisdiction and concentrated, instead, on the requirements for an exercise of specific jurisdiction.

In *Forsythe v. Overmyer*,[163] defendant was the sole shareholder of a corporation which negotiated the sale and leaseback of a warehouse in Oregon. Plaintiffs insisted that defendant personally guarantee lessee's performance, and defendant agreed. This was a vital condition precedent to plaintiffs' assent to the sale-lease agreement. Negotiation took place by phone, telegram and mail between plaintiffs, who were in California, and defendant, who was in New York. Although the guaranty was silent on the matter, under the terms of the lease defendant's corporation agreed to subject itself to the jurisdiction of California courts. The corporation subsequently failed to pay its rent and filed petitions in bankruptcy.[164]

After evaluating these circumstances, as well as the fact that defendant had frequently visited California for purposes associated with the performance of his corporation's obligations to ten California residents,[165] the court concluded that the defendant had sufficient minimal contacts with the forum state such that the exercise of jurisdiction would be reasonable.[166]

The conclusion should not be drawn, however, that an officer of a corporation who, in the performance of his official duties, causes an effect in the forum state will necessarily be subject to personal jurisdiction in that state.[167] Furthermore, "the mere existence of the parent-subsidiary relationship is not alone a sufficient basis for long-arm jurisdiction" over both parties when only one has forum-related activities.[168] The separate identities of the two parties will be observed so long as the parent and subsidiary maintain the proper formal separation.[169]

162. Church of Scientology v. Adams, 584 F.2d 893, 896 (9th Cir. 1978); Forsythe v. Overmyer, 576 F.2d 779, 782 (9th Cir.), *cert. denied*, 99 S. Ct. 188 (1978).

163. 576 F.2d 779 (9th Cir.), *cert. denied*, 99 S. Ct. 188 (1978).

164. *Id.* at 781.

165. *Id.* at 783 n.6.

166. *Id.* at 784 & n.7.

167. Chem Lab Prods., Inc. v. Stepanek, 554 F.2d 371 (9th Cir. 1977) (president of corporation not subject to personal jurisdiction when he merely communicated, from another state, board of director approval of corporate activity in forum state).

168. Mizokami Bros. v. Baychem Corp., 556 F.2d 975, 977 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

169. Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) (although nonresident parent corporation completely dominated subsidiary by owning all capital stock and con-

Church of Scientology v. Adams[170] was a libel action brought by the California-based church against a Missouri newspaper publisher. The allegedly libelous articles were published in Missouri. Approximately 0.04 percent of the newspaper's total circulation reached California; revenues from general advertising by California companies amounted to 2.91 percent of the total.[171] The reporters did not travel to California at any time and the article made only one reference to the California church (a separate corporation), focusing almost exclusively on the St. Louis Scientology office.

At the outset, the effect of the newspaper's advertising revenues was rejected as a source of jurisdiction.[172] The purpose of the advertising, it was concluded, was to reach readers outside of California and not to cause an effect within the forum.

An evaluation of defendant's forum-related activities in the framework of a libel suit depends on "whether or not it was foreseeable that a risk of injury by defamation would arise in the forum state."[173] In applying the general test to the specifics of the case, the *Adams* court relied on the following additional facts in reaching the conclusion that the exercise of jurisdiction would not be reasonable: very few copies of the articles were distributed in the forum,[174] the topic of the articles did not involve California activities, the articles were not aimed at California readers, research and writing did not take place in the state, the church in California was a separate corporation, and there was serious

trolling it commercially and financially, adherence to such corporate formalities as keeping separate books and recording transactions between the parent and subsidiary in the same way as if they were two separate corporations made exercise of jurisdiction over parent improper); Uston v. Grand Resorts, Inc., 564 F.2d 1217 (9th Cir. 1977) (fact that parent corporation did business in California did not result in personal jurisdiction over subsidiary absent showing that formal separation was not scrupulously maintained); Uston v. Hilton Casinos, Inc., 564 F.2d 1218 (9th Cir. 1977).

170. 584 F.2d 893 (9th Cir. 1978).

171. *Id.* at 896.

172. *Id.*

173. *Id.* at 897-98. *See, e.g.*, Taylor v. Portland Paramount Corp., 383 F.2d 634, 639-44 (9th Cir. 1967) (exercise of personal jurisdiction unreasonable where based on conduct of defendant while filming a movie outside the forum which allegedly resulted in decreased attendance at showing of the movie within the forum).

174. Circulation of a small number of copies in the forum state will not always result in a finding of lack of jurisdiction. Rather, the evaluation must focus on the content and expected audience of the articles. For example, jurisdiction was held to be proper in Anselmi v. Denver Post, Inc., 552 F.2d 316 (9th Cir.), *cert. denied*, 432 U.S. 911 (1977), where the article concerned activity within the forum and reporters had been sent to the forum to research and write the story, even though only an extremely small number of the newspapers reach the forum state.

doubt that the articles referred to the plaintiff.[175]

The court refused to adopt the Fifth Circuit's view that newspapers, by reason of first amendment considerations, should be "entitled to increased protection from imposition of personal jurisdiction."[176] Having concluded that it lacked personal jurisdiction over the defendant, the court found it unnecessary to reach the first amendment issue. Instead, the court observed "that first amendment protections are better developed in the context of substantive defenses on the merits rather than at the initial jurisdictional stage of a defamation proceeding."[177]

2. Necessity for State Action

The wording of the fourteenth amendment[178] makes it necessary to distinguish between private and state action in suits alleging denials of due process or equal protection. Private conduct is not considered to be violative of due process or equal protection unless accompanied by significant state involvement.[179]

There is no difficulty in finding state action in acts of state officials (elected or appointed)[180] or employees acting within the scope of their

175. 584 F.2d at 898.

176. *Id.* at 899. *See* New York Times Co. v. Connor, 365 F.2d 567, 572-73 (5th Cir. 1966). The court in *Connor* held that in order to accommodate first amendment concerns, more contacts than the requisite minimum for other tort actions are required to sustain personal jurisdiction in defamation actions against out-of-state publishers.

177. 584 F.2d at 899.

178. The fourteenth amendment states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

179. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961) (restaurant's refusal to serve appellant because of race violated equal protection where restaurant was part of public building, was built and maintained with public funds, and was operated in part by state).

180. Cooper v. Aaron, 358 U.S. 1 (1958) (refusal of governor to permit integration of elementary school).

Plaintiffs in Guadalupe Organization, Inc. v. Tempe Elem. School Dist., 587 F.2d 1022 (9th Cir. 1978), brought an action alleging that they had been denied their civil rights because the school district had failed to provide non-English speaking students with bilingual-bicultural education. Defendants sought to have the court dismiss the suit, contending that its failure to provide the specialized education was not action and hence could not be considered "state action." *Id.* at 1026. The court apparently viewed the argument as specious and disposed of it quickly. It noted that the school district had made the affirmative choice to cure language deficiencies by means other than a bilingual-bicultural program. "By this exclusion it has chosen not to provide that which the appellants seek. This is state action sufficient to merit review by a federal court to determine whether it contravenes the Fourteenth Amendment." *Id.*

It would seem that the defendant confused the jurisdictional argument with the substantive one. The court in Lau v. Nichols, 483 F.2d 791, 798 (9th Cir. 1973), *rev'd on other*

executive power.[181] The use of the state courts to approve racially discriminatory agreements has also been found to be state action.[182] Similarly, state action is present when there is a state-enforced custom of segregation,[183] when an individual or group performs what is traditionally a function of the state,[184] and when governmental property is used by private organizations.[185]

Whether state action can be found solely from the fact that a business activity is licensed or regulated by the state or political subdivision is a more difficult determination. The authorization by statute of the challenged conduct does not by itself necessarily transform private action into state action.[186] There must be significant state involvement

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grounds, 414 U.S. 563 (1974) held that since "the language deficiency suffered by appellants was not caused directly or indirectly by any State action, we agree with the judgment of the district court and distinguish this case from Brown v. Board of Education. . . ." The words "State action" in *Lau* refer not to the activities of the school district in providing education but rather to the reasons for the students' problems with English. This is, perhaps, the way in which the defendant in *Guadalupe* should have focused on those words.

181. Griffin v. Maryland, 378 U.S. 130 (1964) (private guard who had been deputized as a sheriff); Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957) (trustees of a private trust acting as an agency of the state); Screws v. United States, 325 U.S. 91 (1945) (sheriff and policemen); United States v. Classic, 313 U.S. 299 (1941) (state and local election officials).

182. Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

183. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (state-enforced custom of racial segregation in public eating places).

184. Terry v. Adams, 345 U.S. 461 (1953) (pre-primary election by a private association when the results of such election determined who would be the eventual winner in the political subdivision); Marsh v. Alabama, 326 U.S. 501 (1946) (actions of a privately owned "company town"); Smith v. Allwright, 321 U.S. 649 (1944) (political party acting under statutory authority controlled the outcome of an election).

See also Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (privately owned shopping center cannot ban labor-related picketing). *But see* Hudgens v. NLRB, 424 U.S. 507 (1976) (rejecting holding and rationale in *Logan*, Court held employees of a company with a retail store in a shopping center have no constitutional right to picket there); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (privately owned shopping center can restrict handbilling which is unrelated to any activity within the center); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) (*Logan* reasoning does not apply to the parking lot of a free standing retail store).

185. Turner v. Memphis, 369 U.S. 350 (1962) (operation of a private restaurant at the municipal airport); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (operation of a private restaurant in a municipal parking structure).

186. *See* Melara v. Kennedy, 541 F.2d 802, 804-06 (9th Cir. 1976) (enactment of statute pertaining to sale of goods stored in warehouse, together with regulation of the private activity, did not make the private warehouseman's lien enforcement state action). *See also* Culbertson v. Leland, 528 F.2d 426, 431 (9th Cir. 1975) (hotel manager's seizure under state statute of tenants' belongings following their eviction for nonpayment of rent was state action; the court noted that the rights asserted by the manager did not exist at common law, that there was no contractual agreement covering the tenants' property, and that the property seized was not that for which the debt had arisen); Adams v. Southern Cal. First Nat'l

before the Constitution's due process protections will attach.[187] While there is no specific formula for determining whether a state is significantly involved, the Ninth Circuit has enumerated six critical areas of review: (1) whether the source of authority for the private conduct complained of is common law or statute;[188] (2) whether the regulation so pervades the private conduct as to entangle the state in the activity;[189] (3) whether the state is a joint participant in the activity or there are mutual benefits conferred between the state and the private party;[190] (4) whether there is a relationship between the property involved and the underlying debt; (5) whether there is a contract which provides for the challenged action;[191] and, (6) whether the statute represents a delegation of a traditional state function.[192]

In *Charmicor v. Deaner*,[193] for example, plaintiffs sought to invoke the protection of the fourteenth amendment, contending that Nevada's nonjudicial foreclosure statute[194] transformed private foreclosure into state action. They alleged that the statute offended both due process, by failing to provide a pre-sale hearing, and equal protection, by discriminating against plaintiff's shareholders, who were black. In dealing

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Bank, 492 F.2d 324, 330 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974) (individual's use of the self-help repossession provisions of the Uniform Commercial Code did not amount to state action where seller's right to repossess automobile was explicitly set forth in written security agreement).

187. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (granting of a liquor license to a fraternal organization not sufficient state action).

188. A finding of a common-law origin for the action taken may be helpful in showing that the state has not interjected itself into the activity involved. However, it is not determinative on the issue. *See, e.g., Adams, supra* note 186.

189. To some extent the state is involved in many private activities, but that alone is not sufficient to sustain a finding of state action. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (licensing and regulation of a privately owned public utility not sufficient state action in a suit for damages resulting from termination of electric service without notice and hearing).

190. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-26 (1961) (state a joint participant in the operation of a restaurant located in a publicly owned and operated building).

191. For a discussion of areas four and five, see *Adams, supra* note 186.

192. *See, e.g.*, Hall v. Garson, 430 F.2d 430 (5th Cir. 1970). In *Hall*, a statute authorizing landlords to summarily seize the personal property of tenants who defaulted in the payment of their rent was held to be state action because this type of summary seizure has traditionally been reserved to the state. This "state function" rationale has not been accepted by the Ninth Circuit.

193. 572 F.2d 694 (9th Cir. 1978).

194. NEV. REV. STAT. § 107.080 (1973) provides that a trustee may exercise a power of sale after a default upon meeting certain requirements, including notice of default, election to sell, time to cure the default, and a waiting period of three months between recording of notice of default and sale.

with these contentions, the court focused on a comparison of Nevada[195] and California[196] statutory procedures for nonjudicial foreclosures. It found them to be sufficiently similar to permit the use of cases construing the California provisions as precedents for the Nevada statute.[197] Reasoning that the statutory source of authority for the trustee sale did not transform a private, nonjudicial foreclosure into state action and that any state participation was purely ministerial, the Ninth Circuit found there to be no significant state action and, therefore, no federal question.[198]

B. Procedural Due Process

1. Introduction

"Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."[199]

In 1978, the Ninth Circuit had the opportunity to determine what process was due in three distinct areas. In *G-K Properties v. Redevelopment Agency*,[200] the Ninth Circuit ruled that because the plaintiff's failure to comply with discovery orders was not the result of reasons beyond its control, and because the facts leading to the court's dismissal of the action demonstrated a willful refusal to comply with such discovery orders, the court did not deny the plaintiff its due process rights when it dismissed the action pursuant to rule 37(b) of the Federal Rules of Civil Procedure.[201] In *Schuman v. California*,[202] the Ninth Circuit adopted the First Circuit's view that "the use of a motor vehicle is a 'liberty' interest protected by due process,"[203] but then affirmed that a

195. *See* note 194 *supra*.

196. CAL. CIV. CODE §§ 2924-2924h (West 1973).

197. 572 F.2d at 696. *See* Lawson v. Smith, 402 F. Supp. 851 (N.D. Cal. 1975) (construing California nonjudicial foreclosure as not involving state action); U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 116 Cal. Rptr. 44 (1974). *Cf.* Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975) (North Carolina's nonjudicial foreclosure statutes considered examples of significant discretionary acts of county recorder).

198. 572 F.2d at 696. *Accord* Garfinkle v. Superior Court, 21 Cal. 3d 268, 146 Cal. Rptr. 208, 578 P.2d 925, *appeal dismissed*, 98 S. Ct. 343 (1978) (state procedure for nonjudicial foreclosure of deeds of trust on real property constitutes private, not state, action).

199. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

200. 577 F.2d 645 (9th Cir. 1978).

201. *Id.* at 647-48. For a further discussion see text accompanying notes 209-19 *infra*.

202. 584 F.2d 868 (9th Cir. 1978).

203. *Id.* at 870. *See* Raper v. Lucey, 488 F.2d 748, 751 (1st Cir. 1973).

motorist was not denied due process by the manner in which her driver's license was revoked.[204] In *Sutton v. Lionel*,[205] the Ninth Circuit affirmed that a Nevada bar applicant, who had been denied admission to the Nevada state bar after failing the written bar examination and who had failed to make a timely petition for review, had not been denied his due process rights since he had been granted "notice and opportunity" within the fourteenth amendment due process requirements.

2. Dismissals Under Rule 37(b)

Rule 37(b) of the Federal Rules of Civil Procedure provides that a court may dismiss an action for a party's failure to comply with an order compelling discovery.[206] However, such powers of dismissal are not without limitations.[207] For example, in *Societe Internationale v. Rogers*,[208] the Supreme Court held that the dismissal of a complaint under rule 37(b) was improper in a situation in which the noncompliance with the pretrial production order was due to an inability to comply rather than any unwillingness or bad faith.

In the Ninth Circuit case of *G-K Properties v. Redevelopment Agency*,[209] an appeal was based in part upon the claim that the court's order dismissing the action with prejudice for failure to comply with discovery orders was an abuse of discretion and an inappropriate use of rule 37(b).[210] *G-K Properties* involved a suit in inverse condemnation by G-K Properties and Genesco, Inc., as property owners, against the redevelopment agency of the City of San Jose. The complaint alleged

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204. The Department of Motor Vehicles employees gave appellant at least three driving skills tests, a hearing where she declined the opportunity to have counsel present, and notification when her license was revoked. For further discussion, see text accompanying notes 220-22 *infra*

205. 585 F.2d 400 (9th Cir. 1978). For a further discussion, see notes 224-27 *infra*.

206. FED. R. CIV. P. 37(b)(2) reads, in pertinent part:

Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others, the following: . . . (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . .

207. *See, e.g.*, Hovey v. Elliott, 167 U.S. 409 (1897) (sanctions imposed merely for punishment may violate due process).

208. 357 U.S. 197 (1958).

209. 577 F.2d 645 (9th Cir. 1978).

210. The appellants contended that the trial court's order 1) was an abuse of discretion and 2) resulted in a taking of property without due process. *Id.* at 646.

that certain property had become unusable as the result of a redevelopment project. Throughout the action, however, a crucial factual issue was whether the property (a retail store) had been closed because of the alleged inverse condemnation or because it had become unprofitable for other, unrelated reasons.[211] In order to determine this issue, the court ordered appellant to produce any and all reports concerning financial performance, the goals and purposes, and the nature and extent of the store's operations over a period of approximately fifteen years. The plaintiff failed to comply with these orders vis-a-vis a substantial number of the years involved, and the trial date was continued pursuant to the court's ordering the plaintiff either to comply with its previous order or to file an affidavit that such reports did not exist.[212] More than three months after the court issued its order to produce the reports, the appellees moved for dismissal as a sanction for appellants' failure to comply with the court order. At the hearing on this motion, the appellant revealed to the court that such reports as would comply with the court order did, in fact, exist. However, the court refused to accept such documents and, finding that a further continuance would not be an effective sanction, dismissed the case with prejudice.[213]

On appeal, the Ninth Circuit held that

> [w]here it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or orders, it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for noncompliance.[214]

The court found that the trial court had acted within its discretion in dismissing the case with prejudice.[215]

Appellants relied upon the case of *Societe Internationale v. Rogers*[216] in support of their argument that the dismissal of the claim denied

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211. *Id.* at 646-47.

212. *Id.*

213. *Id.* at 647.

214. *Id.*

215. The court's rationale was partially based upon the reasoning found in the Supreme Court opinion of National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam):

> If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts. (emphasis in original).

216. 357 U.S. 197 (1958) (plaintiff failed to comply with a court order to produce documents because such compliance would have been a violation of Swiss law, subjecting the plaintiff to criminal prosecution).

them their right to due process. In *Societe Internationale*, the Court had held that "[r]ule 37 should not be construed to authorize dismissal of [the] complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."[217] However, as the Ninth Circuit pointed out in the case of *G-K Properties*, there was "no suggestion that the appellants . . . failed to comply with the discovery orders because of circumstances beyond their control."[218] *Societe Internationale* was therefore inapposite. The district court decision to dismiss with prejudice the action by the property owners against the redevelopment agency was thus held not to be a denial of due process, and the dismissal was affirmed.[219]

3. Revocation of Driver's License

In *Schuman v. California*,[220] the Ninth Circuit held that the use of a motor vehicle is a liberty interest within the meaning of the due process clause of the fourteenth amendment,[221] but found that, based on the facts presented, the due process requirements had been met. The motorist in *Schuman* was required to take and pass a driving examination. After she failed to pass the driving test at least three times, she was offered the opportunity to appear with counsel at a hearing to determine whether her license should be revoked for lack of skills. The motorist was present at her hearing but, at her own election, was not represented by counsel. Following the hearing, it was recommended that her license be revoked and the motorist was so notified. The Ninth Circuit held that such procedures comported with the requirements of due process and that there was, therefore, no fourteenth amendment violation.[222]

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217. *Id.* at 212.

218. 577 F.2d at 648.

219. *Id.* at 648-49.

220. 584 F.2d 868 (9th Cir. 1978) (per curiam).

221. In so doing the court employed the analysis of the First Circuit, citing Raper v. Lucey, 488 F.2d 748, 752 (1st Cir. 1973) (due process extends to cover the use of a motor vehicle in an application proceeding) and Wall v. King, 206 F.2d 878, 882 (1st Cir.), *cert. denied*, 346 U.S. 915 (1953) (in suspension proceeding court held freedom to use own motor vehicle was protected by due process clause of the fourteenth amendment). *Accord*, Bell v. Burson 402 U.S. 535, 539 (1971)("Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.") *See also* note, *Constitutional Law-Due Process Suspension or Revocation of a Driver's License Without Prior Hearing Deemed Constitutionally Adequate*, 54 N.D.L. REV. 274 (1977).

222. 584 F.2d at 870. *See also* Dixon v. Love, 431 U.S. 105 (1977), which held constitu-

4. Denial of Admission to Practice an Occupation

The Supreme Court has established that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."[223] In 1978, the Ninth Circuit was not called upon to review any case in which the reason for a denial to practice an occupation was at issue. However, in *Sutton v. Lionel*,[224] the Ninth Circuit reviewed the scope of procedural due process required if a license to practice law is to be denied to an applicant.

In *Sutton*, a Nevada bar applicant did not make a timely petition for judicial review after failing the written bar examination for a fourth and, according to the Nevada bar rules, final time. His late petition was denied.[225] The Nevada bar rules provide that upon notice of failure to pass a written examination, a bar applicant has the right to inspect his examination papers as well as the questions given and the ratings received. Additionally, the applicant may file a petition for judicial review within sixty days of being notified of his or her denial of admission to the practice of law.[226] Sutton asserted that the refusal of judicial review denied him his right to due process. However, the Ninth Circuit held that since the board of examiners had acted neither arbitrarily nor capriciously in its dealings with the applicant, the sixty day filing rule as applied in this case was not a denial of procedural due process.[227]

C. Substantive Due Process—Liberty

In *Board of Regents v. Roth*,[228] the Supreme Court held that a decision not to rehire an employee is not in itself sufficient to impose a "stigma or other disability" that forecloses the employee's freedom to partake of other employment opportunities. The Court stated that, "it stretches the concept too far to suggest that a person is deprived of

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tional an Illinois statute providing for full administrative hearing only after the suspension or revocation of a driver's license.

223. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957).

224. 585 F.2d 400 (9th Cir. 1978).

225. *Id.* at 402.

226. *Id.* at 401-02. Such petition must show that the applicant was prevented through fraud, imposition or coercion from passing the written examination by the board of examiners.

227. *Cf.* Tyler v. Vickery, 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) (failure to make provisions for a hearing not violative of procedural due process where the applicant has an unqualified right to re-examination).

228. 408 U.S. 564 (1972).

'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[229] There is therefore no deprivation of an employee's liberty in violation of the fourteenth amendment when an employment contract is not renewed, unless the employer makes charges which might damage the employee's reputation or otherwise interfere with the employee's ability to obtain other employment.[230]

The Ninth Circuit applied the *Roth* rationale in the case of *Haimowitz v. University of Nevada*.[231] Haimowitz claimed, *inter alia*, that his liberty had been infringed upon in violation of the fourteenth amendment since he had not been given tenure.[232] The Ninth Circuit held that the "lack of [any] public statements about [Haimowitz] which [were] false, defamatory or stigmatizing in connection with termination" prevented the employee's fourteenth amendment liberty interests from being implicated.[233]

The scope of the hearing required by procedural due process once a liberty interest of a non-tenured employee is found to be at stake was examined by the Ninth Circuit in *Graves v. Duggane*.[234] Graves, a teacher, had received a letter from the school board stating that the reason her contract had not been renewed was "lack of acceptance by the community of [her] out-of-school activities and the example which [she was] setting for the young people of the school district with [her] personal behavior."[235] The district court ordered that Graves be given an opportunity to clear her name in a post-termination hearing. Applying the Supreme Court's decision in *Codd v. Vegler*,[236] the Ninth Circuit held that the proper scope of such a hearing was only that sufficient to allow the employee to clear her name by determining whether the allegations were true or false.[237] Once such an opportunity has been afforded the injured party, there can be no further claim of denial

229. *Id.* at at 573. *But see id.* at 588-89 (Marshall, J., dissenting) (any denial of government employment requires a due process hearing).

230. *Id.* at 573.

231. 579 F.2d 526 (9th Cir. 1978).

232. For a discussion of Haimowitz's other claims see notes 245-47 & 299-302 *infra* and accompanying text.

233. 579 F.2d at 529 ("His sole contention is that the mere fact of non-retention was sufficiently stigmatizing to implicate a liberty. But such a theory has not been accepted in case law, and we refuse to accept the theory here."). *See also* Codd v. Vegler, 429 U.S. 624, 628 (1977) (per curiam) (only if false and defamatory impression is created and disseminated is a hearing required).

234. 581 F.2d 222 (9th Cir. 1978).

235. *Id.* at 223.

236. 429 U.S. 624 (1977) (per curiam).

237. 581 F.2d at 224. *Cf.* Codd v. Vegler, 429 U.S. 624, 627-28 (1977) (per curiam) (hearing not required if employee does not challenge the substantial truth of the allegations).

of due process on the grounds that such a hearing did not lead to the restoration of her employment.[238] Further, since there was no property interest of the employee involved,[239] the employer could decide not to rehire Graves in the future for other reasons or for no reason at all.[240]

A non-tenured public employee cannot be removed from his position if the dismissal is predicated on an exercise of his first amendment rights.[241] The Supreme Court dealt with this problem in the case of *Mt. Healthy City School District v. Doyle*.[242] The Court identified the issue as one of "striking 'a balance between the interests of the teacher as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.' "[243] The Court held that the employee must show both that his actions were protected by the first amendment and that the actions were a "motivating or substantial" factor in the decision not to rehire. If this is shown, the employer must then show that the decision not to rehire would have been made notwithstanding the disputed conduct.[244]

The Ninth Circuit applied the *Doyle* test to *Haimowitz v. University of Nevada*[245] in reversing a summary judgment against the plaintiff. The court held that since Haimowitz was never afforded the opportunity to show that his constitutionally protected conduct[246] was a motivating factor in his non-retention, it was improper to grant summary judgment against him.[247]

In *deLaurier v. San Diego Unified School District*,[248] the Ninth Circuit relied upon the dictum of the Supreme Court in *Cleveland Board of*

238. 581 F.2d at 224.

239. *Id.*

240. *Id. See* Bishop v. Wood, 426 U.S. 341 (1976) (private communications between employer and employee at time of discharge cannot form the basis for a claim of deprivation of one's liberty); Board of Regents v. Roth, 408 U.S. 564 (1972) (a person is not deprived of liberty when he is not rehired in one job but remains as free as before to seek another). *See generally* Note, *Expected Continued Employment as a Protected Property Right*, 22 LOY. L. REV. 884 (1976).

241. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 275, 281-83 (1977); Haimowitz v. University of Nev., 579 F.2d 526, 529-30 (9th Cir. 1978) (per curiam).

242. 429 U.S. 275, 281-83 (1977) (teacher who was non-tenured and dismissed for, *inter alia*, conveying contents of internal memo to radio media, held entitled to a hearing to determine if non-retention would have occurred absent constitutionally protected conduct).

243. *Id.* at 284 (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

244. 429 U.S. at 287.

245. 579 F.2d 526 (9th Cir. 1978) (per curiam).

246. "[T]here seems little doubt that the speech and conduct described by Haimowitz in his allegations was constitutionally protected." *Id.* at 530.

247. *Id.*

248. 588 F.2d 674 (9th Cir. 1978).

Education v. LaFleur[249] to rule that it was not a denial of due process to mandate that a teacher take a leave of absence at the beginning of the ninth month of pregnancy.[250] In *LaFleur*, the Supreme Court stated that "[t]his court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[251] The Court analyzed the fourth and fifth month mandatory pregnancy leave policies of the Cleveland, Ohio and Chesterfield County, Virginia school boards, respectively, to determine whether they were in violation of the due process clause. The Court reviewed the cases in the context of two legitimate state interests which could possibly justify such mandatory leave policies. The first state interest analyzed was the need for "continuity of instruction."[252] The court concluded that

> the arbitrary cutoff dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction. As long as the teachers are required to give substantial advance notice of their condition, the choice of firm dates later in pregnancy would serve the boards' objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom.[253]

The second state interest scrutinized was the need to keep physically unfit teachers out of the classroom. The Court held, that even assuming that some teachers become physically disabled and therefore perform their duties ineffectively during the latter stages of pregnancy, the rules examined swept too broadly.[254] Such rules violated the due process clause of the fourteenth amendment since they conclusively presumed physical impairment, thus unduly penalizing a female teacher for deciding to bear a child.[255]

The instructor in *deLaurier* had requested permission to teach until the onset of labor and had claimed that the district's ninth-month mandatory leave policy was violative of fourteenth amendment due process. The Ninth Circuit analyzed her claim with the same two-step approach applied by the Court in *LaFleur*.[256] The Ninth Circuit considered the state interest in continuity of instruction but held that "contrary to the situation in *LaFleur*, the districts' ninth-month rule [was]

249. 414 U.S. 632 (1974).
250. 588 F.2d at 681-83.
251. 414 U.S. at 639-40.
252. *Id.* at 642.
253. *Id.* at 643.
254. *Id.* at 644.
255. *Id.* at 644, 648.
256. 588 F.2d at 681-83.

not needless and arbitrary."[257] The court reasoned that the district terminated the teacher's freedom of choice precisely at the point of greatest unpredictability and that setting a date any later would greatly diminish the school's ability to rely upon any firm date.[258] Pursuant to the implications of the dictum in *LaFleur* that the school district had the right to establish some date for mandatory leave, the Ninth Circuit held the San Diego district's ninth-month rule to be reasonable.

As to the "necessity of keeping physically unfit teachers out of the classroom," the Ninth Circuit held that contrary to the case of *LaFleur* "the district judge was entitled to conclude that the ninth-month maternity leave policy was not condemned by the irrebuttable presumption analysis."[259] The court reached this decision by relying on the statement in *LaFleur* that there were exceptions to the irrebuttable presumption doctrine.[260] The Ninth Circuit reasoned that *deLaurier* came within the exception since the possibility of labor beginning in the classroom during the ninth month increased dramatically. The Ninth Circuit therefore held that the ninth-month maternity leave policy in *deLaurier* was "outside the scope of the conclusive presumption analysis."[261]

D. Substantive Due Process—Property

1. Claims of Entitlement

a. Statutory

In its struggle to define property interests which are subject to constitutional due process, the Supreme Court has held that certain govern-

257. *Id.* at 682.

258. *Id.*

259. *Id.* at 683. "Although no Supreme Court decision has formally overruled *LaFleur* or other 'irrebuttable presumption' decisions, it is apparent that the use of the doctrine has been severely limited." *Id.* at 683 n.16.

260. *Id.* at 682. The *LaFleur* Court addressed itself to the exceptions to the irrebuttable presumption doctrine.

> We are not dealing in these cases with maternity leave regulations requiring a termination of employment at some firm date during the last few weeks of pregnancy. We therefore have no occasion to decide whether such regulations might be justified by considerations not presented in these records—for example, widespread medical consensus about the 'disabling' effect of pregnancy on a teacher's job performance during these latter days, or evidence showing that such firm cutoffs were the only reasonable method of avoiding the possibility of labor beginning while some teacher was in the classroom, or proof that adequate substitutes could not be procured without at least some minimal lead time and certainty as to the dates upon which their employment was to begin.

414 U.S. at 647 n.13.

261. 588 F.2d at 683.

mental benefits to which recipients have a "statutory entitlement" constitute one such form of property.[262] While the Court has yet to define a "statutory entitlement," it has stated that the determination turns on a finding of whether one has a mere "unilateral expectation" or a "legitimate claim of entitlement" to the benefit.[263] The Court has further stated that the grounds for such distinction can be found in the independent source creating the interest rather than in the Constitution.[264]

In 1978, the Ninth Circuit reviewed several cases which required a finding of whether a constitutionally protected "property" interest was involved. In *Moore v. Johnson*[265] and in *City of Santa Clara v. Andrus*,[266] the court was required to distinguish between mere "unilateral expectations" and those "statutory entitlements" which form a type of property within the meaning of the due process clause.[267]

The complaint in *Moore v. Johnson*[268] arose out of the relocation of certain veterans from a Veterans Administration facility. The plaintiffs alleged that such relocation without a prior hearing was a denial of due process and that the post-relocation hearing that was afforded was defective. The Ninth Circuit held that even if the complaint was viewed as a constitutional challenge to the veterans' benefits legislation[269] as opposed to a challenge to the Administrator's discretionary decision,[270] the plaintiffs had no "property" or "liberty" interest protected by the due process clause of the fifth amendment.[271]

As the Supreme Court stated in *Board of Regents v. Roth*,[272] property

262. The Court has, however, defined certain benefits as "statutory entitlements" deserving of the protections of the due process clause. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (public education); Board of Regents v. Roth, 408 U.S. 564 (1972) (dictum) (tenured public employment); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare payments).

263. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

264. *Id. See* Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355, 359 (1978).

265. 582 F.2d 1228 (9th Cir. 1978).

266. 572 F.2d 660 (9th Cir.), *cert. denied*, 99 S. Ct. 177 (1978).

267. In other cases, the Ninth Circuit reviewed the issue of whether non-tenured public employees have any "property" or "liberty" interests within the meaning of the due process clause. *See* text accompanying notes 299-304 *infra*.

268. 582 F.2d 1228 (9th Cir. 1978).

269. 38 U.S.C. §§ 601-628 (1976).

270. The court was in doubt as to whether to regard the complaint as a constitutional challenge to an Act of Congress or as a challenge to the decision of the Veteran's Administrator, and therefore dealt with both possibilities. The court found that if the complaint were a challenge to the Administrator's decision, the plaintiffs could be denied judicial review under 38 U.S.C. § 211(a) (1976). 582 F.2d at 1232.

271. *Id.* at 1233-34.

272. 408 U.S. 564 (1972).

interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source."[273] The Ninth Circuit therefore looked to 38 U.S.C. section 610[274] as the source of the plaintiffs' interests. It held that the plaintiffs had a mere unilateral expectation in their choice of a facility which did not rise to the level of a property interest.[275] In so ruling the court noted that 38 U.S.C. section 610 provides the administrator with a great deal of flexibility in determining "the use to which the Administration's facilities are to be put."[276] Since the statute grants the administrator such wide discretion in his decision whether to provide the benefits which the plaintiffs were receiving, it certainly could not be read as granting the recipients a "legitimate claim to entitlement" to particular benefits at a specific facility.[277]

The court's reasoning in characterizing these interests as mere unilateral expectations as opposed to statutory entitlements is sound. However, when the court further supported its position by declaring that the burden of relocation was "not of the magnitude that commends a constitutional response . . . ,"[278] it confused the process of determining the form of hearing required by the due process clause with the issue of whether the requirements of due process were applicable at all.[279] The dictum of the court regarding the burden of relocation is relevant, then, only to the procedures that would have been required by due process and not to whether the interests involved are "property" interests protected by the due process clause.

In *City of Santa Clara v. Andrus*,[280] the Ninth Circuit reviewed a claim by the city of Santa Clara that it had a statutory entitlement to receive, and therefore a property interest in, low-cost hydroelectric power generated by the Central Valley Project in California. The source of such a claim of entitlement was the Reclamation Project Act

273. *Id.* at 577.

274. 38 U.S.C. § 610 (1976) ("*Eligibility for hospital, nursing home, domiciliary care* . . . (b) The Administrator, within the limits of Veterans' Administration facilities, *may* furnish domiciliary care to . . . ." (emphasis added)).

275. 582 F.2d at 1233.

276. *Id.* at 1234.

277. *Id.*

278. *Id.*

279. *See* Board of Regents v. Roth, 408 U.S. 564 (1972):

> A weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake.

Id. at 570-71 (emphasis in original).

280. 572 F.2d 660 (9th Cir.), *cert. denied*, 99 S. Ct. 177 (1978).

of 1939,[281] under which the Secretary of the Interior is required to give a preference to public entities over private entities "in the marketing of power generated by federal reclamation projects."[282]

The court construed the applicable source of the interest at stake to be a preference for public entities over private parties in the Secretary of the Interior's decision as to the allocation of such power. Since the Ninth Circuit had previously held in *Arizona Power Pooling Association v. Morton*[283] that such a preference clause constituted a requirement that the Secretary so act,[284] the court held that this particular preference constituted a statutory entitlement on the part of the city of Santa Clara which was protected by the due process clause.[285]

With regard to any preference over other public entities, however, the court ruled that Santa Clara had no legitimate claim to entitlement. Under the Act, the Secretary is not directed as to the method of allocation among the public entities, and is given such wide discretion as would allow the Secretary "[if] he chooses . . . [to] . . . market all available CVP power to a single public entity without running afoul of the preference clause."[286] The court reasoned that the rationale of *Board of Regents v. Roth*[287] was applicable in that the decision-makers in each case (the school board and the Secretary of the Interior) had such unbridled discretion that reasons were not required to justify a decision whether to bestow a benefit upon the potential recipient. Thus, the plaintiff in *City of Santa Clara v. Andrus* had no statutory entitlement to a preference over other public entities; rather, it possessed a mere abstract concern in receiving a part of the allotment of power made to all public entities.[288]

In both *Moore v. Johnson* and *City of Santa Clara v. Andrus*, the Ninth Circuit defined "statutory entitlement" in the negative. Both cases hold that statutes which give an administrator complete discretion over the choice of recipient of statutory benefits create mere unilateral

281. 43 U.S.C. § 485h(c) (1964) reads in pertinent part: "Provided further, that in said sales or leases [of electric power] preference *shall* be given to municipalities and other public corporations or agencies . . . ." (emphasis added).

282. 572 F.2d at 667. *See* Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

283. 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

284. *Id.* at 727 ("The preference clause clearly calls for the Secretary to defer to the stated congressional objective of offering the government's excess power allotment to public entities first, subject only to considerations of overall project efficiency. . . .").

285. 572 F.2d at 667.

286. *Id.*

287. 408 U.S. 564 (1972).

288. 572 F.2d at 675-76.

expectations and cannot create the type of statutory entitlements protected as "property" interests under the due process clause.[289] In *City of Santa Clara v. Andrus* the Ninth Circuit further stated that a protected "property" interest is created when an administrator is required to follow a specific statutory directive as to the distribution of a benefit.[290]

b. Non-Statutory

In *Board of Regents v. Roth*,[291] the Supreme Court held that a professor who had been hired for a fixed term, without tenure, had no property right within the meaning of the fourteenth amendment due process clause to continued employment. The Court found that any such property interest in continued employment "was created and defined by the terms of his appointment."[292] Since those terms specifically provided for a particular termination date and did not contain a provision for renewal, the Court held that Roth had only an "abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment."[293]

However, in *Perry v. Sindermann*,[294] the companion case to *Roth*, the Court recognized that there are exceptions to the general rule that only a written contract with explicit tenure provisions gives rise to a property interest protected by the fourteenth amendment. This exception occurs when officials act in such a manner as to give rise to a reasonable expectation of continued employment. As the Court stated in *Perry*:

> A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has

289. *See also* Note, *Statutory Entitlement and the Concept of Property*, 86 YALE L. REV. 695, 704 (1977).

290. 572 F.2d at 676-77.

291. 408 U.S. 564, 578 (1972) (teacher hired with one year employment contract, the terms of which "secured absolutely no interest" in continued employment, did not have a sufficient property interest to require a hearing when he was not rehired).

292. *Id.* at 578.

293. *Id.* (emphasis in original).

294. 408 U.S. 593, 602-03 (1972) (teacher who had been employed in the Texas state college system for ten years under a continuous series of one year contracts which did not have tenure provisions was entitled to a hearing on his claim of having a property interest in continued employment when he was not offered a contract for an eleventh year).

> employed a process by which agreements, though not formalized in writing, may be "implied."[295]

This exception has become known as "de facto" tenure.[296] The de facto tenure doctrine was used in *Soni v. Board of Trustees*,[297] to support a finding of a property interest in continued employment where tenure had not been granted under the University's tenure system. The Sixth Circuit held that a university professor who was an alien and therefore ineligible for tenure nevertheless had a property interest protected by the fourteenth amendment because there was "sufficient objective evidence to vest in plaintiff a cognizable property interest in the form of a reasonable expectation of future and continued employment."[298]

The Ninth Circuit dealt with the application of the de facto tenure doctrine in *Haimowitz v. University of Nevada*.[299] In *Haimowitz*, a non-tenured faculty member whose employment contract was not renewed claimed to have a protected property interest in continued employment created by the actions of several of his fellow faculty members. The Ninth Circuit held that since the university had a formal, written tenure system, of which Haimowitz had full knowledge, the doctrine of de facto tenure was not applicable. The court thus distinguished *Haimowitz* from the case of *Perry v. Sinderman*[300] since in *Perry* there was no written tenure system, stating that "the existence of a formal code governing the granting of tenure precludes a reasonable expectation of continued employment [property interest] absent extraordinary circumstances."[301] The court also distinguished *Soni* as being limited to its "singularly unique facts"[302] and denied Haimowitz's claim that he had a property interest protected by the fourteenth amendment.

This strict application of the de facto tenure doctrine was continued

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295. *Id.* at 601-02.

296. The de facto tenure doctrine is based on the concept of an implied contract. *See generally* 3 A. CORBIN, CORBIN ON CONTRACTS §§ 561-572A (1960). "The process is generally regarded by the court as one of true interpretation of the words of the contract, in light of our language, habits and other circumstances." *Id.* at 278.

297. 513 F.2d 347, 349-50 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976) (teacher who was prevented from obtaining tenure because of a state statute forbidding the granting of tenure to non-citizens, but who was accorded all rights and privileges of a tenured faculty member, was entitled to a hearing to protect his fourteenth amendment property interests).

298. *Id.* at 350 (quoting Soni v. Board of Trustees, 376 F. Supp. 289, 292 (E.D. Tenn. 1974).

299. 579 F.2d 526 (9th Cir. 1978) (per curiam).

300. 408 U.S. 593 (1972).

301. 579 F.2d at 528.

302. *Id.*

by the Ninth Circuit in *Davis v. Oregon State University*.[303] Davis claimed that conversations with his department chairman had established a binding employment contract, a written tenure system notwithstanding. The Ninth Circuit again refused to extend *Perry*, affirming the lower court's finding that Davis had not been granted de facto tenure and therefore did not have a property interest protected by the fourteenth amendment.[304]

The clear teaching of *Haimowitz* and *Davis* is that a de facto tenure claim will only be viable if there is no written tenure policy or if there are extraordinary circumstances, such as those in *Soni*.

c. *Military Pay*

In *Costello v. United States*,[305] the Ninth Circuit considered whether military retirement pay could be altered prospectively without offending due process. Pursuant to an Act of Congress in 1963, retirement pay was calculated with reference to the cost of living index rather than the active duty pay scales, as it had been previously. After concluding that appellants, who had retired prior to the 1963 statutory changes, had "no contract right to have their compensation computed under the old law,"[306] the court confronted the central issue: whether such retirement pay was deferred compensation which was fully earned at the date of retirement, or whether it was compensation for continuing military service. Following the holdings of *Lemly v. United States*[307] and *Abbott v. United States*,[308] the Ninth Circuit ruled that "retirement pay does not differ from active duty pay in its character as pay for continuing military service."[309] Based on this interpretation of military retirement pay, the Ninth Circuit ruled that such pay could be altered prospectively by Congress without offending due process.[310]

This holding is supported by the holding of the Supreme Court in *United States v. Larionoff*.[311] In *Larionoff*, the Court restated that Congress may prospectively reduce the future pay of members of the armed services in spite of any general expectations to the contrary,

303. 591 F.2d 493 (9th Cir. 1978).
304. *Id.*, slip op. at 3694.
305. 587 F.2d 424 (9th Cir. 1978).
306. *Id.* at 426.
307. 75 F. Supp. 248 (Ct. Cl. 1948). The *Lemly* court distinguished a "pension" for past services rendered from "retirement pay."
308. 200 Ct. Cl. 384, *cert. denied*, 414 U.S. 1024 (1973).
309. 587 F.2d at 427.
310. *Id.* at 427-28.
311. 431 U.S. 864 (1977).

whereas Congress may not deprive service members of compensation for services already rendered.[312] Thus, a determination that military retirement pay is compensation for continuing, future services, as opposed to compensation for past services rendered, supports the Ninth Circuit's holding that such retirement pay can be altered prospectively without offending due process.[313]

2. Last Employer Doctrine

The last employer doctrine states that it is not a denial of due process to impose full liability for employment related injuries upon the injured employee's last employer, even though the injuries may be a cumulative result of employment by several different employers over the course of the employee's work life.[314] This doctrine was articulated by Judge Medina of the Second Circuit in *Travelers Insurance Co. v. Cardillo*[315] and was first followed by the Ninth Circuit in the 1978 case of *Cordero v. Triple A Machine Shop*.[316]

In *Cordero*, the claimant was a welder who had worked for various employers for over thirty years. The Triple A Machine Shop had been one of the claimant's employers sporadically during this time and had been his employer from May 1972 until August 1972, when he was laid off for lack of work. The claimant returned to Triple A for three days in October 1972, at which time he was unable to continue work due to a pulmonary condition.[317] In November 1975, an administrative law judge found Cordero to be permanently and totally disabled under the Longshoremen's and Harbor Workers' Compensation Act as the result of a pulmonary impairment arising out of his employment as

312. *Id.* at 879 ("No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn.").

313. 587 F.2d at 428. In *Costello*, the Ninth Circuit did not deal with the issue of whether "retirement pay" which is fully earned at retirement can be altered prospectively without offending due process, but assumed, arguendo, that it could not be divested without compensation. *Id.* at 427 n.2. *See* Board of Regents v. Roth, 408 U.S. 564, 576 (1972) ("The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.").

314. Traveler's Ins. Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (Coal Mine Health and Safety Act of 1969 constitutional); National Indep. Coal Operator's Ass'n v. Brennan, 372 F. Supp. 16 (D.D.C.), *aff'd*, 419 U.S. 955 (1974) (regulations promulgated under Coal Mine Health and Safety Act of 1969 establishing liability of operators for injuries to employees do not violate the operators' due process or equal protection rights).

315. 225 F.2d at 145.

316. 580 F.2d 1331 (9th Cir. 1978).

317. *Id.* at 1333.

a welder.[318] The administrative law judge also found Triple A to be solely liable for Cordero's disability benefits because it was his last employer. Triple A asserted that this finding violated its due process rights.[319]

The Ninth Circuit stated that the rationale underlying the last employer doctrine of *Cardillo* is that "all employers will be the last employer a proportionate share of the time."[320] Similarly, in *National Independent Coal Operator's Association v. Brennan*,[321] the district court of the District of Columbia, analyzing the apportionment of liability for miners' pneumoconiosis (black lung disease) under the federal Coal Mine Health and Safety Act[322] stated that

> it does not violate due process of law to place full liability on one of several operators responsible for the pneumoconiosis. . . . [I]t is consonant with due process to presume that an operator for whom a miner worked for one year contributed to the miner's pneumoconiosis since there is a rational connection between the fact proven—the one-year employment—and the fact presumed—the contribution to the development of the disease.[323]

Although the injured claimant in *National Independent Coal Operator's Association* had been employed for an accumulated period of one year by the employer on whom liability was placed, and the claimant in *Cordero* had only been employed for a little more than three months by the Triple A Machine Shop, the Ninth Circuit stated that this did not in any way dilute the principles established in *Cardillo*.[324] The court held that there was a "rational connection between the length of employment proven and the contribution to the development and aggravation of the disease"[325] and that the application of the *Cardillo* last-employer rule did not, therefore, offend either the due process or the equal protection clauses of the Constitution.[326]

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318. *Id.*
319. *Id.* at 1335-36.
320. *Id.* at 1336.
321. 372 F. Supp. 16 (D.D.C.), *aff'd*, 419 U.S. 955 (1974) (regulations promulgated under Coal Mine Health and Safety Act establishing liability of responsible operators do not violate the operators' due process or equal protection rights).
322. 30 U.S.C. §§ 801-804, 811-821, 841-846, 861-878, 901, 902, 921-924, 931-936, 951-960 (1976).
323. 372 F. Supp. at 24.
324. 580 F.2d at 1336.
325. *Id.*
326. *Id.* at 1337.

IV. EQUAL PROTECTION

In recent years, the Supreme Court has applied a two-tiered approach to questions regarding the equal protection clause of the fourteenth amendment. When a classification is based upon a "suspect"[327] criterion or involves a "fundamental right,"[328] the Court has subjected the classification to "strict scrutiny."[329] On the other hand, the Court has held that when neither a fundamental right nor a suspect classification is involved, the classification need only pass a "rational basis" test to be constitutionally valid.[330]

It is critical to any analysis in this area, then, to first determine the basis upon which a classification depends. For example, the issue in the Supreme Court case of *Morton v. Mancari*[331] was whether an employment preference for Indians in the Bureau of Indian Affairs constituted a classification based upon race. The Court stated that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."[332] The Court held that the classification did not offend the concept of equal protection[333] because the preference was "reasonable and rationally designed to further Indian self-government . . . ."[334]

The Ninth Circuit recently applied the holding of *Mancari* to *Puget*

327. *See, e.g., In re* Griffiths, 413 U.S. 717 (1973) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Korematsu v. United States, 323 U.S. 214 (1944) (national origin).

328. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting rights); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation). *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), which held that education is not a fundamental right. The Ninth Circuit recently followed this ruling in Guadalupe Org., Inc. v. Tempe Elem. School Dist., 587 F.2d 1022 (9th Cir. 1978).

329. *See In re* Griffiths, 413 U.S. 717 (1973).

330. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955). In 1978, the Ninth Circuit had occasion to apply the rational basis test in the case of Leigh v. United States, 586 F.2d 121 (9th Cir. 1978) (per curiam), in which the court upheld Oregon's decision to limit retroactivity of its new comparative negligence statutes to cases litigated in the trial court after the statutes' effective date as being rationally related to a legitimate state interest. *Id.* at 123. The Ninth Circuit also applied the rational basis test in Guadalupe Org., Inc. v. Tempe Elem. School Dist., 587 F.2d 1022, 1027 (9th Cir. 1978) ("There exists no constitutional duty imposed by the Equal Protection Clause to provide bilingual-bicultural education such as the appellants request.").

331. 417 U.S. 535 (1974).

332. *Id.* at 554.

333. This case was decided under the due process clause of the fifth amendment as it incorporates the concepts of equal protection under the fourteenth amendment. *Id.* at 551. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

334. 417 U.S. at 555. Had the Court determined that this was a racial classification, it

Sound Gillnetters Association v. United States District Court.[335] It held that orders of certain district courts allocating fishing rights between treaty Indians and all others was not a classification by race. The court cited *Mancari* for the proposition that this was a political rather than a racial classification.[336] It was able to support the position because, as the court noted, "[a]n ethnic Indian who is not a member of a tribe with reserved fishing rights is in the same position with respect to Washington fish and game laws as any other citizen of the state."[337] The significance of this finding was that, as in *Mancari*, the classification became subject to the rational basis test rather than the stringent rules of strict scrutiny.

Out of the arena of gender-based classification cases there has emerged a third or middle tier to the traditionally two-tiered approach to equal protection analysis. As explained by one commentator, "[T]he middle tier approach does not accept at face value the legislative justifications for sex discrimination, as does the minimum scrutiny standard, but neither does it demand the stringent compelling state interest germane to strict scrutiny."[338] However, before a court can decide the degree of scrutiny against which to measure a classification plan, it must answer the threshold question of whether the plan constitutes gender-based discrimination.

In *De La Cruz v. Tormey*,[339] the Ninth Circuit was required to determine the narrow issue of "whether a statutory and constitutional challenge to facially neutral but allegedly discriminatory official action may be resolved on the pleadings."[340] To resolve this issue, the court reviewed a series of recent Supreme Court cases[341] dealing with govern-

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would have been compelled to subject it to the much more arduous standards of strict scrutiny.

335. 573 F.2d 1123 (9th Cir.), *cert. granted*, 99 S. Ct. 277 (1978). This case is merely one in a series of complex litigations concerning the tribal fishing rights of Indians in the northwest United States. The issue discussed here, while obviously important, was not the central issue of dispute among the parties.

336. *Id.* at 1127.

337. *Id.* at 1130.

338. Comment, *Gender-Based Discrimination and Equal Protection: The Emerging Intermediate Standard*, 29 U. FLA. L. REV. 582, 586 (1977). *See* Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). In deLaurier v. San Diego Unified School Dist., 588 F.2d 674 (9th Cir. 1978), the Ninth Circuit held that a ninth-month pregnancy leave policy did not offend equal protection because it "substantially protected [state] interests." *See* text accompanying notes 248-261, *supra*.

339. 582 F.2d 45 (9th Cir. 1978).

340. *Id.* at 47 (Palmieri, J., sitting by designation).

341. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974).

mental action which, while not facially discriminatory, has the effect of establishing a gender-based classification scheme.[342] The court stated that when dealing with an allegation based upon a theory of discriminatory effect,[343] the litigants "are required to prove two essential elements before they can be entitled to relief under the Fourteenth Amendment: discriminatory effect and invidious discriminatory intent or purpose."[344] The court found its support for this proposition in both *Washington v. Davis*[345] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[346]

The plaintiffs in *De La Cruz* were young women of low economic means who alleged that the San Mateo Community College District had denied them equal access to educational opportunities because of the district's policy of "refusing to allow child care facilities on campuses, refusing to apply for or accept funds for the establishment or maintenance of child care centers, and refusing to allow District funds to be used for these purposes."[347] The plaintiffs claimed, *inter alia*, that these actions violated "the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because they constitute intentional, invidious, gender-based discrimination and because they are arbitrary and unrelated to the legitimate goal of providing educa-

342. The Ninth Circuit did not reach the issue of what standard of review should apply to acts of gender-based discrimination. 582 F.2d at 59 ("While it is not clear what level of 'scrutiny' is applicable on the novel facts of this case, we cannot disregard plaintiffs' assertion that, in some respects, defendants' actions promoted no legitimate state interest and were completely without rational basis.").

343. The theory of "discriminatory effect" is to be distinguished from the concept of governmental actions which are facially discriminatory. *See generally* Washington v. Davis, 426 U.S. 229 (1976).

344. 582 F.2d at 51 (footnote omitted). *See* Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961, 1000-01:

> The Supreme Court is now completely committed to a rule requiring proof of discriminatory purpose in all types of racial discrimination cases under the equal protection clause. Only Justices Brennan and Marshall did not join the Court's opinion on this issue in *Davis* [Washington v. Davis, 426 U.S. 229 (1976)], arguing that the statutory issues made it unnecessary for them to reach the constitutional question. Seven months later, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* [429 U.S. 252 (1977)], however, they too endorsed the requirement that purposeful discrimination is a prerequisite to an equal protection violation.

345. 426 U.S. 229 (1976). The Court "sustained the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department." *Id.* at 232.

346. 429 U.S. 252 (1977). "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 264-65.

347. 582 F.2d at 47. The court quoted the complaint at length on pages 48-49.

tion."[348]

In *Geduldig v. Aiello*,[349] the Supreme Court upheld California's exclusions of disabilities resulting from pregnancy from its definition of "disability" under its state disability insurance program.[350] The Court ruled that by such an exclusion "California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted underinclusiveness of the set of risks that the State has selected to insure."[351] The Court found the state's actions to involve merely decisions as to the economic allocation of its resources, stating that "[p]articularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point."[352] Two years later, in *General Electric Co. v. Gilbert*,[353] the Court put aside any doubt as to its intended meaning in *Geduldig* by stating that the "reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability-benefits plan was not in itself discrimination based on sex."[354] And, in *Nashville Gas Co. v. Satty*,[355] the Court reaffirmed its position but drew a distinction between not extending "to women a benefit that men cannot and do not receive . . . [and] impos[ing] on women a substantial burden that men need not suffer."[356]

The majority in *De La Cruz*, however, distinguished these three cases from the case at hand on the grounds that

> [T]he essence of plaintiffs' grievance is that the absence of child care facilities renders the *included* benefits less valuable and less available to wo-

348. *Id.* at 47.

349. 417 U.S. 484 (1974).

350. *Id.* at 497.

351. *Id.* at 494.

352. *Id.* at 495.

353. 429 U.S. 125 (1976). In *Gilbert*, the Court applied the reasoning of *Geduldig* to a case brought under Title VII of the Civil Rights Act of 1964 and validated General Electric's exclusion of pregnancy-related disabilities from its Weekly Sickness and Accident Insurance Plan.

354. *Id.* at 135.

355. 434 U.S. 136 (1977).

356. *Id.* at 142.

> Two separate policies are at issue in this case. The first is petitioner's practice of giving sick pay to employees disabled by reason of nonoccupational sickness or injury but not to those disabled by pregnancy. The second is petitioner's practice of denying accumulated seniority to female employees returning to work following disability caused by childbirth.

Id. at 138 (footnote omitted). The second practice was held to be a burden in violation of Title VII of the Civil Rights Act of 1964. *Id.* at 143.

> men; in other words, that the effect of the District's child care policy is to render the entire "package" of its educational programs of lesser worth to women than to men.[357]

The majority held that since it failed to appear "to a certainty under existing law that no relief [could] be granted under any set of facts that might be proved in support of plaintiffs' claim,"[358] and since plaintiffs alleged both a discriminatory effect and "a course of conduct by the defendants susceptible of an inference of intentional discrimination,"[359] it was improper to dismiss the claim on the pleadings.[360]

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357. 582 F.2d at 56.

358. *Id.* at 48.

359. *Id.* at 58.

360. During the survey period, the Ninth Circuit distinguished *De La Cruz* in the case of Guadalupe Org., Inc. v. Tempe Elem. School Dist., 587 F.2d 1022 (9th Cir. 1978).

> There we held that a complaint that alleged 'a course of conduct by defendants susceptible of an inference of intentional discrimination' on the basis of sex contrary to the Equal Protection Clause survived a motion to dismiss. Appellants here alleged no course of conduct from which an inference of intentional discrimination can be drawn. They acknowledge that the remedial instruction in English is sufficient to allow Mexican-American and Yaqui students to participate effectively in the educational program. A failure to do more constitutes no intentionally discriminatory course of conduct condemned by the Equal Protection Clause.

Id. at 1028-29 (citation and footnote omitted).