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FOURTEENTH ANNUAL TENTH CIRCUIT SURVEY

THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHIEF JUDGE WILLIAM J. HOLLOWAY, JR.

The son of a former Oklahoma governor, Judge Holloway was born in Hugo, Oklahoma, in 1923. He and his family moved to Oklahoma City in 1927. He served as a First Lieutenant in the Army during World War II. He then returned to complete his undergraduate studies at the University of Oklahoma, receiving his B.A. in 1947. He graduated from Harvard Law School in 1950.

In 1951 and 1952, Judge Holloway was an attorney with the Department of Justice in Washington, D.C. Afterwards, he returned to private practice in Oklahoma City where he was appointed to the United States Court of Appeals for the Tenth Circuit by Lyndon B. Johnson in 1968 and became Chief Judge on September 15, 1984. He is a member of Phi Beta Kappa and Phi Gamma Delta.

JUDGE JAMES K. LOGAN

Judge Logan was born in Quenemo, Kansas, in 1929. He received his A.B. from the University of Kansas in 1952 and was graduated *magna cum laude* from Harvard Law School in 1955. He went on to be U.S. Circuit Judge Walter Huxman's law clerk in 1956 and then practiced with the Los Angeles firm of Gibson, Dunn & Crutcher. He became Dean of the University of Kansas Law School in 1961 and served in the capacity until 1968.

Since 1961 he has been a visiting professor at Harvard Law School, The University of Texas Law School, Stanford University, and the University of Michigan. He was a commission for the U.S. District Court from 1964 until 1967 and was a candidate for the U.S. Senate in 1968.

Judge Logan is a Rhodes Scholar, a member of Phi Beta Kappa, Order of the Coif, Beta Gamma Sigma, Omicron Delta Kappa, Pi Sigma Alpha, Alpha Kappa Psi, and Phi Delta Phi. He has co-authored numerous books on estate planning and administration. In 1977 he was appointed to the United States Court of Appeals for the Tenth Circuit.

JUDGE JAMES E. BARRETT

The son of the late Frank A. Barrett, who served as Wyoming's Congressman, Governor, and U.S. Senator, Judge Barrett was born in 1922 in Lusk, Wyoming. He attended the University of Wyoming for two years prior to his service in the Army during World War II. After the War, he attended Saint Catherine's College at Oxford University. He received his LL.B. from the University of Wyoming in 1949. In 1973 he was given the Distinguished Alumni Award from his alma mater.

Prior to his appointment, Judge Barrett had been involved in private practice in Lusk and had served as County and Prosecuting Attorney for Niobrara County; Town Attorney for the towns of Lusk and Manville; and attorney for the Niobrara County Consolidated School District. In 1967 he was appointed by Governor Stanley K. Hathaway to serve as Wyoming Attorney General and he remained in that position until 1971.

Judge Barrett is a member of the Judicial Conference Subcommittee on Federal Jurisdiction, the U.S. Foreign Intelligence Surveillance Court of Review, and is a trustee of Saint Joseph's Children's Home. He was appointed to the United States Court of Appeals for the Tenth Circuit in 1971.

JUDGE MONROE G. McKAY

Judge McKay was born in Huntsville, Utah, in 1929 and lives in Provo. He graduated from Brigham Young University in 1957 with high honors. He received his J.D. from the University of Chicago and became the law clerk for Justice Jesse A. Udall of the Arizona Supreme Court in 1960. From 1961 to 1974, Judge McKay was with the firm of Lewis and Roca in Phoenix, taking two years out to serve as Director of the United States Peace Corps in Malawi, Africa. He was a law professor at Brigham Young University from 1974 until he was appointed to the United States Court of Appeals for the Tenth Circuit in 1977.

JUDGE STEPHANIE K. SEYMOUR

Judge Seymour was born in Battle Creek, Michigan, in 1940. She graduated from Smith College, *magna cum laude*, in 1962 and earned her J.D. from Harvard Law School in 1965. She was admitted to the Oklahoma bar in 1965.

Judge Seymour has practiced law in

Boston, Massachusetts, 1965-1966; in Tulsa, Oklahoma, 1967; and Houston, Texas, 1968-1969. Most recently, she has practiced with the Tulsa firm of Doerner, Stuart, Saunders, Daniel & Anderson from 1971 to 1979. Judge Seymour is a member of Phi Beta Kappa, and the American, Oklahoma, and Tulsa County Bar associations. She served as a bar examiner from 1973 through 1979.

Judge Seymour was appointed to the United States Court of Appeals for the Tenth Circuit by President Carter in 1979.

JUDGE JOHN P. MOORE

Judge Moore was born in Denver, Colorado in 1934 and still lives in Denver. He received his B.A. from the University of Denver in 1956 and received his LL.B. from the University of Denver College of Law in 1959. Following graduation he practiced as an associate at the Denver law firm of Carbone & Walsmith until 1962. From 1962 through 1975 Judge Moore worked in the Colorado Attorney General's Office. He served as Assistant Attorney General from 1962 through 1967, as Deputy Attorney General from 1967 through 1972, and, ultimately, as Attorney General for the State of Colorado from 1972 through 1975.

In January of 1975, Judge Moore was appointed to the Bankruptcy Court of the United States District Court for the District of Colorado. Judge Moore served as a bankruptcy judge until July of 1982 when he was appointed to the United States District Court for the District of Colorado by President Reagan. President Reagan appointed Judge Moore to the United States Court of Appeals for the Tenth Circuit in May of 1985.

JUDGE STEPHEN H. ANDERSON

Judge Anderson was born in 1932. He attended Eastern Oregon College between 1949 and 1951, and Brigham Young University in 1955 and 1956. He received an LL.B. degree from the University of Utah College of Law in 1960. Judge Anderson served in the United States Department of Justice between 1960 and 1964. He was a trial attorney in the tax division of the Department of Justice. In 1964, he became a member of the law firm of Ray, Quinney, and Webeker, P.C., in Salt Lake City, Utah. From November, 1985, until the present, Judge Anderson has served as a Circuit Judge on the United States Court of Appeals for the Tenth Circuit.

Judge Anderson has appeared as lead counsel in 17 courts throughout the United States. He has served as President and Commissioner of the Utah State Bar. He was a member of the Utah Judicial Counsel and the Utah Judicial Conduct Commission. In addition, Judge Anderson presently serves as the chairman of the Utah Law and Justice Center Committee and is a member of the Fellows of the American Bar Foundation. Judge Anderson has been a director of three major corporations and has held prestigious positions with the Salt Lake Area Chamber of Commerce and the University of Utah Law School Alumni Association.

JUDGE DEANELL R. TACHA

Deanell Reece Tacha grew up in Scandia, Kansas. She graduated from the University of Kansas in 1968 with a B.A. degree with honors in American Studies. At K.U., she was a member of Mortar Board and Phi Beta Kappa. She attended law school at the University of Michigan, Ann Arbor, Michigan, and received a J.D. degree there in 1971. In the spring of 1971, Judge Tacha was selected to be a White House Fellow. During her fellowship, she was sent on official trips to Southeast Asia, East and Central Africa, and the European Economic Community. Following her year as a White House Fellow, Judge Tacha was an associate with the law firm of Hogan and Hartson in Washington, D.C. In 1973, she returned to Kansas and was engaged in a private law practice in Concordia, Kansas.

In the fall of 1974, she was appointed to the faculty of the Law School at the University of Kansas. In 1979, she was appointed as the Associate Vice Chancellor for Academic Affairs, and in 1981 the Vice Chancellor for Academic Affairs. In December of 1985, President Reagan appointed her to the United States Court of Appeals for the Tenth Circuit, where she now serves as a Circuit Judge. With her appointment to the Court of Appeals, she became the seventeenth woman to be appointed to that court in its nearly 200 year history.

BOBBY R. BALDOCK

Judge Bobby R. Baldock was born in Rocky, Oklahoma, in 1936 and grew up in Hagerman and Roswell, New Mexico. He is a graduate of the New Mexico Military Institute in Roswell (1956) and received his J.D. from the University of Arizona College of Law (1960). He is a member of the New Mexico and Arizona bars. Judge Baldock was appointed to the United States Court

of Appeals for the Tenth Circuit in late 1985. Since 1983, he had served as a federal district judge in Albuquerque, New Mexico. Before that and for 23 years, he had been a trial lawyer in the firm of Sanders, Bruin & Baldock, P.A. Judge Baldock resides in Roswell.

SENIOR JUDGE OLIVER SETH

Judge Seth was born in New Mexico in 1915 and grew up in Santa Fe. He received his A.B. degree from Stanford University in 1937 and his LL.B. from Yale in 1940.

During World War II he served as a Major in the U.S. Army and was decorated with the Croix de Guerre. Judge Seth has been a director of the Santa Fe National Bank, chairman of the Legal Committee of the New Mexico Oil and Gas Association, and counsel for the New Mexico Cattlegrowers' Association. He has also been a regent of the Museum of New Mexico and a director of the Santa Fe Boy's Club. In 1962 he was appointed to the United States Court of Appeals for the Tenth Circuit by President John F. Kennedy. He became Chief Judge in 1977 and held this position until September 15, 1984. On December 25, 1984, Judge Seth assumed senior status.

SENIOR JUDGE ROBERT H. MCWILLIAMS

Judge McWilliams was born in Salina, Kansas, in 1916 and moved to Denver in 1927 where he has lived ever since. He received his A.B. and LL.B. degrees from the University of Denver. In 1971, he was awarded an Honorary Doctor of Law degree from the University.

During World War II, Judge McWilliams served in the United States Army and was with the Office of Strategic Services. He has served as a Deputy District Attorney, a Colorado district court judge, and was a member of the Colorado Supreme Court for nine years prior to his appointment to the Court of Appeals.

Judge McWilliams is a member of the Judicial Conference Committee on the Administration of the Criminal Law, Phi Beta Kappa, Omicron Delta Kappa, Phi Delta Phi, and Kappa Sigma. He was sworn in as a Judge of the United States Court of Appeals for the Tenth Circuit in 1970. On August 31, 1984, Judge McWilliams assumed senior status.

SENIOR JUDGE DELMAS C. HILL (Retired)

Judge Hill was born in Wamego, Kansas, in 1906. He received his LL.B. from Washburn College in 1929. From 1929 to 1943 he practiced law in Wamego, serving as an Assistant U.S. Attorney from 1934 to 1936. He was general counsel for the Kansas State Tax Commission from 1937 to 1939 and Chairman of the State Democratic Committee from 1946 to 1948. During World War II he was a Captain in the U.S. Army. In 1945, he assisted in the prosecution of General Yamashita in Manila. He was a U.S. District judge from 1949 until 1961 when he was appointed to the United States Court of Appeals for the Tenth Circuit. Judge Hill became a Senior Judge on April 1, 1977.

TABLE OF CASES

ADMINISTRATIVE LAW

OVERVIEW

During the survey period, the Tenth Circuit reviewed several decisions handed down by administrative agencies, following the pattern of recent years.[1] This article will discuss seven of the most important of these cases. The Tenth Circuit concentrated its review of the cases in the following areas: sufficiency of evidence,[2] the duty to follow precedent,[3] the parameters of judicial restraint,[4] and the scope of protection offered by the fifth amendment in an administrative action.[5] While judicial deference remained the general rule in reviewing an administrative decision, it is important to note that the Tenth Circuit reversed the majority of the cases discussed herein.

I. SUBSTANTIALITY OF EVIDENCE

A. *Background*

It is a general rule in administrative law that a "reviewing court shall . . . hold unlawful and set aside agency action findings . . . and conclusions found to be . . . unsupported by substantial evidence . . . ."[6] While this empowers a reviewing court to reverse an agency's decision on the grounds of insubstantial evidence, it leaves to the courts to define exactly where the line between "insubstantial" and "substantial" evidence is to be drawn. Substantial evidence has been defined as more than a mere scintilla.[7] It has also been said to be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[8] Unfortunately, these standards are nothing more than ad hoc definitions. Thus, in order to give them meaning, one must examine a court's ad hoc reviews of substantial evidence issues.

During the survey period, the Tenth Circuit reviewed two cases concerning the substantiality of evidence. Both cases involved decisions by the Social Security Administration ("SSA"), and both cases were

1. *See* Note, *Administrative Law*, 64 DEN. U.L. REV. 105 (1987); Note, *Administrative Law*, 63 DEN. U.L. REV. 165 (1986).

2. Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Weakley v. Heckler, 795 F.2d 64 (10th Cir. 1986).

3. Big Horn Coal Co. v. Temple, 793 F.2d 1165 (10th Cir. 1986).

4. United Transp. Union v. Dole, 797 F.2d 823 (10th Cir. 1986); E.E.O.C. v. Commercial Office Prods. Co., 803 F.2d 581 (10th Cir. 1986) *rev'd.*, 108 S.Ct. 1666 (1988); Rutherford v. United States, 806 F.2d 1455 (10th Cir. 1986).

5. Roach v. National Transp. Safety Bd., 804 F.2d 1147 (10th Cir. 1986), *cert. denied*, 108 S.Ct. 1732 (1988).

6. 5 U.S.C. § 706(2)(e) (1980).

7. Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

8. *Id.*

reversed.[9]

B. Talbot v. Heckler[10]

The claimant, Harley Talbot, applied for social security disability benefits on June 9, 1982, and again on June 13, 1983. Each application was denied by the SSA.[11] Talbot appealed the second denial to an administrative law judge ("ALJ"), who affirmed the SSA's decision. Talbot then sought review in the Appeals Council of the Secretary of Health and Human Services ("Council"), but was again denied benefits.[12] He then brought his case to the federal district court, only to have that court uphold the administrative actions.[13] Talbot then sought review of his case by the Tenth Circuit.

1. The ALJ's Decision

Talbot appeared before the ALJ without the benefit of counsel. After hearing his testimony and allowing him an opportunity to comment on the documentary evidence, the ALJ concluded that Talbot was not disabled as defined by the Social Security Act and therefore not entitled to benefits.[14]

The ALJ based his inquiry on whether or not Talbot was able to either return to his previous occupation or to engage in other work, as required by the SSA regulations.[15] The ALJ determined that Talbot could not return to his past work, which required medium to heavy exertion, because his residual functional capacity ("RFC") would not allow it.[16] However, the ALJ also found that Talbot did retain the RFC for a wide range of light work, restricted only "by inability to work in environments with excessive dust, fumes or gases."[17]

The ALJ's decision recognized no substantial exertional limitations on Talbot's ability to perform the full range of light work. However, the ALJ explicitly recognized the environmental restrictions which are considered non-exertional limitations on the ability to perform work.[18] In the end, the ALJ concluded that the "claimant's capacity for the wide range of light work has not been significantly compromised by his non-exertional limitations."[19] He further concluded that, pursuant to Rule 202.14 of the SSA's Medical Vocational Guidelines concerning residual strength, age, work experience and education, Talbot was not

9. *See supra* note 2.
10. 814 F.2d 1456 (10th Cir. 1987).
11. *Id.* at 1457. The impairments are listed in Appendix 1 of the Social Security Act regulations, 20 C.F.R. § 1.
12. *Talbot*, 814 F.2d at 1457.
13. *Id.*
14. *Id.* at 1459.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* The non-exertional limitations were an "inability to work in environments with excessive dust, fumes, or gases."

disabled.[20]

2. The Tenth Circuit Decision

The primary issue for the Tenth Circuit was whether there was substantial evidence to support the ALJ's finding that Talbot had the exertional capacity to perform a full range of light work.[21] Relying on an analysis of the entire record of the case, the court determined that many of the conclusions upon which the ALJ based his decision lacked substantial evidence.

The ALJ had concluded that the claimant's testimony was "not wholly credible and . . . somewhat probably exaggerated."[22] The court found this conclusion to be unwarranted, noting that the ALJ had failed to give any particular reasons for drawing this conclusion.[23] The ALJ had also made the inference that the claimant had himself showed that he thought he was capable of returning to work by seeking retraining.[24] The ALJ used this inference as support for his ultimate finding that Talbot's respiratory impairments imposed only "an insignificant environmental restriction" on his ability to work.[25] The court found the logic of this conclusion inconsistent, and again ruled there was a lack of substantial evidence.[26]

The ALJ had further concluded that Talbot's combined impairments had not prevented him from performing light and sedentary work "on a regular and continued basis," and used this conclusion to support his finding of insignificant environmental conditions.[27] The court found this conclusion to be in defiance of the record, noting that the uncontradicted information in the record suggested a contrary conclusion, and was not even addressed by the ALJ.[28]

Lastly, the ALJ had concluded that, despite a conflicting series of medical reports on Talbot by various doctors, Talbot was capable of engaging in a full range of light work.[29] The court noted that the ALJ had failed to properly evaluate and explain the conflicting reports of the physicians, and thus based his decision on impressions and mis-

20. *Id.* n.1. *See* 20 C.F.R. pt. 404, subpt. P, app. 2, § 202.00, Table No. 2, Rule 202.14 (where one's age, education, and previous work experience are factors considered in making a decision).

21. 814 F.2d at 1461.

22. *Id.* at 1459.

23. *Id.* at 1461.

24. *Id.* Talbot had applied for rehabilitation training—training which was denied because of his impairments, using different criteria for disability than the SSA criteria.

25. *Id.*

26. *Id.*

27. *Id.* at 1461-62. "Light" and "sedentary" work are defined in C.F.R. §§ 404.1567(a) & (b) (1986). The ALJ determined that Talbot's attempt to do some painting and install a shower was a performance of light and sedentary work on a regular basis. The ALJ failed to consider that Talbot was unable to finish or keep these jobs because of health problems, and was never paid for them.

28. *Id.*

29. *Id.* at 1463.

characterizations.[30] Because of the insubstantial evidence which formed the basis for many of the ALJ's conclusions, the Tenth Circuit reversed the decision, and awarded benefits to Talbot commencing from the date of his second application.[31]

C. Weakley v. Heckler

In *Weakley v. Heckler*,[32] the Tenth Circuit was confronted with the second of the "SSA" cases involving the issue of "substantiality of evidence." George Weakley had appealed the denial of his disability insurance benefits which he had applied for after suffering a back injury at work.[33] The ALJ who conducted the hearing found that Weakley's back impairment met listing 1.05(c) of the Social Security Listing of Impairments.[34] However, the ALJ found that Weakley was not entitled to benefits because he failed to give an acceptable reason for refusing to have the back surgery his physician had prescribed.[35]

The Council denied Weakley's subsequent appeal, forcing Weakley to seek review in federal district court. That court rejected Weakley's claim for benefits, in an opinion which failed to consider the fact that Weakley's back impairment had been found to meet listing 105(c) of the Social Security Listing of Impairments.[36]

1. The Tenth Circuit Decision

Once again, the primary issue on appeal was whether there was substantial evidence to support the administrative decision, as required by 42 U.S.C. section 405(g).[37] In this case, the decision was made by the Secretary of Health and Human Services to deny Weakley his benefits because he refused to submit to prescribed surgery.[38]

The court found that Weakley had met his burden of demonstrating impairment, noting that the Secretary did not dispute that the back injury met listing 105(c).[39] However, the court held that the Secretary had failed to meet its burden of demonstrating why Weakley's refusal to submit to prescribed surgery was unjustified.[40] Because the Secretary did not present substantial evidence that the rejected back surgery was expected to restore Weakley's ability to work, the first element of the four-

30. *Id.* at 1464.

31. *Id.* at 1466. The court decided that it was only at this time that the record contained substantial evidence of Talbot's disability.

32. 795 F.2d 64 (10th Cir. 1986).

33. *Id.* at 65.

34. *Id.* (citing 20 C.F.R., pt. 404 subpt. P, app. 1. listing 1.05(c)).

35. *Id.*

36. *Id.* Apparently, the district court acted as merely a rubber stamp in affirming the ALJ's decision. However, it is not entirely clear upon what exactly the district court based its decision.

37. *Id. See* 42 U.S.C. § 405(g) (Supp. 1985), "The findings of the Secretary . . . if supported by substantial evidence, shall be conclusive . . . ."

38. 795 F.2d at 65. *See* 20 C.F.R. § 404.1530 (1987).

39. *Weakley*, 795 F.2d at 65.

40. *Id.* at 66. The applicable test is as follows: Once the claimant demonstrates that

prong test was not satisfied, and the denial of benefits was in error.[41]

D. Analysis

An analysis of the *Talbot* and *Weakley* decisions must be conducted within the framework of 42 U.S.C. section 405(g), which provides that federal review of an agency's factual findings must be limited to the question of whether substantial evidence supports the factual finding.[42] The analysis must also consider the review standards discussed above.

Of the two cases, the *Talbot* case is the more expansive. The *Talbot* court specifically adopted the Supreme Court's holding that substantial evidence must be "more than a mere scintilla" and of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[43] However, the *Talbot* court also stated that the search for adequate evidence does not include a weighing of the evidence, and a court must refrain from substituting its discretion for that of the agency.[44] Still, the *Talbot* court felt that the reviewing court must consider the record as a whole, and the "substantiality of the evidence must take into account whatever in the record fairly detracts from its weight."[45]

With these basic parameters providing the backdrop, the *Talbot* and *Weakley* decisions appear to be soundly reached. As stated above, the *Talbot* court found the reasoning behind the ALJ's major conclusions to be less than persuasive. The ALJ's conclusion as to the claimant's credibility was rejected, not because it was beyond his authority to make such a judgment, but because he failed to provide any particular reasoning for discounting Talbot's credibility except to observe that there were no witnesses present when Talbot suffered his alleged blackouts.[46]

Concerning the ALJ's second conclusion that Talbot himself believed he could return to work by trying to retrain himself,[47] the court again did not question the authority of the ALJ to make such an inference. However, the court refused to allow the use of the inference to

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he is impaired, the government has the burden of demonstrating each of the four elements:

1. The treatment at issue should be expected to restore the claimant's ability to work;
2. The treatment must have been prescribed;
3. The treatment must have been refused;
4. The refusal must have been without justifiable excuse. *See* Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985). *See also* Jones v. Heckler, 702 F.2d 950, 953 (11th Cir. 1983); Cassiday v. Schweiker, 663 F.2d 745, 749 (7th Cir. 1981).

41. 795 F.2d at 66.

42. *See* 42 U.S.C. § 405(g) (Supp. 1985).

43. *See* Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NRLB, 305 U.S. 197, 229 (1938)).

44. *Talbot*, 814 F.2d at 1461.

45. *Id.* (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)). Similarly, the *Weakley* court felt that its role was to consider the record as a whole, and determine whether that record contained substantial evidence to support the administrative decision.

46. *Id.* at 1461. Talbot had experienced blackouts and dizzy spells over a period of several years prior to his application for benefits.

47. *Id.*

conclude that Talbot thought he could work at a full range of activity rather than a limited range of light or sedentary activity.[48] This particular substantial evidence issue provides a useful illustration of how far an agency's evidentiary finding may go in terms of supporting differing conclusions. The court was willing to allow the fact that Talbot attempted to retrain himself as sufficient to sustain the conclusion that he thought he could work.[49] But the court refused to allow that factual finding to sustain the further conclusion that Talbot thought he could work at a certain activity level.[50] To determine the activity level, more evidence was needed.

Lastly, the court addressed the ALJ's finding of insignificant environmental restrictions,[51] which the ALJ attempted to support with the conclusion that Talbot had been able to perform light and sedentary work on a "regular and continued basis."[52] The court examined this conclusion by comparing the evidentiary record with the requirements of the social security definitions, and found the ALJ's conclusion to be "highly questionable."[53] The information in the record suggested that Talbot did not meet the definitional requirements. However, the court did not reverse the ALJ for making a conclusion in defiance of the record, but did so because the ALJ failed to even address the contradictory information that was contained in the record.[54]

The *Weakley* decision is more straightforward. The court focused on a single issue: whether the Secretary had met his burden of showing that the rejected back surgery was expected to restore Weakley's ability to work.[55] The Secretary presented the testimony of one doctor who stated that Weakley's problem was correctable by surgery, and that following the surgery, Weakley would have an estimated residual disability of 15% to the body as a whole.[56] This testimony was in contradiction to several doctors' testimony on behalf of Weakley that there was a good possibility that there would be no improvement with the surgery.[57]

The court found the ALJ's decision lacked the requisite substantial evidence. The court could not see how one doctor's statement, which itself admitted that a significant residual disability would remain, could somehow outweigh the contrary opinions of several other doctors.[58] Again, the court did not quarrel with the decision. It suggested that the Secretary return with evidence as to whether Weakly was disabled or

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1462.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Weakley*, 795 F.2d at 66.
56. *Id.* The physician based his estimate on the probable results of the surgery and the postoperative recuperation period.
57. *Id.*
58. *Id.*

not,[59] but it refused to "rubber-stamp" a decision based on insubstantial evidence.

E. Conclusion

The conclusion to be drawn from the *Talbot* and *Weakley* decisions is that judicial deference to agency decisions ends when unsubstantiated conclusions are drawn by administrative judges and panels. From *Talbot*, one may assume that credibility judgments made by an ALJ must be based on more than mere impression or any other single subjective factor. One may also conclude that some factual findings may be sufficient to establish general inferences.[60] From both *Talbot* and *Weakley*, one may assume that conclusions which are drawn in defiance of the record will be reversed. Beyond their illustrative examples, neither *Talbot* nor *Weakley* provides a definite standard as to what constitutes "substantial evidence." Instead, the standard has been, and is likely to long remain, what a court believes would persuade a reasonable mind.

II. The Agency's Duty to Follow Its Own Precedent

A. Background

In *Midwestern Transportation, Inc. v. Interstate Commerce Commission*,[61] the Tenth Circuit held that a court "must require the agency to adhere to its own pronouncements or explain its departure from them; an agency must apply criteria it has announced as controlling or otherwise satisfactorily explain the basis for its departure therefrom."[62] This holding was in line with the Tenth Circuit's earlier holdings as well as previous United States Supreme Court rulings.[63] During the survey period, the Tenth Circuit was again faced with reviewing an agency decision which departed from its own precedent.

B. *Big Horn Coal Company v. Temple*[64]

In *Big Horn*, the Tenth Circuit was petitioned to review the final order of a Department of Labor Benefits Review Board (the "Board") which had upheld a previous ruling by an ALJ. The ALJ had awarded disability benefits to Edward Temple, an employee of Big Horn, under the Black Lung Benefits Act (the "Act").[65] Because the ALJ had failed

59. In doing so, the court limited itself to the record. Since the Secretary had agreed that Weakley was in fact disabled, the court had no choice but to limit its review to the question of whether Weakley's refusal was reasonable. The court thus affirmed that review of an agency decision is confined to the record.

60. For example, Talbot's retraining attempts could sustain a conclusion as to his state of mind, but this same factual finding may be insufficient to sustain a legal conlcusion that Talbot could work at a definite level of activity.

61. 635 F.2d 771 (10th Cir. 1980).

62. *Id.* at 777.

63. Squaw Transit Co. v. United States, 574 F.2d 492 (10th Cir. 1978); *see also* Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973).

64. 793 F.2d 1165 (10th Cir. 1986).

65. 30 U.S.C. §§ 901-945 (1986) (providing in part that "the purpose of this sub-

to consider evidence which the Board, in previous cases, had deemed necessary to a decision,[66] the Tenth Circuit reversed the Board's order and remanded for further proceedings.

1. The ALJ's Decision

Temple had originally filed his claim for benefits under the Act in 1976.[67] In 1977, the claim was informally denied on the basis that neither the x-ray report nor the ventilatory study showed pneumoconiosis under the applicable regulations.[68] In 1978 the Act was amended[69] and Temple's original application was reviewed. The informal denial was reversed, and Temple was ruled eligible for benefits under the Act.[70] Big Horn generally denied Temple's claim and requested a hearing in front of an ALJ.

After the hearing, the ALJ issued a Decision and Order which found that Temple had pneumoconiosis under the interim presumption found in 20 C.F.R. section 727.203(a)(3). This section essentially provides that if a coal miner has been employed as such for at least ten years, he will be presumed to have work-related pneumoconiosis if the blood gas studies reveal an impairment in the transfer of oxygen from the lungs to the blood when the values equal or exceed those in the appropriate table.[71] The ALJ specifically found that the applicable criteria necessary to invoke the presumption was satisfied.[72]

Upon finding the "interim presumption" triggered, the ALJ then turned to the question of whether Big Horn had rebutted the presumption under C.F.R. section 727.203(b). The ALJ ruled that Big Horn failed to rebut the presumption under the enumerated methods in that section.[73] The ALJ stated that there was no medical evidence which

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chapter is to provide benefits. . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease . . . ."

66. *See* Martino v. U.S. Fuel Co., 6 BLACK LUNG REP. 1-33 (1983).

67. *Big Horn Coal Co.*, 793 F.2d at 1166.

68. *Id.*

69. Among the 1978 amendments to the Act was § 902(f), which broadened the term "total disability" in an attempt to liberalize the award of benefits. 30 U.S.C. § 902(f) (1978).

70. *Id.*

71. 20 C.F.R. § 727.203(a)(3) provides:

> (a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis . . . if one of the following requirements is met: . . .
>
> (3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table . . . .

The ALJ specifically found that the values necessary to invoke this presumption were present. *Id.* at 1167.

72. The specific values which triggered the presumption were "a P.CO2 of 31 and P.O2 of 57 at rest and a P.CO2 of 32 and P.O2 of 67 upon exercise." *Id.*

73. 20 C.F.R. § 727.203(b) provides:

> (b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, *all relevant medical evidence* shall be considered. The presumption in paragraph [20 C.F.R. § 727.203(a)] shall be rebutted if: . . .(1) in light of all relevant evidence it

would permit a finding that Temple did not have "any chronic pulmonary disease . . . aggravated . . . by coal mine employment."[74] This ruling was subsequently approved by the Board. Big Horn objected to this ruling, and raised on appeal the issue of whether the Board had erred in approving the ALJ's evaluation of the arterial blood gas tests without considering the effects of altitude and weight.

2. The Tenth Circuit Decision

The Tenth Circuit focused its review on the rebuttal evidence offered by Big Horn. Specifically, the evidence consisted of testimony by Dr. Hoyer, a physician who reviewed and commented on Temple's 1979 Arterial Blood Gas ("ABG") test results. Dr. Hoyer testified that the tests used on Temple "did not establish a pulmonary abnormality in light of the post-exercise results, the age of the miner, and the altitude at which the test was performed."[75] The ALJ ignored this conflicting evidence, and his actions were affirmed by the Director of the Office of Worker's Compensation Programs, Department of Labor.

On appeal, the Director conceded that it was error for the ALJ to have not considered the rebuttal testimony of Dr. Hoyer, but claimed that the omission was harmless error.[76] Big Horn, however, claimed that the omission was reversible error, and relied upon the Board's own decision in *Martino v. United States Fuel Company*.[77]

In *Martino*, the Board rejected a challenge to the validity of C.R.S. section 727.203(a)(3) interim presumption because the table standards were not adjusted for altitude.[78] However, the Board also explained that the ALJ must consider rebuttal evidence regarding the effect of altitude and other factors on the AGB test results.[79] The Board ruled that "if a blood gas study produces abnormal results which can be attributed to altitude rather than pathogenic dysfunction, then this evidence . . . is relevant medical evidence which the fact finder must consider if introduced . . . ."[80]

Because the Director had acknowledged that the ALJ had failed to consider the kind of evidence which *Martino* deemed necessary to a decision, the Tenth Circuit found little difficulty in reversing the Agency's decision. Since no explanation was offered for the divergence from *Martino*, the Tenth Circuit held that the failure to consider the rebuttal evidence was reversible error.[81]

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is established that the individual is in fact doing his usual coal mine work or comparable or gainful work . . . .

Emphasis added.

74. *Big Horn Coal Co.*, 793 F.2d at 1167 (quoting 20 C.F.R. § 727.202).
75. *Id.* at 1168.
76. *Id.*
77. 6 BLACK LUNG REP. 1-33 (1983).
78. *Big Horn Coal Co.*, 793 F.2d at 1168.
79. *Id.*
80. *Id.*
81. *Id.* at 1169.

3. Conclusion

It is important to note the uncompromising posture which the court assumes in *Big Horn*. Although the equities, and certainly the sympathies, of the case point toward an award of benefits to a black lung victim, the court intransigeantly clings to the time-honored rule that an agency shall be bound by its own precedent unless adequate explanation exists for a departure from it.[82] The court, by remanding, is forcing the agency to go through the proper hoops, even if doing so prevents an individual suffering a compensable occupational disease from recovering compensation. The law in this area appears to be etched in stone: An agency will not be allowed to deviate from its own precedent, absent an explanation for doing so.

III. The Agency's Interpretation of Promulgated Rules and Judicial Restraint

A. Background

The standard for federal review of agency decisions is set forth in 5 U.S.C. section 706.[83] Although this section provides broad grounds for such review, historically courts have shown a reluctance to overturn an agency decision. Among the first cases espousing the need for judicial restraint in reviewing agency decisions was *Ford Motor Credit Company v. Milhollin*.[84] There it was held that an agency's construction of its own regulation is entitled to substantial deference from the judiciary.[85] The Tenth Circuit expanded this rule in *Emery Mining Corp. v. Secretary of Labor*,[86] stating that judicial deference is especially appropriate if agency expertise or technical knowledge is involved, or if the agency's construction is contemporaneous with the regulation's promulgation.[87]

Three times during the survey period, the Tenth Circuit was confronted with the difficult issue of whether to replace an agency's interpretation of a regulation with that of its own.[88] In two of the cases, the

82. National Conservative Political Action Comm. v. FEC, 626 F.2d 953 (D.C. Cir. 1979); Midwestern Transp., Inc. v. ICC, 635 F.2d 771 (10th Cir. 1980).

83. 5 U.S.C. § 706(2)(E) (1980). "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . . ."

84. 444 U.S. 555 (1980). A group of car buyers whose retail purchase contracts were assigned to a finance company, filed suit against the finance company for violations of the Truth in Lending Act (15 U.S.C. §§ 1601-1700) and Regulation Z of the Federal Reserve Board (12 C.F.R. part 226). The alleged violations centered on undisclosed acceleration clauses. The Supreme Court held that in the absence of a clear expression by either the Act or Regulation Z, a high degree of deference must be shown to the Reserve Board and its staff.

85. *Id.* at 556.

86. 744 F.2d 1411 (10th Cir. 1984) (dealing with the Federal Mine Safety and Health Review Commission's finding that a mine operator had violated the miner retraining requirements of the Federal Mine Safety and Health Act). The court of appeals held that agency's interpretation of its enabling statute and its own regulations is entitled to deference.

87. *Id.* at 1415.

88. United Transp. Union v. Dole, 797 F.2d 823 (10th Cir. 1986); E.E.O.C. v. Com-

court overruled the agency interpretation. However, in each of the two, a vigorous dissent was filed on the issue of whether to defer to agency interpretation and expertise. In the third case, the agency interpretation was upheld by a unanimous panel.

B. *United Transportation Union v. Dole*[89]

1. Background

The Federal Railway Administration ("FRA") and the Secretary of the Department of Transportation ("Secretary") are charged with enforcing the railroad safety laws by the Hours of Service Act (the "Act").[90] Among other things, the Act seeks to improve the safety of sleeping accommodations which railroads provide for their crews, specifically prohibiting the housing of crews in a dorm if the buildings are in the immediate vicinity (within 1/2 mile) of railroad tracks where hazardous materials are switched.[91] However, the Act also establishes a grandfather clause, whereby buildings which were in existence before July 8, 1976, are exempt from the location requirements unless construction or reconstruction is performed on the building.[92] The term "construction" is defined by the Act and its implementing regulations to include acquisition and use of an existing building.[93]

In *United Transportation Union*, the FRA was charged with failure to fulfill its mandatory enforcement obligations against the St. Louis Southwestern Railroad Company ("SSW"). The specific charge was that the FRA failed to issue orders prohibiting SSW from housing its employees in a dormitory located in the Armourdale yard in Kansas City, Kansas.[94]

The Armourdale dormitory had been constructed by the Chicago, Rock Island and Pacific Railroad Company in 1966. In March of 1980, SSW purchased the dormitory along with some trackage and the surrounding railyard. The dormitory was built within 300 feet of tracks where switching operations for hazardous materials took place. During

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mercial Office Prods. Co., 803 F.2d 581 (10th Cir. 1986), *rev'd*, 108 S.Ct. 1666 (1988); Rutherford v. United States, 806 F.2d 1455 (10th Cir. 1986).

89. 797 F.2d 823 (10th Cir. 1986).

90. 45 U.S.C. § 64(b) (1986) (which states in part, "[i]t shall be the duty of the Secretary of Transportation to lodge with the appropriate United States Attorney information of any violation as may come to the knowledge of the Secretary"); 49 C.F.R. § 1.49(d) (1985) (the Federal Railroad Administration is delegated authority to: "(a) investigate and report on safety compliance records of applicants seeking railroad operating authority. . . .")

91. *United Transp.*, 797 F.2d at 825.

92. *Id.* at 826.

93. *See* 49 C.F.R. § 228.101(c) (1985) which provides:

> (c) As used in this subpart-
>
> (1) "Construction" shall refer to the-
>
> (i) Creation of a new facility;
>
> (ii) Expansion of an existing facility;
>
> (iii) Placement of a mobile or modular facility;
>
> (iv) *Acquisition and use of an existing building.*

Emphasis added.

94. *United Transp.*, 797 F.2d at 825.

the period between May 1980 and July 1983, the dormitory was used as a locker facility in lieu of a sleeping facility. At the end of this period, however, the SSW announced plans to refurbish the structure and resume use of it as a sleeping facility. Thus, there arose the situation where a grandfathered facility was transferred from one railroad to another.

For its defense, the FRA asserted that, according to its own interpretation of its regulations, the transfer in question did not fall within the definition of "construction," and was therefore exempt from the location requirements of the Act.[95] Specifically, the FRA claimed that the regulation which provides that "construction refers to acquisition and use of an existing building" did not include within its purview those buildings which were sold from one railroad to another, as in the present case.[96]

The trial court granted FRA's motion for summary judgment on this ground, holding that the rulemakers were not concerned with the transfer of grandfathered facilities from one railroad to another.[97] It further held that "SSW's plan for rehabilitation of the dormitory facility does not meet the definition of construction . . . [contained in] 49 C.F.R. section 228.101(c)(1)."[98] However, the trial court failed to explain why this definition was not met[99] and United Transportation Union ("UTU") appealed, challenging the FRA's interpretation of its own regulations.[100]

2. The Tenth Circuit Decision

After a preliminary determination of waiver,[101] the court focused on the FRA's interpretation of 49 C.F.R. section 228.101(c).[102] FRA maintained that the regulation did not include existing buildings which are transferred from one railroad to another.[103] UTU urged that all acquisitions are subject to the prohibition on construction.[104]

In a split decision, in which each of the three participating judges wrote an opinion, the court ruled that the agency's interpretation was inconsistent with congressional intent, the plain language of the regulation, and its own prior administrative interpretations.[105] Although the court acknowledged the general rule that substantial deference must be

95. *Id.* at 828.
96. *Id.*
97. *Id.* at 827.
98. *Id.*
99. *United Transp.*, 797 F.2d at 826-27.
100. *Id.*
101. The issue of waiver before the court was whether UTU had abandoned the issue because of its failure to adequately develop the issue in its brief. The court held that because the issue was at least superficially discussed in UTU's brief, was adequately discussed in FRA's brief, and was an issue of importance and first impression, the issue was not now waived. *Id.* at 827.
102. *Id.* at 828.
103. *Id.*
104. *Id.*
105. *Id.* at 829.

shown to an agency's interpretation of its own regulation,[106] it refused to allow that deference to become "blind adherence."[107] Because the issue was one involving a question of statutory interpretation, a question of law, the court ruled that it was the final authority.[108] Under that authority, the court reversed the lower rulings, and found SSW's proposed reopening of the Armourdale facility to be within the definition of "construction" as contemplated by 49 C.F.R. section 228.101(c).[109]

Interestingly, the dissent used the same analytical framework as the majority to reach a completely opposite result. In examining the statute and its legislative history, the dissent found nothing which would suggest that existing facilities should lose their statutory exemption and become "new construction" if the ownership of a railroad passed from one railroad to another.[110] It directed the court's attention to the fact that in the face of an economic climate which was conducive to mergers and acquisitions, Congress nowhere provided a caveat that transfer of ownership would trigger the prohibition.[111] Thus, Congress' primary intent was to prevent the abrupt loss of railroad capital assets through an artificial external event, such as legislation or changes in the ownership of railroads.[112]

In examining the regulations, the dissent pleaded for judicial restraint, maintaining that if there was any ambiguity in such a case, a court is compelled to defer to an agency's interpretation, especially when that agency interprets its own regulation.[113] When there is such ambiguity, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[114] In opposition to the majority, the dissent found no such error.

In response to the dissent, a concurring opinion was filed. It disagreed with the dissent's interpretation of the congressional intent behind the statute. The concurrence felt that the intent was for employee safety, not railroad economics.[115] The grandfather clause was added to ameliorate the loss incurred by the railroads, but not to eliminate their obligation to provide safe housing.[116]

The concurrence also took the position that judicial responsibility demands review of agency interpretation when an agency overindulges

106. *Id.*

107. *Id. See also* Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987) (where the court also discusses the limits of judicial deference in area of sufficiency of evidence).

108. *United Transp.*, 797 F.2d at 829. *See also* SEC v. Sloan, 436 U.S. 103 (1943).

109. *Id.* at 829-30.

110. *Id.* at 834 (dissenting opinion).

111. *Id.*

112. *Id.*

113. *Id.* at 835 (citing Udall v. Tallman, 380 U.S. 1, 16-17 (1965)). *See also* Hoover & Bracken Energies, Inc. v. United States Dep't of Interior, 723 F.2d 1488, 1489 (10th Cir. 1983).

114. *United Transp.*, 797 F.2d at 835.

115. *Id.* at 832 (concurring opinion).

116. *Id.*

in "ad hoc" decision making or "after the fact rationalizations."[117] It found dispositive the fact that the FRA itself had stated that the "acquisition of an existing structure for use as sleeping quarters is listed as an event clearly within the purview of the statute and these regulations, and found nothing in the record to suggest that the agency had previously taken the position it was advocating before the court."[118] In light of these facts, the concurrence saw the purpose of the statute and its implementing regulations as the prevention of railroads from making significant additional investments in sleeping quarters near hazardous railroad switching operations after July, 1976.[119]

3. Analysis

The decision in *United Transportation* appears to be soundly reached. The majority opinion found that the interpretation being urged by the FRA was inconsistent with the version set forth when the regulation was promulgated.[120] The majority also found that the agency's interpretation was inconsistent with the statute it was designed to implement.[121] Finally, the majority found that the plain language of the regulation was inapposite to the agency's interpretation.[122] What emerges from this analysis is the groundwork for a tripartite test for judicial review of an agency's interpretations of regulations.[123]

But the foundation which the majority lays for such review is undermined by the dissent's plea for judicial restraint. Fortunately, the dissent's reasons for deferring to the agency interpretation are not as well reasoned as the majority's. The dissent felt that an examination of the legislative history revealed an element of ambiguity in the underlying congressional intent.[124] Such ambiguity would compel the court to defer to the expertise of the agency and accept its interpretation.[125] The dissent was in favor of judicial restraint in this case, citing that the agency's interpretation was not plainly inconsistent with an ambiguous, general regulation.[126]

While sound in concept, the dissent fails to reconcile its principles with the facts of the case. As the majority points out, the case does not involve an area of expertise peculiar to the FRA.[127] It is a case of statutory interpretation, a task for which the court is unquestionably quali-

117. *Id.*
118. *Id.*
119. *Id.* at 832.
120. *Id.* at 829.
121. *Id.*
122. *Id.*
123. The test, although not specifically designated as such by the court, would be as follows: An agency's interpretation of its rules will not be shielded from judicial review when its interpretation is inconsistent with: (1) congressional intent; (2) the plain language of the regulation; and (3) its own prior administrative interpretations.
124. *Id.* at 836.
125. *Id.*
126. *Id.*
127. *Id.* at 829. The court declines to explain what such specialized knowledge would be. However, based on its later decision in Rutherford v. United States (806 F.2d 1455

fied. Secondly, the dissent's assertion that the intent behind the Act was to "prevent the abrupt loss of railroad capital assets" strains credibility. While this was certainly a pragmatic, conciliatory measure taken by Congress in promulgating the Act, there is little doubt that Congress was more concerned with worker safety than railroad economics.[128]

The dissent's analysis of the implementing regulation does appear more persuasive than its interpretation of the Act's intent. The regulation states that the word "construction" includes "acquisition and use of an existing building."[129] The dissent reasoned that since the rulemakers did not explicitly address the issue of whether railroads are prohibited from acquiring or using "grandfathered" sleeping quarters, the court should refrain from imposing its own interpretation.[130] This analysis is hardly compelling. While it is true that such a situation was not specifically addressed, it seems more logical to assume that the overall intent of Congress, that is, that railroads should make no additional investment in hazardous sleeping quarters after 1976, eliminates the ambiguity. To pretend that there is too much ambiguity not to defer, seems to go beyond judicial deference and into the realm of blind adherence.

C. *Equal Employment Opportunity Commission v. Commercial Office Products Co.*[131]

1. Background

On March 26, 1984, Suanne Leerssen filed a charge with the EEOC after being discharged by Commercial Office Products Co. ("Commercial"), alleging violations of Title VII of the 1964 Civil Rights Act.[132] On March 30, the EEOC forwarded a copy of the charge, along with a charge transmittal form, to the Colorado Civil Rights Division ("CCRD") which stated that the EEOC would initially process the charge pursuant to a work-sharing agreement between it and the CCRD.[133] The CCRD returned the charge transmittal form to the EEOC, indicating that the CCRD waived its right to initially process the charge. On April 4, 1984, the CCRD sent a letter to Leerssen explaining that it had waived its right to initially process the charge, but stated that it specifically retained jurisdiction over her case.[134]

The EEOC's investigation began on March 26, 1984, the date that it

(10th Cir. 1986)), such specialized knowledge would involve technical expertise which the court does not possess.

128. *United Transp.*, 797 F.2d at 825. *See also* Atchison, T.& S.F.Ry. Co. v. United States, 244 U.S. 336 (1917); Chicago & Alton R.R. Co. v. United States, 247 U.S. 197 (1918).

129. *United Transp.*, 797 F.2d at 835.

130. *Id.*

131. 803 F.2d 581 (10th Cir. 1986), *rev'd*, 108 S.Ct. 1666 (1988).

132. 42 U.S.C. § 2000e (1985). Section 2000e-2 forbids discrimination in employment opportunities because of race, color, religion, sex or national origin. Section 2000e-5 outlines the procedure for invoking the Act's protections.

133. *Commercial Office Prods.*, 803 F.2d at 584.

134. *Id.*

initially received the complaint.[135] After Commercial refused to cooperate in providing relevant information, the EEOC issued an administrative subpoena.[136] Commercial refused to comply with the subpoena on the grounds that Leerssen's charge was untimely filed.[137] The EEOC sought enforcement of the subpoena at the district court level, but was denied enforcement on the grounds that the filing of the Title VII charge was not timely.[138]

2. The Tenth Circuit Decision

On appeal, the Tenth Circuit was confronted with the issue of whether Leerssen's complaint was timely filed under the 300-day filing requirement of Title VII of the Civil Rights Act.[139] The court's first consideration was whether the state agency had been given its sixty days to act upon the charge.[140] The court looked to the Supreme Court's decision in *Love v. Pullman*,[141] and interpreted it to mean that when a complainant files a charge with the EEOC, the deferral of that charge by the EEOC is an initial filing in the state agency sufficient to commence the 300-day time limitation.[142] The court found that the EEOC had initiated the charge with the CCRD on behalf of Leerssen, and that the 300-day limitation was invoked.[143]

The court then turned to the question of the meaning of the word "filed" as contemplated by section 706(e).[144] The court found that the referral of a charge from the EEOC to the state agency begins a period of "suspended animation" during which the state has a maximum of 60 days to resolve the charge before it can be filed officially with the

135. *Id.*

136. *Id.* The commission issued its subpoena pursuant to the power granted by 42 U.S.C. § 2000e-4(g)(2) (1985).

137. *Id.*

138. *Id.*

139. The statutory scheme adopted in § 706 of Title VII and 42 U.S.C. § 2000e-5 (1985) makes a distinction between states which have an approved state civil rights enforcement agency (deferral states), and those states which do not (non-deferral states), providing different time limitations for each. In non-deferral states, a charge must be filed within 180 days after the alleged unlawful employment practice began. An exception to this 180 day time limit applies in deferral states which effectively grant a 300 day filing limit for claimant in those states. However, this limit is also subject to the requirement that no such charge may be filed with the EEOC until the state agency has had 60 days to file the charge.

140. *Commercial Office Prods.*, 803 F.2d at 585.

141. 404 U.S. 522 (1972). The court dealt with the complaint of a black porter who filed a complaint to the EEOC. The EEOC orally notified the Colorado Civil Rights Commission ("CCRC") of its receipt of the complaint. The CCRC waived its right to action, and the EEOC commenced its own action. The defendant refused to comply on the grounds that the EEOC had failed to properly notify the CCRC of the complaint, and had thus failed to follow proper filing procedure. The district court granted summary judgment and the court of appeals affirmed. The Supreme Court reversed, finding that the "oral filing," by the EEOC had been in full compliance with intent of the act, and the time limits had therefore been properly adhered to.

142. *Commercial Office Prods.*, 803 F.2d at 586.

143. *Id.*

144. *See* 42 U.S.C.§ 2000e-5 (1985).

EEOC.[145] The court found this despite the contrary language of an EEOC Procedural Regulation, holding along with *Love*, that Congress chose to prohibit the filing of any federal charge until after state proceedings had been completed, or until 60 days had passed.[146]

The court agreed with the Supreme Court's *Mohasko*[147] rationale, that the combination of a 300-day filing requirement and a 60-day deferral period means that a complainant must file his charge within 240 days of the alleged discriminatory practice in order to preserve his federal rights.[148] It also means that any charges brought between the 240th and 300th day are timely filed with EEOC only if the state agency happens to complete its proceedings before the expiration of the 60-day deferral period, and prior to the 300th day.[149]

The court found that since the 60-day deferral period did not begin until the 289th day after the alleged unlawful practice, it did not end until the 349th day, well beyond the 300-day limit.[150] Thus, the court reasoned, the charge could only have been timely filed with the EEOC if the CCRD had terminated its proceedings under section 706(c) before expiration of the 300-day limit.[151]

The EEOC had argued that a state agency "terminates" its proceedings under section 706(c) when that agency waives its right to initially process a charge, defers to the EEOC, and retains jurisdiction to act after the EEOC has completed its proceedings.[152] This interpretation was categorically refuted by the Tenth Circuit.

The court chose to adopt the plain and ordinary meaning of the word "terminate" which, in the context of section 706(c), contemplates the moment when the agency completely surrenders its jurisdiction over a complaint.[153] It likewise interpreted the term "proceedings" to mean those actions a state agency must take in resolving a charge under Title VII.[154] The court was thus faced with deciding whether the forwarding by the EEOC of the charge to the CCRD, and the CCRD's subsequent waiver to "initially process" the charge, was a commencement and termination of state proceedings sufficient to shorten the mandatory 60-

145. *Commercial Office Prods.*, 803 F.2d at 586.

146. *Id.*

147. Mohasko Corp. v. Silver, 447 U.S. 807 (1980). The Court decided the question of whether a letter from a discharged employee sent to the EEOC 291 days after alleged discriminatory discharge was "filed" for purposes of Title 7. The Supreme Court held that the statute prohibited the EEOC from allowing the charge to be filed on the date it was received. The Court further held that even if the EEOC were allowed to file the complaint automatically for the employee, it would still be required to wait 60 days or until the state had terminated its proceedings. The state did not terminate its proceedings. Therefore the 60-day period was invoked and added to the 291 days elapsed after discharge, putting complainant well above the 300 day limit.

148. *Id.* at 821.

149. *Commercial Office Prods.*, 803 F.2d at 587.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

day limit.[155] The court was convinced that it was not.

The court found that CCRD merely acknowledged receipt of Leerssen's charge, waived initial processing, and retained jurisdiction reserving the right to act or to adopt the EEOC findings after the EEOC had terminated its proceedings.[156] The court refused to construe this as a commencement and termination of proceedings.[157] Once this was decided, simple mathematics eliminated Leerssen's complaint. The deferral period required by section 706(c) had not concluded until the 349th day, and the CCRD had not terminated its proceedings by the 300th day.[158] The charge was thus ruled not timely filed.

The dissent first contested the majority's interpretation of the legislative history behind Title VII and its implementing legislation.[159] At the heart of this argument was the idea that Congress did not intend the burden of a statutory ambiguity to fall on the victims of discrimination.[160] The ambiguity concerning who is to file when, and to what agency, was admitted even by the majority.[161]

The dissent then made a plea for judicial restraint, claiming that the agency had already interpreted the statute, and the court should defer to that construction, particularly when that statute is ambiguous.[162] It cited the Supreme Court's rationale that when Congress is silent as to a statutory question, the court's sole inquiry is to determine whether the agency's interpretation is a permissible construction of the statute.[163] The dissent maintained that the EEOC's interpretation of the statute was clearly rational and consistent with the statute's purpose, and was thus entitled to judicial deference.[164]

3. Analysis

The *Commercial* decision is surprising, in that the majority opinion admits that the confusion surrounding the filing requirements defeats two important congressional goals: (1) the ease of filing civil rights charges by lay complainants, and (2) timely resolution of civil rights charges.[165] However, in the same breath, the court disqualifies itself from the task of implementing these goals, claiming that it had no choice but to follow the text of the statute, the legislative history, and the relevant judicial interpretations.[166]

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155. *Id.* at 589.
156. *Id.* at 590.
157. *Id.*
158. *Id.* at 591.
159. *Id.* (McKay, J., dissenting).
160. *Id.*
161. *Id.* at 585.
162. *Id.* at 591-92 (citing Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982).
163. *Id.* at 592 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).
164. *Id.*
165. *Id.* at 585.
166. *Id.*

That "choice" turns out to be far less obligatory than the court would have us believe. The decision of the case turned essentially on what constitutes the termination of proceedings.[167] In *Isaac v. Harvard University*,[168] the First Circuit adopted the EEOC's interpretation of section 706(c), meaning that a state agency terminates its proceedings when the agency waives its right to initially process a charge, defers to the EEOC, and retains jurisdiction to act after the EEOC has completed its proceedings. The *Commercial Office Products* opinion expressly refutes this interpretation, claiming it to be contrary to legislative history and judicial interpretation.[169]

In reviewing this "contrary legislative history," the majority seems to have lost sight of the forest because of the trees. While Congress no doubt intended to encourage state and local agencies to resolve civil rights disputes, and to prevent premature federal intervention, it is difficult to see how these intentions would pre-empt the overall purpose of the statute, which is to provide a means of redress for the victims of discrimination.

The dissent is on target in this respect: "One would have to attribute either congressional hostility to discrimination claimants or a lack of congressional concern for the inability of lay people to understand this complex statute to suggest [Congress] intended such a result."[170] For the majority to rule otherwise, shows an almost slavish obsession to the technicalities of the law, and a troublesome neglect of the equities of the case.

This strict constructionist approach is also troublesome in the context of the court's other decisions during this survey period. As in *United Transportation Union*,[171] the court again refuses to defer to an agency's interpretation of its own rules. While this is not surprising, it nonetheless illustrates an incipient antagonism between the court and administrative agencies.

Nowhere is this more clear than in the majority's footnote number 15.[172] There, the court recognized that the time limitations for a Title VII suit in federal court are subject to equitable modification. It even hinted that Leerssen, should she decide to raise such an argument in her own action, would prevail.[173] However, since it was the EEOC who

167. *Id.* at 589.

168. 769 F.2d 817 (1st Cir. 1985) (where a state agency's waiver of its right to initially process a faculty member's employment discrimination charge was held to constitute a "termination" for the purposes of the 60-day deferral provision of Title VII).

169. *Commercial Office Prods.*, 803 F.2d at 587.

170. *Id.* at 592.

171. 797 F.2d 823 (10th Cir. 1986).

172. *Commercial Office Prods.*, 803 F.2d at 590-91 ("We recognize that the time limitations for filing a Title VII suit in federal court are not jurisdictional prerequisites for the court but rather are subject to equitable modification. . . . The EEOC, however, failed to argue to the district court that any equitable circumstances existed in this case that would have justified a departure from the time limitations. . . .").

173. *Id.* ("Leerssen. . . can raise any equitable arguments that she might have in seeking to persuade a court to hear her case despite her failure to file a timely charge with the EEOC.").

raised the issue, and since the EEOC failed to argue it before the district court, the court refused to consider it.[174]

Lastly, the majority opinion throws away an opportunity to clarify a confusing situation. The split among the circuits[175] has led to a confusing state of affairs for both the layman and the lawyer. The Tenth Circuit admitted this problem in *Commercial Office Products*, and refused to act, under the guise of "separation of judicial and legislative functions." Unfortunately, the court's non-action in this case seems less a separation of powers than an act of judicial apathy.

D. *Rutherford v. United States*

1. Background

In *Rutherford v. United States*,[176] the Tenth Circuit was asked to consider an appeal which was the culmination of nearly twelve years of litigation between terminally ill cancer patients and the Food and Drug Administration ("FDA").[177] The litigation centered around the drug Laetrile, a substance which had been classified by the FDA in 1971 as a "new drug" for the purposes of the Federal Food, Drug and Cosmetic Act (the "Act"). Such a classification normally requires the filing of a new drug application and subsequent FDA approval before the drug may be administered.[178]

The introduction of such a "new drug" into interstate commerce is prohibited by the Act unless the FDA has approved a new drug application. In order to be exempt from the new drug requirements, the drug must be generally recognized by qualified experts as safe and effective when used in the prescribed manner.[179] Normally, this means that the proponents of a drug must define its effectiveness by articulating what the drug is supposed to do.[180]

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174. *Id.* ("The EEOC . . . failed to argue to the district court that any equitable circumstances existed in this case that would have justified a departure from the time limitations . . . We adhere to the rule that a party may not raise an issue on appeal that it did not raise before the district court.") *Cf.* United Transp. Union v. Dole, 797 F.2d 823, 827 (10th Cir. 1986) (where the court considered issues on equitable grounds despite the parties' failure to develop the issue in their brief, according to procedure).

175. *See Commercial Office Prods.*, 803 F.2d at 592 (and cases cited therein). The cases in support of the proposition that a state agency's waiver of its right to initially process a charge may constitute a "termination" for the 60 day deferral provision, are in the majority. *See Isaac*, 769 F.2d at 827-28; EEOC v. Ocean City Police Dep't, 617 F. Supp. 1133 (D. Md. 1985), *aff'd on other grounds*, 787 F.2d 955 (4th Cir. 1986), *reh'g granted*, 795 F.2d 368 (4th Cir. 1986), *rev'd on other grounds*, 820 F.2d 1378 (4th Cir. 1987), *vacated*, 108 S.Ct. 1990 (1988); Thompson v. International Ass'n of Machinists, 580 F. Supp. 662 (D.C. 1984). *But see* Klausner v. Southern Oil Co., 533 F. Supp. 1335 (N.D.N.Y. 1982) (waiver of initial processing did not constitute a termination of state proceedings).

176. 806 F.2d 1455 (10th Cir. 1986).

177. *Id.* at 1457. 21 U.S.C. § 355 (Supp. 1985) outlines the procedure and requires that samples be submitted with the proper documentation of the veracity of all statements within 180 days. The application will either be approved, or a hearing on the question of approvability will be held within 90 days.

178. *Id.*

179. *Id.* at 1458.

180. *Id.* at 1458.

In *Rutherford*, the plaintiffs claimed that Laetrile alleviates pain and that pain reduction should be a criterion for effectiveness.[181] This question had been raised in the earlier decisions, as well as in the FDA hearings.[182] However, the FDA determined that there was no general recognition of effectiveness for pain alleviation. This determination was based on both medical studies and physician testimony.[183]

On appeal from the FDA's decision, the district court affirmed the FDA's ruling that Laetrile was not "generally recognized as safe and effective," thus classifying it as a new drug.[184] However, the district court further held that Laetrile was exempt from new drug status because of a 1962 grandfather clause.[185] After two reviews by the Tenth Circuit on the issue of exempt status, and an order to dismiss, the district court instead allowed the plaintiffs to amend their complaint.[186] In their amended complaint, the plaintiffs asserted that a new issue had arisen which would justify reconsideration of their case. The district court agreed and reopened the case.

2. The Tenth Circuit Decision

The crucial issue before the Tenth Circuit in *Rutherford* was whether the district court had erred in reopening the case and allowing the plaintiffs to amend their complaint. The court held in the affirmative. Although acknowledging that a district court generally has discretion to allow an amended complaint when the appellate court reverses and remands, such discretion is not unbounded.[187] The court held that if an appellate court ruling either calls for or precludes amendment, then the district court has no discretion in allowing an amended complaint.[188]

In applying this general principle to the facts in *Rutherford*, the Tenth Circuit found that because it had previously affirmed the district court's ruling regarding laetrile's "lack of effectiveness," the district court was bound by that decision.[189] The court further held that the plaintiffs' assertion of "new evidence"[190] could not overcome the prior

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 1459.
185. *See* 21 U.S.C.S. § 321(p)(1) (1984) ("[A] drug . . . shall not be deemed to be a "new drug" if at any time prior to this chapter it was subject to the Food and Drugs Act of June 30, 1906 . . . ."). *See also* Public Law No. 87-781, § 107(c)(4), 76 sta. 788 ("In the case of any drug which, on the day immediately preceding the enactment date, (A) was commercially used or sold in the United States, (B) was not a new drug as defined by section 201(p) of the basic Act as then in force, and (C) was not covered by an effective application under section 505 of that Act, the amendments to section 201(p). . . shall not apply . . . .").
186. *Rutherford*, 806 F.2d at 1459.
187. *Id.* at 1459-60. *See* R.E.B., Inc. v. Ralston Purina Co., 525 F.2d 749, 751 (10th Cir. 1975). *See also* Beltran v. Myers, 701 F.2d 91, 93 (9th Cir. 1982), *cert. denied*, 462 U.S. 1134 (1983) (lower courts may decide an issue on remand so long as the issue was not expressed or impliedly disposed of on appeal).
188. *Rutherford*, 806 F.2d at 1460.
189. *Id.*
190. *Id.* The Tenth Circuit held that the plaintiff's assertion of a new issue was in fact merely an assertion of newly discovered evidence.

appellate mandate, and justify reconsideration at the district court level. The court held that the district court simply did not have jurisdiction to hear the new evidence, and that the proper forum for such reconsideration was with the body that initially decided the issue—the FDA.[191] Thus, the plaintiffs' remedy lay with the FDA and not the district court.

3. Analysis

The *Rutherford* case presents a new twist in the area of judicial restraint in the review of agency decisions. Unlike *United Transportation* and *Commercial Office Products*, the restraint here imposed is jurisdictional, rather than doctrinal.

The plaintiffs had attempted to introduce a new issue into the case for the purpose of reopening it.[192] They stated the new issue to be "*as of 1984*, Laetrile was an ordinary drug not requiring any 'new drug' approval because [it was] generally recognized as safe and effective to alleviate or reduce pain. . . ."[193] This issue differed only by date, from the one previously disposed of.[194] The Tenth Circuit refused to consider this a new issue, finding that a simple change of date was not a statement of a new issue, but rather an indication of newly developed evidence.[195] As such, the initial jurisdiction to hear that evidence lay with the FDA and not the district court.

The court cited its previous holding in *Trujillo v. General Electric Co.*,[196] stating that "[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."[197] In doing so, the court established jurisdictional parameters on judicial review of agency decisions. Normally, the Tenth Circuit has permitted lower courts almost plenary power in the decision to review or not to review.[198] However, the court was not willing to allow a district court to usurp initial jurisdiction of an administrative case since hearing evidence is not the function of a reviewing court, and in the case of administrative hearings, the district court is a reviewing court.

The Tenth Circuit was very concerned with maintaining the proper separation of the FDA and the district courts as contemplated by the Act.[199] The court cited the provisions of section 355(h) as demonstrat-

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. 621 F.2d 1084 (10th Cir. 1980) (where the court held that district director of the EEOC had the power to reconsider his earlier determination, and had the power to reverse his finding and rescind his earlier notice of right to sue).
197. *Id.* at 1086.
198. *See supra* note 1.
199. *Rutherford*, 806 F.2d at 1461. *See* 21 U.S.C.S. § 355(h) (1984) (Until the record is filed for appeal, the Secretary may modify his order concerning a new drug application. After the record is filed, the petitioner may apply to the court to present additional evidence. The court of appeals may then grant the application and order the Secretary to reconsider the order.).

ing the intent of Congress to give the FDA primary jurisdiction in determining evidentiary matters concerning new drugs.[200] It is also apparent that the court was uneasy with the district court's failure to defer to agency expertise in a matter which demanded such expertise.[201]

The *Rutherford* case is an unusual example of judicial restraint in the review of agency decisions. The case history of the Tenth Circuit has been in favor of judicial review.[202] However, the court in this instance could not allow the district court to use its right to review an agency decision as a way to "supplant the FDA by making a de novo determination of 'new drug' status after reviewing evidence never considered by the FDA."[203] The Tenth Circuit reaffirmed that the judicial role in agency cases is not to conduct evidentiary hearings, but merely to review the final decisions that result from those hearings.

IV. Regulatory or Punitive? The Characterization Of Administrative Proceedings and the Protections of the Fifth Amendment.

A. Background

The fifth amendment's self-incrimination clause[204] protects not only a defendant's right to refuse to take the witness stand at his own criminal trial, but also the privilege of any witness, in any formal or informal governmental proceeding, to refuse to answer questions when the answers might incriminate him.[205] The witness's privilege against self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.[206] However, this is a privilege to decline to respond to inquiries, not a prohibition against inquiries designed to elicit responses incriminating in nature.[207] To rely on this facet of the amendment's protection, a witness must normally take the stand, be sworn to testify, and assert the privilege in response to each allegedly incriminating question as it is asked.[208]

The defendant's right to refuse to take the stand is the right of an

200. 21 U.S.C.§ 355(h) (1985).

201. *Cf. United Transp. Union*, 797 F.2d at 829.

202. *See, e.g.*, United States v. Brown, 672 F.2d 808 (10th Cir. 1982); Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975); Bramble v. Kleindienst, 357 F.Supp. 1028 (D.C. Colo. 1973), *aff'd*, Bramble v. Richardson, 498 F.2d 968 (10th Cir. 1974).

203. *Rutherford*, 806 F.2d at 1461.

204. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .").

205. *See, e.g.*, United States v. Housing Found. of Am., 176 F.2d 665 (3rd Cir. 1949); United States v. Gay, 567 F.2d 916 (9th Cir. 1978), *cert. denied*, 435 U.S. 999 (1978).

206. Lefkowitz v. Turley, 414 U.S. 70 (1973).

207. *See* MCCORMICK ON EVIDENCE, § 130 at 315 (3d Ed. 1984).

208. United States v. Malnik, 489 F.2d 682, 685 (5th Cir. 1974), *cert. denied*, 419 U.S. 826 (1974).

accused at his own criminal trial to avoid not only giving incriminating responses to inquiries put to him, but to be free from the inquiries themselves.[209] The defendant may invoke this protection by simply not offering to testify.[210] While this protection is absolute in a criminal proceeding, it does not extend to proceedings which are administrative in nature. In the case of administrative proceedings, the issue centers around the characterization of the sanction being contemplated, and whether that sanction is regulatory or punitive.

The test applied to determine whether a statutorily defined penalty is civil or criminal has traditionally proceeded on two levels.[211] The first level is to determine the intent of Congress in establishing the penalty. Second, where Congress has indicated an intent to establish a civil penalty, is to determine whether the statutory scheme was so punitive in either purpose or effect as to negate that intention.[212]

During the survey period, the Tenth Circuit was asked to consider a case where the defendant in an administrative hearing sought protection under the fifth amendment's witness and defendant clauses.[213] The court granted the review, and held that neither protection was available.

B. *Roach v. National Transportation Safety Board*

1. Facts

In *Roach v. National Transportation Safety Board*,[214] Joseph A. Roach petitioned for review of a final order of the NTSB which suspended Roach's commercial pilot's certificate for thirty days.[215] The suspension was the result of flight violations made by Roach at the La Junta, Colorado, airport. After conducting a sales demonstration flight, Roach took off with a Roach Aircraft Sales Representative, for a return flight to Denver. Before returning to Denver, however, Roach made three passes over the La Junta airport runway at an altitude of approximately 500 feet so that his clients could see the plane in flight. At the end of the third pass, Roach executed an aileron roll and then left for Denver.[216]

As a result of this incident, the Federal Aviation Administration ("FAA") ordered Roach's license suspended for 60 days.[217] Roach sought review of this order with the FAA's regional office. At a de novo hearing, the ALJ ruled that the FAA Administrator failed to prove that Roach had violated any Federal Aviation Regulations because he failed to prove that Roach flew within 500 feet of any building when he made

209. *See supra* note 204.

210. United States *ex rel.* Santana v. Fenton, 570 F. Supp. 752, 759 (D.N.J. 1981), *rev'd. on other grounds*, 685 F.2d 71 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983).

211. United States v. Ward, 448 U.S. 242 (1980), *reh'g denied*, 448 U.S. 916 (1980).

212. *Id.* at 248.

213. *See* Roach v. National Transp. Safety Bd., 804 F.2d 1147 (10th Cir. 1986).

214. 804 F.2d 1147 (10th Cir. 1986).

215. *Id.* at 1150.

216. *Id.* at 1149 (An aileron roll is an acrobatic manuever accomplished by rolling a plane to one side in a complete somersault.).

217. *Id.* at 1150.

his three passes over the runway.[218] However, the ALJ upheld the remaining charges concerning the aileron roll, finding that the sales representative was not a crew member who was performing crew member duties, and he was not wearing a parachute, which violated FAA regulations.[219] Accordingly, the ALJ reduced the suspension from 60 days to 30 days, a sentence which was subsequently affirmed by the NTSB.[220]

2. The Tenth Circuit Decision

The key issue before the court was whether Roach's fifth amendment rights were violated when the Administrator was allowed to call him as an adverse witness.[221] Essentially, the court was faced with determining exactly which rights under the fifth amendment would support Roach's argument. The answer to this problem centered on whether the protections normally afforded a defendant in a criminal proceeding extend to an administrative hearing as well. The court held that if the suspension was intended as punishment, then it was criminal in character, and the privilege against self-incrimination guaranteed by the fifth amendment would apply.[222]

The character of the sanction was to be determined by the Congressional intent behind the statute.[223] After a lengthy analysis, the court found the Congressional intent behind the enactment of the legislation to be regulatory rather than punitive, and that the "clear proof" necessary to override that intent did not exist.[224] Roach's trial was thus regulatory in nature, and not within the scope of the "self-incrimination" clause of the fifth amendment.[225]

Roach further claimed that the ALJ's interpretation of the applicable FAA rules was unprecedented, and as such, violative of his due process rights.[226] While agreeing that parties have a right to be "informed with reasonable certainty and explicitness of the standards by which a license may be revoked,"[227] the court ruled that the ALJ's findings had followed long-standing NTSB interpretations, and that no violation of due process had occurred.[228]

Roach also claimed that the ALJ had created a novel definition of "crew member" by interpreting the term to include only the persons aboard an aircraft whose presence is required to operate the aircraft.[229]

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218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 1152.
223. *Id.* at 1153.
224. *Id.* (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984); United States v. Ward, 448 U.S. 242, 249, *reh'g denied*, 448 U.S. 916 (1980)) ("only the clearest proof . . . will override Congress' manifest preference for a civil sanction").
225. *Id.*
226. *Id.* at 1155.
227. *Id.* at 1155 (quoting *Sorenson v. National Transp. Safety Bd.*, 684 F.2d 683, 686 (10th Cir. 1982)).
228. *Id.*
229. *Id.* at 1156.

Again, the court found this argument unpersuasive. The court found that the ALJ's interpretation of the word "crew member"[230] was consistent with the FAA's long-standing position on the issue. The court thus found that Roach had fair warning of the scope of the regulation, and its application in the present case was not violative of his due process rights.[231]

3. Analysis

In affirming the decision of the agency on all counts, the court was particularly concerned with the self-incrimination aspect of Roach's fifth amendment argument. Although the court had often dealt with the question of self-incrimination in criminal proceedings, it had little experience in applying the fifth amendment in administrative hearings.[232] The court looked to the Supreme Court's decision in *United States v. One Assortment of 89 Firearms*[233] for the test which would trigger the protection of the fifth amendment. The *Firearms* court had stated that for a party in an administrative hearing to be able to assert a defendant's fifth amendment right not to take the stand, it must be decided whether the sanctions contemplated by the hearing are regulatory or punitive in nature.[234]

The Tenth Circuit then relied upon the standard for the regulatory/punitive distinction as set forth in *United States v. Ward*.[235] The *Ward* court stated that the "inquiry in this regard traditionally proceeds on two levels. The first step inquires as to Congress' intent in establishing the penalizing mechanism. The second step inquires as to whether the statutory scheme was so punitive either in purpose or effect so as to negate that intention."[236]

The Tenth Circuit concentrated its analysis on the list of considerations set forth in *Kennedy v. Mendoza-Martinez*.[237] That court stated those considerations as follows:

> Whether the sanction involves an affirmative disability or restraint, whether it has been historically regarded as punish-

230. *Id.* The FAA does not provide a definition for "crew member." However, the court felt that the student pilot exemption contained in 14 C.F.R. § 91.15(d) (1987) should have placed Roach on notice that mere assistance during the flight would not elevate his passenger to crew member status. The court thus held that the parachute requirements of 14 C.F.R. § 91.15(c)(1987) were reasonably applied to the facts.

231. *Id.*

232. *See, e.g.*, United States v. Nunez, 668 F.2d 1116 (10th Cir. 1981); Enrichi v. United States, 212 F.2d 702 (10th Cir. 1954).

233. 465 U.S. 354 (1984). The Court held that gun owner's acquittal on criminal charges involving firearms does not preclude a subsequent in rem forfeiture proceeding against the same firearms. Neither collateral estoppel nor double jeopardy bars a civil proceeding initiated following an acquittal on criminal charges.

234. *Id.* at 362. If the sanctions contemplated are punitive in nature, then the absolute self-incrimination protections of the fifth amendment may be invoked. If the sanctions are regulatory in nature, then the fifth amendment's protections do not apply.

235. *See supra* note 208.

236. *Roach*, 804 F.2d at 1153.

237. 372 U.S. 144 (1963) (where the Court held that deprivation of citizenship was penal in nature and that draft evaders were entitled to fifth amendment protection).

> ment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .[238]

However, the Tenth Circuit also placed this "test" within the confines of a "showing of only the clearest proof."[239]

The court found that this clear proof did not exist, and hence, Congress' apparent intent that the sanction be regulatory rather than punitive could not be overcome by a theory of overriding effect or purpose.[240] This ruling was consistent with other courts' holdings in other cases.[241] In those cases, the courts generally found that when an act includes a penalty within a civil section, and discusses criminal penalties in an entirely separate section, a strong indication is made that Congress intended the penalty to be civil.[242] The case at bar was precisely of this type; the act in question discussed criminal penalties in a separate section which expressly excluded violations of safety regulations from its purview.[243]

The ruling was also consistent with that line of cases[244] in which courts have found that license suspension or revocation proceedings are not criminal for the purposes of determining the admissibility of previously immunized, compelled testimony.[245] The court acknowledged a contrary line of cases,[246] fostered by Judge Prettyman's dissent in *Lee v. Civil Aeronautics Board*,[247] in which the Civil Aeronautics Board held that a suspension of an airman's certificate was penal in nature.[248] However, the Tenth Circuit ruled that the more recent judicial trend was toward the former rationale.[249] The court thus held that since the suspension did not have a clearly penal purpose or effect, no fifth amendment rights were violated.

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238. *Id.* at 168-69.

239. *Roach*, 804 F.2d at 1153. The *Kennedy* factors are analyzed in the overall framework of the *Ward* "clearest proof" test.

240. *Id.* at 1153-54.

241. *Id.* at 1153.

242. *Id.*

243. *Id.*

244. *Id.* (The court relied on such cases as *In Re* Daley, 549 F.2d 469, 476-77 (7th Cir. 1977), *cert. denied sub. nom* Daley v. Attorney Registration and Disciplinary Comm'n of the Supreme Court of Illinois, 434 U.S. 829 (1977); Burley v. United States Drug Enforcement Agency, 443 F.Supp. 619, 622-23 (M.D. Tenn. 1977).

245. *Id.* at 1154 n.7.

246. Lewis H. Brubaker and Charles E. Olsen, 19 C.A.B. 885, 886-87 (1954); Herbert R. Galloway, INTSB 2104, 2105 (1972); Pike v. Civil Aeronautics Bd., 303 F.2d 353, 357 (8th Cir. 1962).

247. 225 F.2d 950, 953 (D.C. Cir. 1955). Judge Prettyman's dissent maintained that suspension of pilots' certificates was punitive in nature, and therefore the pilots were entitled to fifth amendment protection.

248. *Roach*, 804 F.2d at 1154 n.7.

249. *Id.* at 1154.

4. Conclusion

The *Roach* decision appears to be a soundly reached decision, and is a step forward in clarifying the line which divides regulatory and penal administrative hearings. In reaching its decision, the Tenth Circuit had many additional factors weighing in favor of its ruling. For example, Roach's flight certification was a privilege voluntarily granted, thus its revocation was "characteristically free of the punitive criminal element."[250] However, it is also significant to note that Roach's privilege was also the means by which he earned his living. The argument could have been advanced that he was being deprived of a vested property right, which may have triggered a more independent standard of review.[251]

The court also had public interest on its side. As the NTSB found, there was a substantial public interest in the safety of air commerce and air transportation which Roach violated with his low passes and acrobatic rolls.[252] Lastly, the equities of the case pointed toward an affirmance of the agency/ALJ ruling. The penalty which Roach received was a thirty-day suspension of his pilot certificate,[253] a penalty which could hardly have shocked the conscience of the court. It was thus not difficult for the court to defer to the agency's decision.

The Roach case was an excellent opportunity for the court to clarify a somewhat muddled situation among the circuits concerning the scope of fifth amendment protections in agency proceedings.[254] The court took advantage of this opportunity to provide a framework in which the nature of agency proceedings may be analyzed.[255] Only time will reveal the impact this case will have on the uniformity of such decisions in other circuits.

CONCLUSION

If there were hopes that the "doctrine" of judicial restraint in the review of agency decisions would become a more settled area of law, they were quickly frustrated by the recent survey period. The cases were factually complex, yet among those facts, one struggles to find the keys to what triggers judicial restraint and what does not.

Particularly difficult to reconcile are the *United Transportation* and

250. *See* Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

251. *See* Halaco Eng'g Co. v. South Cent. Coast Regional Comm'n, 720 P.2d 15, 227 Cal. Rptr. 667, 42 Cal. 3d 52 (1986) (where developer claimed he had vested right to continue his development, it was proper for court to apply independent standard of review).

252. *Roach*, 804 F.2d at 1154.

253. *Id.* at 1150. The ALJ had dropped one of the four charges against Roach, because the Administration had failed to prove that Roach had flown within 500 feet of a building in violation of Federal Aviation Regulation 91.57. In view of Roach's long history in aviation, the ALJ reduced the original 60 day suspension to 30 days.

254. *See* 804 F.2d 1147 and cases cited therein.

255. It should be noted that the court was able to decide the issue while deferring to the ALJ's decision—which no doubt made their own decision easier to attain.

Commercial Office Products cases. In the former, the Tenth Circuit interpreted a statutory term based on congressional intent, the plain language of the regulation, and the agency's prior interpretations.[256] In doing so, the court refused to defer to the agency interpretation. In the latter case, the court determined that congressional intent and agency interpretation were outweighed by the plain language of the regulation.[257] The court also refused to defer to agency interpretation. It is a troublesome pattern, with common elements being considered, but with almost irreconcilable results being reached. Between the two cases, the only common denominator it seems, is the court's refusal to defer to "agency expertise."

Fortunately, the *Rutherford* case sheds some light. Despite its pretensions of dealing with jurisdictional limits, one cannot overlook the fact that the case dealt with the scientific issue of what constitutes a new drug.[258] The court was very uneasy about allowing a lower court to wander too far into an unknown realm.[259] In contrast, the court seems much more confident about its ability to decide issues that deal with statutory interpretation, e.g., the *United Transportation Union* and *Commercial Office Products* cases.

In the attempt to reconcile these cases, no true test emerges. What does emerge however, is the somewhat amorphous rule that the limits on judicial pre-emption of an agency ruling are drawn at the point where the court no longer feels more qualified than the agency to adjudicate the issue.

ADDENDUM

On May 16, 1988, the United States Supreme Court reversed the Tenth Circuit's decision in *Equal Employment Opportunity Commission v. Commerical Office Products Company*.[260] In so doing, the Court concentrated on two questions. The primary question considered was whether a state agency's decision to waive its exclusive sixty-day period for initial processing of a discrimination charge, pursuant to a work sharing agreement with the EEOC, "terminates" the agency's proceedings within the meaning of section 706(c) of Title VII, so that the EEOC immediately may deem the charge filed.

The Tenth Circuit had reasoned that a state agency "terminates" its proceedings only when it completely surrenders its jurisdiction over a charge.[261] Since the Colorado Civil Rights Division ("CCRD") had reserved jurisdictional right to review the EEOC's decision in this case, the

256. *United Transp.*, 797 F.2d at 829.
257. *Commercial Office Prods.*, 803 F.2d at 588-89.
258. *Rutherford*, 806 F.2d at 1461.
259. *Id.*
260. 108 S.Ct. 1666 (1988). Justice Marshall wrote the majority opinion. Justice O'Connor filed an opinion in which she concurred in part and with the judgement. Justice Stevens filed a dissenting opinion in which Chief Justice Rehnquist, and Justice Scalia joined. Justice Kennedy did not participate.
261. 803 F.2d at 587.

Tenth Circuit held that the CCRD did not "finally and unequivocally terminate its authority."[262] The Tenth Circuit had expressly rejected the First Circuit's interpretation of the same filing provisions in *Issac v. Howard University*.[263] The Supreme Court granted certiorari to resolve the conflict.

I. THE DECISION

The majority opinion concentrated on the definition of the term "terminated" as contemplated by the statute. The Tenth Circuit had held, in the face of the EEOC's conficting interpretation, that "terminates" meant "completely relinquish[ing] its authority to act on the charge at that point or in the future."[264] The Supreme Court rejected this interpretation and adopted the First Circuit's view that "terminates" includes "cessation in time."[265] This interpretation supported the EEOC's position that a state agency "terminates" its proceedings when it declares that it will not proceed for a specified interval of time.

The basis of the Supreme Court's decision was a finding by the Court that the EEOC's interpretation of ambiguous language in the enabling statute was entitled to judicial deference. The Court found that the EEOC's interpretation was more than amply supported by the legislative history of the deferral provisions of Title VII, the purposes of those provisions, and the language of other sections of the Act.[266] The secondary issue considered by the Court was Commerical Office Products' argument that the extended 300-day federal filing period is inapplicable to this case because the complainant failed to file her discrimination charge with the CCRD within Colorado's 180-day limitations period. The Supreme Court rejected this argument, affirming the decisions of the various circuits which had ruled on the question.[267] The Court reasoned that the imposition of state limitation periods upon section 706(e) would confuse lay complainants and contradict the remedial scheme of Title VII in which lay persons, not lawyers, are expected to initiate the process.[268]

The Court further reasoned that such consideration of state limitation periods would unnecessarily involve issues of state law.[269] The Court was not willing to force the EEOC to decide such issues as whether state limitation periods are waived or equitably tolled. The Court thus affirmed its ruling in *Mohasco Corp. v. Silver*,[270] in which the Court held that a complainant "need only file his charge within 240 days

262. Id. at 590.
263. 769 F.2d 817 (1st Cir. 1985).
264. 803 F.2d at 589 n.13.
265. 108 S.Ct. at 1676.
266. 108 S.Ct. at 1671.
267. *See* Gilardi v. Schroeder, 833 F.2d 1226 (7th Cir. 1987); Mennor v. Fort Hood Nat'l Bank, 829 F.2d 553 (5th Cir. 1987); Maurya v. Peabody Coal Co., 823 F.2d 933 (6th Cir. 1987), *cert. denied*, 108 S.Ct. at 1030 (1988).
268. 108 S.Ct. at 1676.
269. *Id.*
270. 447 U.S. 807 (1980).

of the alleged discriminatory employment practice in order to ensure that his federal rights will be preserved."[271] The Court found that such a holding "establishes a rule that is both easily understood by complainants and easily administered by the EEOC."[272]

In a brief concurring opinion, Justice O'Connor agreed with the majority's opinion that the agency's construction was reasonable and therefore entitled to deference.[273] However, she was careful to point out that the majority's strong language in rejecting the respondant's position,[274] should not be interpreted as a statement by the Court that an agency decision to adopt the respondant's position would be rejected by the Court.[275] This concurrence took a strictly deferential approach, based solely on the "traditional deference accorded the EEOC in the interpretation of the statute."[276]

The dissent simply took the position that the Court's decision "is not faithful to the plain language of the statute, the legislative compromise that made it possible to enact the Civil Rights Act of 1964, or to our prior interpretation of the very provision the Court construes today."[277]

II. ANALYSIS

The Supreme Court's decision is a reaffirmation of the doctrine of judicial deference to agency interpretation of statutes. The Tenth Circuit had refused to accept the EEOC's construction of its own enabling statute, even though the interpretation appeared to be reasonable. The Supreme Court's decision reaffirms the circuit court's obligation to defer to agency interpretation when that interpretation appears reasonable. If the circuit courts had begun to exceed the boundaries of judicial pre-emption of agency decisions, the Supreme Court's holding re-establishes those parameters.

On a more practical level, the decision benefits those for whom Title VII was designed to benefit, lay claimants who are the victims of discrimination. It removes the filing procedures for such claims from the dockets of the courts and returns them to the local agencies and lay claimants where they may be dealt with in a more efficient manner. By clarifying the law on this matter, the Court may have gone a long way toward relieving the antagonism which had manifested itself between the Tenth Circuit and the EEOC in this case.

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271. *Id.* at 814.
272. 108 S.Ct. at 1676.
273. *Id.*
274. The majority had labelled the respondant's position "absurd." *Id.* at 1674.
275. 108 S.Ct. at 1676 (concurring opinion).
276. *Id.* at 1677.
277. 108 S.Ct. at 1677 (dissenting opinion).

ANTITRUST LAW

OVERVIEW

This survey reviews two recent Tenth Circuit opinions which deal with antitrust law interpretations. In the first opinion, *Westman Commission Co. v. Hobart International, Inc.*,[1] the court of appeals found no conspiracy in restraint of trade nor a per se antitrust violation when a manufacturer refused to grant a distributorship. In reaching this holding, the court determined the scope of the relevant product market to be restaurant equipment generally sold by dealers, irrespective of the "one-stop shopping" classification. The relevant geographic market was determined to include nothing less than the Denver metropolitan area.[2] In the second opinion, *Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*,[3] the Tenth Circuit held that there was no per se tying arrangement which could be construed to be in violation of antitrust laws. The court concluded that such arrangements were actually procompetitive rather than anticompetitive.[4]

Both decisions involved vertical agreements where the trial court erroneously found the arrangements to be illegal per se. The analysis of the Tenth Circuit opinions focused on the fundamental problem of the lower court's desire to protect specific competitors in lieu of properly protecting competition in general. In addition, these decisions involved end distributors or dealers who were unable to prevent the procompetitive impact of the manufacturers' actions. The Tenth Circuit concluded that the actions of the dealers did not limit intrabrand competition but rather ultimately benefited the consumer by creating interbrand rivalries. Thus, the dealers did not violate the purpose of the antitrust laws, which is to promote consumer welfare.[5]

This article discusses: (1) vertical price fixing and tying arrangements, and (2) the Tenth Circuit's most recent approach in determining whether price fixing and tying arrangements are anticompetitive.

I. PRICE FIXING AND TYING ARRANGEMENTS IN GENERAL

A. *The Right to Refuse to Deal and Exclusive Dealing*

The antitrust laws do not inhibit a seller's or buyer's right to refuse to deal with anyone. However, refusal to deal must not stem from an illegal motive or an anticompetitive result. For example, exercising the right of refusal in conjunction with others, on a horizontal level, to

1. 796 F.2d 1216 (10th Cir. 1986)[hereinafter *Westman II*].
2. *Id.* at 1229; *see* Westman Comm'n Co. v. Hobart Int'l, Inc., 461 F. Supp. 627 (D. Colo. 1978)[hereinafter *Westman I*].
3. 806 F.2d 953 (10th Cir. 1986).
4. *Id.*
5. *Westman II*, 796 F.2d at 1220.

freeze another out of business will bring such motive and action within the "combination . . . or conspiracy" language of section one of the Sherman Act.[6] In addition, the refuser must demonstrate lack of dominance in the market place, otherwise there is a violation of the monopolization concept in section two of the Sherman Act.[7] Under present Tenth Circuit law, a unilateral refusal to deal is normally permitted.[8]

Refusal to deal is critical to a manufacturer's ability to control his distributor's resale price and, so long as there is no concerted action or monopoly power, a manufacturer may refuse to deal or even threaten to refuse to deal with any distributor who cuts resale prices.[9] Accordingly, resale price maintenance is permissible so long as the motive or intent behind it is not unlawful, such as concerted action.[10] In other words, for the refusal itself to be lawful, it must be unilateral, and must effect only the one refusing and the one refused.[11]

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6. 15 U.S.C. § 1 (1982).

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. *See* 2 L. ALTMAN, CALLMANN UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES 11, § 10.03 (4th ed. 1982); *see, e.g.*, United States v. General Motors, 384 U.S. 127 (1966).

7. 15 U.S.C. § 2 (1982).

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1342 (9th Cir. 1970). A manufacturer who enjoys a dominant position in the market cannot choose or replace distributors at will if "the public is left with only the manufacturer instead of the manufacturer and the independant distributor."

8. Card v. National Life Ins. Co., 603 F.2d 828 (10th Cir. 1979).

9. 2 L. ALTMAN, *supra* note 6, § 10.03, at 11.

10. *Id.* The anticompetitive aspect of exclusive dealing is that it restricts a buyer from being able to choose and buy from any other seller. Consequently, exclusionary dealing precludes the buyer from participating in a competitive market. 16A J. VONKALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST TRADE LAWS: TRADE REGULATION, § 6G.02[1], 6G-10 (1987). The crux of antitrust law is protection of the consumer and the economy from the abuses commonly associated in a private monopoly. Therefore, any activity between buyer and seller which impinges on the free market place is considered unlawful. *See* D.J. ARMENTANO, ANTITRUST POLICY: THE CASE FOR REPEAL 47 (1986).

11. 2 L. ALTMAN, *supra* note 6, § 10.04, at 19. Unilateral refusal to deal is likely to be anticompetitive unless and until it can be shown that multiple parties are involved. Presently, an exclusive dealing arrangement is tested for its anticompetitiveness and, as such, is probably not violative under section one of the Sherman Act unless it affects 50% of the relevant market. 16A J. VONKALINOWSKI, *supra* note 10, § 6G.03 [2], at 6G-29. The rule of reason determines whether a competitor is foreclosed from access to the relevant market. Thus, an exclusive agreement does not foreclose a competitor's access to a market if the excluded competitor has an alternative means to the consumer. *See, e.g.*, M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973 (1st Cir. 1984). For further discussion on the rule of reason approach to exclusive dealing arrangements see 16A J. VONKALINOWSKI, *supra* note 10, § 6G.04 [1](a), at 6G-30.

The principal "refusal to deal" has a corollary to it: the manufacturer may in good faith refuse to market his product, but good faith need not be shown when selecting distributors.[12] When an anticompetitive action is employed to achieve exclusive dealing arrangements and in effect restricts the competition's access to the market, then it is an unlawful restraint of trade and a violation of the antitrust laws.[13]

A vertical agreement between a manufacturer and a dealer is lawful if reasonable. This is also true for a vertical arrangement with several manufacturers. However, agreements which tend to eliminate competition between horizontal competitors may be found to be illegal per se.[14] Therefore, it is often the legality of the *purpose* for the agreements, horizontal or the vertical found to be horizontal in nature, that will determine the legality of the restraint itself.[15]

B. *Anticompetitive Distribution Practices: Tying Arrangements*

Tying arrangements are a form of exclusive dealing arrangements whereby a seller, who has sufficient control over an item supplied (the "tying" product), will condition the availability of the original product. Usually, the seller will require the purchase or lease of a second product, whether or not that product (the "tied" product) is complementary or supplementary to the originally supplied item.[16] Tying arrangements create the opportunity for a manufacturer to expand his economic power from one product to another. Often tying arrangements are employed to boast the sales of one product which lacks demand.[17] Anticompetitive tying arrangements are generally found to be illegal per se.[18] The "tied" product, not the "tying" product, is insulated from competition and causes an antitrust violation.[19]

12. 2 L. ALTMAN, *supra* note 6, § 10.06, at 19. The reasonableness or unreasonableness of an exclusive dealing arrangement depends upon the overall anticompetitive effect. Specifically, this requires analysis of the effect in light of : (1) the relevant product market (reasonable interchangeability of use, cross-elasticity of demand); and (2) the relevant geographic market (ability of buyer to find other sources of supply, transportation costs of the seller). 16A J. VONKALINOWSKI, *supra* note 10, § 6G.04 [1], at 6G-31. However, a business usually has the right to deal or refuse to deal with whomever it wishes. This includes the right of a franchisor either to refuse to grant a franchise, or having already granted a franchise, the right to terminate it. *See* 16A J. VONKALINOWSKI, *supra* note 10, § 6H.02 [2], at 6H-6; 2 L. ALTMAN, *supra* note 6, § 10.16, at 98.

13. United States v. General Motors, 384 U.S. 127 (1966); White Motor Co. v. United States, 372 U.S. 253 (1963). Both Courts stated that if a manufacturer initiates restrictions to eliminate competition, then the restrictions are illegal per se.

14. All exclusive dealerships are illegal per se when they tend to stifle competition or promote a pernicious effect. 2 L. ALTMAN, *supra* note 6, § 10.16, at 98.

15. United States v. National Soc'y of Professional Eng'rs, 435 U.S. 679, 692 (1978)("Price is the 'central nervous system of the economy,' and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face."); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (3d Cir. 1979)(price-fixing motives were the main reason for refusal to deal).

16. 2 L. ALTMAN, *supra* note 6, § 10.18, at 104.

17. There may be several reasons for this. For example, a manufacturer may want to insulate himself against competition in the tied product, protect his goodwill with respect to the tying product, or facilitate introduction of a new product into the market. *Id.*

18. *Id.*

19. *Id.* The sale of the tied product is no longer based on demand, rather the sale of

The fundamental requirement in demonstrating a violation is that the arrangement involves two separate and distinct products that are so unrelated that they are considered disassociated from each other.[20] Although tying arrangements are voluntary contractual agreements between buyer and seller, these agreements result in restricting the buyer in certain ways.[21] Historically, tying arrangements were believed to be harmful to competition and the final consumer.[22] Recently courts have leaned toward the idea that vertically restrictive agreements might be procompetitive in that they could serve to discriminate prices[23], preserve goodwill, shift business risks, and financially strengthen a distribution or reduce inefficient "free riding" activity.[24] However, a tying arrangement will be held anticompetitive for one of several reasons: (1) if its probable effect is to "substantially lessen competition or tend to create a monopoly in any line of commerce," a violation of section three of the Clayton Act; [25] (2) if it results in an unreasonable restraint which effects a "not unsubstantial amount of interstate commerce," a violation of section one of the Sherman Act;[26] or (3) if it is shown to be "in conflict with basic policies" of the antitrust laws, a violation of section five of the Federal Trade Commission Act.[27]

Special note should be given to the distinction between an exclusive

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the product is dependent on the demand of the tying product. *See supra* notes 6 and 7 and accompanying text.

20. *See, e.g.*, 2 L. ALTMAN, *supra* note 6, § 10.16, at 98 *citing* United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961). The four criteria used in determining the relation or distinction of two products in a tying arrangement are: (1) trade usage or practice in the field; (2) sale of a consistently homogeneous combination of the two products; (3) lump sum billing for the combination; and (4) existence of other related products not included in the unit. 2 L. ALTMAN, *supra* note 6, § 10.16, at 98.

21. Restrictions imposed on the consumer include territorial restrictions, full line forcing, and tie-in sales. D.J. ARMENTANO, *supra* note 9, at 48; *see also supra* note 15 and accompanying text.

22. D.J. ARMENTANO, *supra* note 10, at 49.

23. Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1345 (9th Cir. 1970)(manufacturer offers prices to other distributors which discriminate against another distributor).

24. The inefficiency of "free ride" services take place in, for example, the computer industry when a manufacturer wants the distributor to provide pre-sale information, and/or post-sale service. The inefficiency of this system occurs where the consumer takes full advantage of the pre-sale information and ultimately buys the product from the discount distributor. The intrabrand competition may drop the price of the product, thereby causing the manufacturer to suffer with respect to interbrand competition. Courts therefore feel that permitting the manufacturer to impose limited territorial restrictions and resale price maintenance agreements may serve to remedy the situation by creating "more efficient" rivalries with other manufacturers. D.J. ARMENTANO, *supra* note 10, at 49-50 (citing R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTUS 171-84 (1976)).

25. 15 U.S.C. § 14 (1982).

26. 15 U.S.C. § 1 (1982).

27. 15 U.S.C. § 45 (1982). *See* 2 L. ALTMAN, *supra* note 6, § 10.19, at 118; *see, e.g.*, Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953). Buyers of space for general display and classified advertising in the Times-Picayune could only purchase combined insertions appearing in both the morning and evening papers, and not in either separately. Suit was filed under the Sherman Act, which challenged the "forced combination" contracts as unreasonable restraints of interstate trade, and as tools in an attempt to monopolize a segment of interstate commerce. The contracts were viewed as tying arrangements. *Times-Picayune*, 345 U.S. at 597.

dealing arrangement and a tying arrangement. The Tenth Circuit views an exclusive dealing arrangement as a manufacturer's general response to market conditions, and is therefore procompetitive rather than anticompetitive. On the other hand, a tying arrangement is viewed as a restriction imposed by a dominant seller, and serves no economic purpose.[28] In both *Westman* and *Fox*, the Tenth Circuit focused on violations of section one of the Sherman Act. Both decisions reflect an approach followed in *United States v. Arnold Schwinn & Co.*[29] *Schwinn* balanced the anticompetitive effects versus the procomptitive effects of exclusive dealing and tying arrangements.

II. RELEVANT PRODUCT MARKET, GEOGRAPHIC MARKET, AND PER SE ANALYSIS: *WESTMAN COMMISSION CO. V. HOBART INTERNATIONAL, INC.*

A. *Facts*

Defendant, Hobart International (Hobart), is a manufacturer of one of fifty-three lines of kitchen equipment sold by Westman Commission Company, plaintiff. Westman is a Denver metro restaurant equipment supplier in competition with Nobel, Inc. Until 1977, Nobel was one of eight successful competitors in the Denver area, which sold kitchen equipment products to the restaurant and food service industry. Until 1973, Westman was involved only in the wholesale grocery business, but thereafter acquired the assets of the WE-4 Division of Wilscam Enterprises, Inc. (WE-4), and became an active competitor in the restaurant supply market.[30]

At the time Westman acquired WE-4, WE-4 had an informal distributor agreement with Hobart. This relationship was continued by Westman for about fourteen months after acquisition, at which time Hobart informed Westman that it had no intention of formally offering Westman a distributorship. Hobart then permanently terminated its casual sales relationship with Westman in 1976.[31]

Given the above circumstances, Westman brought an antitrust action claiming that the denial by Hobart to grant Westman a distributorship was a conspiracy on the part of Nobel and Hobart to prevent Westman from competing with Nobel in the Denver area restaurant supply market.[32] The trial court agreed with Westman, and found that Ho-

28. 2 L. ALTMAN, *supra* note 6, § 10.18, at 104; *see Westman II*, 796 F.2d 1216 (10th Cir. 1986); *see also* Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc., 806 F.2d 953 (10th Cir. 1986).

29. 388 U.S. 365 (1967)(overruled on other grounds by Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)). *Schwinn* was rejected by the trial court since this case did not involve an exclusive distributorship or franchise, and the evidence revealed that "much of Hobart's product line [did] not have equivalent brands available in the market." *Westman II*, 796 F.2d at 1225 (quoting *Westman I*, 461 F. Supp. 627, 637 (D. Colo. 1978)). *See infra* note 72 and accompanying text.

30. *Westman II*, 796 F.2d at 1219.

31. *Id.*

32. The record of the lower court revealed that Nobel had informed Hobart that granting WE-4 a distributorship would "jeopardize" Hobart's pre-existing business rela-

bart Int'l violated section one of the Sherman Antitrust Act.[33]

B. *Analysis*

The Tenth Circuit concluded that the lower court's decision was incorrect because the analysis provided by the trial court was improper. More specifically, the lower court incorrectly defined the relevant product market and relevant geographic market, and consequently erroneously found a per se violation.[34]

i. Relevant Product Market

In *Westman I*, the court found that the relevant product market was the "one-stop shopping" market.[35] This type of market is a method of marketing whereby the distributor carries multiple lines of the same type of product in addition to a line of complimentary products. As a result of this type of marketing, one distributor can provide for all of the needs of a food service operator.[36]

Proper determination of the relevant product market requires an examination of the commodities which are reasonably interchangeable by a consumer for the same purpose.[37] The critical error on the part of the lower court was its improper focus on the marketing methods of the restaurant supply competitors and not on the product selection of the ultimate consumer.[38] The Tenth Circuit Court found nothing in the record to suggest that the cross elasticity of Hobart products was inelastic.[39] The Tenth Circuit also found that the trial court erroneously fo-

tionship with Nobel. The appeals court found that this "veiled threat" was the underlying reason for denying the distributorship. *Id.* (citing *Westman I*, 461 F. Supp. 627, 635 (D. Colo. 1978)).

33. *Westman I*, 461 F. Supp. at 627; *see also* 15 U.S.C. § 1 (1982). Here, the sole basis for Westman's action was that denial of the distributorship based upon the "veiled threat" was a conspiracy, and, therefore, a per se violation. *Westman II*, 796 F.2d at 1219.

34. *Westman II*, 796 F.2d at 1219-20.

35. This type of sales based strategy is also known as full line distribution where the consumer of the distribution is able to benefit more from the convenience, cost savings, and better service offered here than from a specialty house distributor. *Id.* at 1220 (citing *Westman I*, 461 F. Supp. at 628).

36. *Westman II*, 796 F.2d at 1220.

37. *Id.* at 1221 (citing United States v. E.I. du Pont de NeMours & Company, 351 U.S. 377, 395 (1956)). In *Westman I*, an expert witness gave testimony saying that "in certain lines of restaurant equipment there is a noticeable absence of acceptable substitutes at a price comparable with that of Hobart products." *Westman I*, 461 F. Supp. at 628. The importance being that substitutes *do* in fact exist, however it is difficult to find a substitute at an equivalent price. In other words, the simple fact that one manufacturer is more prominent than another does not necessarily mean that other manufacturers' products are not reasonably interchangeable. *Westman II*, 796 F.2d at 1221.

38. "Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." *Westman II*, 796 F.2d at 1220-21 (quoting United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592 (S.D.N.Y. 1958)).

39. The expert witness testified that there were other manufacturers competing with Hobart in the same market. *Westman II*, 796 F.2d at 1221. Elasticity and inelasticity merely relate to the freedom of demand within the relative product market. In other words, are the buyers able to chose freely what product they wish to buy (an elastic market) or are they limited in their choices due to inadequate selections and excessive prices (an inelastic market). Elasticity is most important with respect to the court's determination of the rele-

cused on the products generally sold by restaurant equipment dealers, and that it was irrelevant whether or not the brands sold by other restaurant equipment dealers were classified as "one-stop shopping."[40]

On appeal, Westman attempted to support the lower court's decision by defining the relevant restaurant supply market as a "cluster or package" of goods and services.[41] Westman relied on *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*[42] This argument, as well as the "one-stop shopping" analysis, was rejected by the appellate court on the basis that the restaurant equipment market, unlike the beauty supply market of the *JBL* case, did not generally operate at the full-line-of-services level.[43] In addition, the availability of other products in the market created elasticity. In the final analysis, the court stated that if Hobart were ever to raise its prices, this would only force the buyer of restaurant equipment supplies to purchase a lower priced competing brand rather than cause other restaurant supply manufacturers to raise their prices.[44] Consequently, Hobart's pricing strategy was not found to be an anticompetitive price fixing scheme.

ii. The Relevant Geographic Market

The relevant geographic market is defined as "the narrowest market which is wide enough so that products from adjacent areas . . . cannot

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vant product market and the optimum cross-elasticity of demand, which is the extent to which a consumer is able to shift freely between two or more products. 16A J. VONKALINOWSKI, *supra* note 10, at § 6G.04 [1](1)(a) & (b), at 6G-30.

40. *Westman II*, 796 F.2d at 1221. The court focused on a line of commerce that ignored what buyers actually do and considered mainly what sellers do or can do. However, the focus of the lower court was misplaced in determining the relevant market (i.e. "[t]he fact that a distributor is able to satisfy all of his customer's needs at one location does not mean that it is free from competition from other types of distributions"). *Id.* (citing United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592 (S.D.N.Y. 1958)).

41. *Westman II*, 796 F.2d at 1211.

42. 698 F.2d 1011, 1016-17 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983).

43. Evidence of the "one-stop-shopping" market strategy was the fact that, until Westman entered the restaurant supply market, Nobel was the only one of eight Denver area metro suppliers, that used the "one-stop-shopping" method. Furthermore, nothing in the lower court record suggested that such a market strategy existed outside the Denver metro area. Moreover, the lower court erroneously determined the relevant geographical market to include even less than the Denver area. The appeals court found that the relevant geographic market also included "non-one stop shopping" restaurant distributors. *Westman II*, 796 F.2d at 1222. On appeal, Westman sought to have the court consider the findings of authorities which suggested that sellers who provide a full line of products or services create a separate product market or a "cluster or package" of goods and services. However, the "cluster" must be the object of consumer demand and is only appropriate where the "product package" appeals to the buyer on a significantly different basis than would an individual product considered separately. *Id.* at 1221 (quoting JBL Enters., Inc. v. Jhirmack Enters., Inc., 698 F.2d 1011, 1016-17 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983). The court therefore felt that the "cluster" of goods was *not* the object of consumer demand in the restaurant equipment market, unlike the hair care and cosmetics industry, where it is generally necessary to carry a "full-line" of products and the generally accepted practice in advertising and promoting is to group the products together. *Westman II*, 796 F.2d at 1221.

44. The fact that there were other manufacturers competing with Hobart reveals cross-elasticity within the market and not inelasticity. *Westman II*, 796 F.2d at 1221. The elasticity of the market place makes Hobart's actions procompetitive, rather than anticompetitive, and supportive of intrabrand rivalry.

compete on substantial parity with those included in the market."[45] The Tenth Circuit held that the relevant geographic market should have included those restaurant equipment distributors who compete to supply to the Denver area restaurants, including those distributors from the multistate region that bid on Denver area contracts.[46] Accordingly, the appellate court held that it was unreasonable for the lower court to conclude that the relevant geographic market included less than all the restaurant equipment suppliers located in the Denver metro area.[47]

iii. The Per Se Test in Vertical Restraints

Since the lower court found that Westman had been excluded from participating in the relevant product and geographic markets, it held that Hobart had committed a per se violation of section one of the Sherman Act.[48] However, the Tenth Circuit, holding this analysis and conclusion erroneous, found the per se test in vertical restraint cases to be in a "state of evolution," and chose to align itself with the approach of the Seventh Circuit.[49] The Seventh Circuit holds that "in the absence of any evidence of intent to raise prices . . . an agreement whereby a supplier of some good or service refuses, at the behest of one of his distributors, to deal with a competitor of that distributor is not illegal per se."[50] Other circuits, such as the Third Circuit, have rejected this

45. [T]he outer boundary of the relevant product market is reached, if one were to raise the price of the product or limit its volume of production, while demand held constant, and supply from other sources beyond the boundary could not be expected to enter promptly enough and in large enough quantities to restore the old price or volume.

Satellite Televisions and Assoc. Resources, Inc. v. Continental Cablevision of V.I., Inc., 714 F.2d 351, 356 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984) (citing L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 41, § 12 (1977)). *Satellite Television* involved the challenging of an exclusivity provision of a contract between Continental and apartment owners, where the provision gave apartment owners the option of either paying the expense of wiring their building for cable or giving Continental exclusive pay television rights to their apartments. The exclusivity provision was not found to be in violation of any antitrust laws. *Satellite Television*, 714 F.2d at 353.

46. *Westman II*, 796 F.2d at 1222. Distributors from a multistate region competed with Westman and Nobel, thus falling within the relevant geographic market. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 1222-23.

50. *Id.* (quoting Products Liability Ins. Agency, Inc. v. Crum and Forster Ins. Cas., 682 F.2d 660, 663 (7th Cir. 1982); *see also* Business Elecs. Corp. v. Sharp Elecs. Corp., 780 F.2d 1212, 1218 (5th Cir. 1986) ("In order for a manufacturer's termination of a distributor to be illegal per se, it must be pursuant to a price maintenance agreement with another distributor."); Ron Tonkin Gran Turisimo, Inc. v. Fiat Distributors, 637 F.2d 1376, 1386-87 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981)(citing A.H. Cox & Co. v. Star Mach. Co., 653 F.2d 1302, 1306 (9th Cir. 1981)). The Ninth Circuit held that restraints solicited by a distributor but implemented by a manufacturer were not automatically illegal per se but only came within the per se analysis if they "clearly had or [were] likely to have, a pernicious effect on competition and lacked any redeeming virtue." *Ron Tonkin*, 637 F.2d at 1386-87. Other courts have rejected the views of the Seventh, Fifth, Sixth, and Tenth Circuits by stating that a manufacturer who refused to deal with a distributor commits a per se antitrust violation if the refusal is made at the request of a competing distributor even though the manufacturer's refusal to deal is a vertical restraint. The agreement becomes horizontal in nature when the distributor seeks to "supress its competition by utiliz-

view.[51] However, the court in *Westman II* found that such a rejection has occurred in situations where a price fixing motive has been the basis of the manufacturer's refusal to deal.[52]

Here, the court of appeals relied on the reasoning of *Monsanto Co. v. Spray Rite Service Corp.*[53] In *Monsanto*, the Supreme Court held that the plaintiff's failure to establish a price fixing agreement, as a prerequisite to per se liability in a distributor termination case, precluded it from surviving a directed verdict.[54] Similarly, Westman failed to assert, and the record did not reveal, any price fixing or tying arrangements on the part of Hobart. Therefore, Hobart's refusal to deal could not be found to be illegal per se.[55]

C. *Conclusion*

The court of appeals, in rejecting the lower court's analysis, concluded that a manufacturer should generally be given wide discretion in determining the "profile" of its distributors, and cited *Schwinn* for support. Unlike *Schwinn*, the appeals court agreed that the case at hand did not involve an exclusive franchise agreement. However, the court held that *Schwinn* was applicable in that a manufacturer's ability to choose its own customers should not hinge on whether the limited distribution is by exclusive contract or not.[56] A manufacturer's ability to grant or deny distribution rights should not be restricted by whether or not its decision is made to obtain an exclusive franchise agreement.[57] The decision to distribute or not will involve not only customer loyalty, but will ultimately turn on whether more or less distribution would make a manufacturer's products more or less competitive in the market.[58]

A manufacturer's ability to expand or limit distributorships should not be restricted merely because of an absence of equivalent brands within the market place unless such a distributor possesses market power.[59] "Market power" is the ability to raise prices above those that would be charged in the competitive market, and requires a showing of either "power to control prices" or "power to exclude competition."[60]

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ing the power of a common supplier." Cernunto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (3d Cir. 1979).

51. *Westman II*, 796 F.2d at 1223. *See also, supra* note 54 and accompanying text.

52. *Westman II*, 796 F.2d at 1223.

53. 465 U.S. 752, *reh'g denied*, 466 U.S. 994 (1984).

54. Plaintiff must show that the "distributors are *not* making independent pricing decisions." *Monsanto*, 465 U.S. at 762.

55. If there was evidence of price fixing and tying arrangements, then the approach would have been quite different. *See Westman II*, 796 F.2d at 1224-25.

56. In addressing the issue of vertical restraints, the *Schwinn* court stated: "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods." United States v. Arnold, Schwinn & Co., 388 U.S. 363, 376 (1967).

57. *Westman II*, 796 F.2d at 1225.

58. *Id.*

59. *Id.*

60. *Id.* at 1225 n.3 (quoting Board of Regents v. NCAA, 707 F.2d 1147, 1158 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984)).

The existence or lack of market power depends upon the availibility of competing products to which a purchaser can turn when faced with price increases.[61] The appellate court relied on "sound economic theory" to conclude that the "only real incentive for a manufacturer to *restrict* distribution" is to make its product more competitive.[62] The manufacturer therefore gains nothing by limiting its distribution.[63] If a manufacturer decides to limit the number of distributors with whom it wishes to deal, the Tenth Circuit will permit it to do so. However, such refusals to deal with the distributors would be invalidated if the refusals were related to illegal pricing or tying arrangements.[64]

D. *Concurring Opinion*

In the concurring opinion, Judge Seth arrives "at the same result but by a slightly different route."[65] He felt that there were no "substantial problems" with the product market analyses of the lower court.[66] This was evident when he stated that the lower court tried the case with the understanding that the relevant product market was the restaurant supply market, and the use of "one-stop shopping" distribution methods was not a market conclusion, rather it was a marketing method description.[67]

Justice Seth's definition of the relevant geographic market differs from the majority in that he would disregard the location of suppliers, and instead examine the trade area. For example, a trade area would be defined by the area "where a price increase or supply reduction would cause a prompt influx of products of others not already in the area."[68] Although Justice Seth agreed with the majority that the trial court's reference to the "one-stop shopping" was *not* a market conclusion but rather a marketing method description in the Denver area, he believed that use of the "one-stop shopping" method alone could not be considered a restraint of trade.[69]

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61. However, only as it applies to the relevant geographic market. *Westman II*, 796 F.2d at 1226; *see also supra* notes 42 and 43 and accompanying text.

62. *Westman II*, 796 F.2d at 1227.

63. The court listed several reasons why it is procompetitive to permit a manufacturer to limit its distribution:

> First, when a manufacturer limits the number of its distributors, it may reduce its distribution costs by allowing each distributor to achieve economies of scale and to spread fixed costs over a large number of products. . . . Second, refusals to deal may facilitate the entry of a new manufacturer into the market. . . . Third, limiting the number of outlets that distribute a product may encourage distributors to provide promotional activities. . . . Finally, restricting distribution can reduce transaction costs by permitting a manufacturer to deal only with distributors with whom it believes it can develop an efficient working relationship.

Id. at 1227. *See* Bork, *Vertical Restraints & Schwinn Overruled*, 1987 SUP. CT. REV. 171, 180-81.

64. *Westman II*, 796 F.2d at 1229 (only one distributor in the Denver area used "one-stop shopping").

65. *Id.* (concurring opinion).

66. *Id.* (concurring opinion).

67. *Id.* (concurring opinion).

68. *Id.* (concurring opinion).

69. *Id.* (concurring opinion).

In addition, Justice Seth agreed with the majority that the defendant exercised no market power, and for the trial court to find otherwise was clearly erroneous.[70] He further agreed with the majority that no evidence existed to find a per se violation since nothing in the facts alleged illegal pricing or tying arrangements.[71]

On the other hand, Justice Seth disagreed with the majority's reliance on *Schwinn*[72] because *Schwinn* had been overruled by *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*[73] Furthermore, *Schwinn* relied on unsupported and unreliable authorities.[74] Justice Seth concluded that reliance on "sound economic theory," as reiterated in part V of the majority opinion, depends on one's view of a given situation.[75]

III. TYING ARRANGEMENTS, SALES BASED ALLOCATION SYSTEMS: *FOX MOTORS, INC. V. MAZDA DISTRIBUTORS (GULF), INC.*

A. *Facts*

Mazda automobiles are manufactured in Japan and distributed, once imported, throughout the United States to numerous dealers.[76] One of those dealers was Central who distributed Mazdas to thirty-one western and mid-western states. Central distributed to Gulf, the defendant, who was an independently owned company and distributor of Mazda automobiles to dealers in eleven states in the southern Gulf of Mexico area. Plaintiffs, Fox and Meyers are dealers within the Gulf distribution area and have dealt with Mazda since 1972. Neither Fox nor Meyers carried competing manufacturer's products with Mazda even though this freedom had been available since 1973.[77]

Between 1974-1977 Mazda experienced a slump in sales, and in 1978 the only available Mazda automobile was the Mazda "GLC." As a

70. *Id.* at 1230 (concurring opinion).

71. *Id.* (concurring opinion).

72. 388 U.S. 365 (1967). Antitrust suit under section one of the Sherman Act was brought against Schwinn, which challenged the consignment or agency arrangements with distributors and retailers. The arrangements involved direct shipment to retailers with Schwinn invoicing the dealers, extending credit, and paying a commission to the distributors taking orders. In addition, specific territories were assigned to each wholesale distributor and all were instructed to sell only to franchised dealers in their respective territories. *Id.* at 370-71. The Court found this type of price fixing to be anticompetitive. Furthermore, the Court found that the promotion of self-interest alone did not invoke the rule of reason to immunize illegal conduct. *Id.* at 381-82.

73. 433 U.S. 36 (1977). GTE sold television sets through retailers who were allowed only to sell within a given geographic area. Continental, a retailer, claimed a violation of section one of the Sherman Act. *Id.* at 43. However, the Court affirmed the appellate court's decision that the location restriction had less potential for competitve harm than the restrictions invalidated in *Schwinn* and, thus, should be judged under the rule of reason. Moreover, the Supreme Court overruled the per se rule in *Schwinn*. *Id.* at 58-59.

74. *Westman II*, 796 F.2d at 1230 (concurring opinion).

75. *Id.* (concurring opinion). It would seem Justice Seth viewed the "sound economic theory" approach as purely subjective and of very little substance in determining antitrust issues.

76. *Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*, 806 F.2d 953 (10th Cir. 1986). This case dealt with claims in antitrust as well as claims based on the Dealers Day in Court Act, 15 U.S.C. § 1222 (1982).

77. *Fox Motors*, 806 F.2d at 956.

result of the slump, Gulf had a glut of GLC models in stock which created a financial burden for many dealers. Dealers were encouraged by their distributors that newer and better models would soon be available to "take up the slack."[78] In 1978 Mazda followed through with the introduction of the "RX-7" which became extremely popular and scarce in supply. To better serve the interests of each individual dealer, distributors were encouraged to establish an allocation system.[79]

In the case at bar, the allocation system was commenced by Central and passed on to Gulf and its dealers. Pursuant to the Gulf allocation system, those dealers who had been more successful at moving the GLC were to receive the greater number of RX-7s. The crux of the allocation system was that a dealer could not get RX-7s merely by *purchasing* more GLCs, but instead it had to *sell* more GLCs. Thus, many dealers were selling the GLCs at a discount in order to move them more quickly and improve their inventory. There were also many new dealers being signed up with Gulf who were not initially affected by the allocation system and were given an allotment of RX-7s. As a result, new dealers were not initially dependent upon their success of moving the GLCs.[80] This allocation system lasted from 1978-1979.[81]

In conjunction with the implementation of the allocation system, the "drastic action" system, was used by Gulf to eliminate established but financially failing dealerships.[82] Fox and Meyers were targets of this system, and Gulf even threatened to terminate Meyers for contemplating legal action in response to its allocation system.[83]

At the trial level, the antitrust claims were submitted to a jury, which found that Gulf's allocation method constituted a presumptively illegal tying arrangement, and that Central had conspired with Gulf to implement the system. A verdict and damages were rendered in favor of Fox and Meyers.[84]

On appeal, Gulf and Central argued that the trial court errored in sending the tying arrangement issue to a jury pursuant to a per se instruction. Plaintiffs claimed that the tying arrangement should not have been characterized as per se since the elements thereof were never established as a matter of law. Gulf also claimed that the evidence of a conspiracy that was alleged to have taken place between Central and Gulf was insufficient to even have been submitted as a jury issue.[85]

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* The Tenth Circuit considered the "drastic action" in determining whether there was a violation of the Dealer's Act. However, the Tenth Circuit found nothing illegal with the "drastic action." *Id.* at 960.

84. *Id.* at 956.

85. Gulf and Western submit that nothing in their actions could be taken as collusive or conspiring to restrain trade, especially in view of the fact that no "tying arrangement" existed or was established by Fox. *See supra* notes 14-27 and accompanying text.

B. *Analysis*

The Tenth Circuit held that it was unreasonable to apply antitrust principles in a way that assumes every tying arrangement to be illegal per se.[86] As viewed by the Tenth Circuit, an arrangement violates the antitrust laws when a seller exploits his control over a market and forces buyers to purchase an unwanted product.[87]

The court suggested that a three-part analysis be used in order to determine whether exploitation has been the motive behind the tying arrangement.[88] This analysis requires a finding of the following: (1) purchase of the tying product must be conditioned upon purchases of a distinctly tied product,[89] (2) a seller must possess sufficient power in the tying market to compel acceptance of the tied product,[90] and (3) a tying arrangement must foreclose to competitors of the tied product a "not insubstantial" volume of commerce.[91]

To support the procompetitive approach to tying arrangements, the court cited *NCAA v. Board of Regents*,[92] where the Supreme Court held that a tying arrangement may have procompetitive justifications making condemnation thereof inappropriate without a substantial amount of market analysis.[93] The Tenth Circuit determined that when the above three-part analysis is fulfilled, then it is appropriate to presume an unlawful restraint which warrants a per se condemnation pursuant to the antitrust laws.[94] Therefore, the court held that the initial characterization of a challenged restraint as a tying arrangement is crucial in determining which method of analysis, the per se or rule of reason, is most appropriate.[95]

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86. *Fox Motors*, 806 F.2d at 957 (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9-14 (1984)).

87. Where a seller has power in one market, he is not permitted, pursuant to the antitrust laws, to use such power to impair competition. In addition, purchasers may not be denied the freedom to select the best buy in the market. *Fox Motors*, 806 F.2d at 957 (citing *Hyde*, 466 U.S. at 1559-60).

88. *Fox Motors*, 806 F.2d at 957.

89. *Id.* (citing Fixture Enters. v. United States Steel Corp., 394 U.S. 495 (1969); Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953)).

90. Where a seller offers a unique or otherwise desirable product which competitors cannot economically offer themselves, or where the market shares are high, then the seller posses power to compel buyers to accept a tied product. *Fox Motors*, 806 F.2d at 957 (citing *Fixture Enters.*, 394 U.S. at 504-06 n.2; *Times-Picayune*, 345 U.S. at 611-13).

91. *Fox Motors*, 806 F.2d at 957 (quoting Northern Pac. Ry Co. v. United States, 365 U.S. 1, 5-6 (1958)); *see* Fortner Enter. v. United States Steel, 394 U.S. 495, 499 (1969). In determining "not insubstantial," the Court discussed the "small percentage" of land that was foreclosed to competitors for development.

92. 468 U.S. 85 (1984).

93. This analysis concerns only the elements which would establish a presumption of anticompetitive forcing. *Fox Motors*, 806 F.2d at 957 n.2 (citing *NCAA*, 468 U.S. 85 (1984)).

94. Where these elements are found to exist, then any procompetitive approach is discharged and the per se analysis is used alone to determine whether there is a sufficiently great anticompetitive effect. The per se analysis requires no further determination of the market conditions. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), states that the court may utilize strict treatment for certain tying arrangements, and precludes any application of the rule of reason where the three part analysis has been met.

95. *Fox Motors*, 806 F.2d at 958; *see* P. AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES, 30-32 (1981).

The facts in *Fox* were unlike the traditional violative tying arrangement because the availability of the alleged "tied" product (the RX-7) was not based on *purchases* but rather on *sales*.[96] This distinction appeared to make a great difference to the Tenth Circuit because this meant that the allocation system achieved a procompetitive effect by promoting price competition and, thereby, avoided the inherent evils associated with tying arrangements.[97]

C. *Conclusion*

Since the allocation system was based on sales rather than purchases, it did not violate any antitrust laws.[98] Aside from lack of negative consumer impact, the allocation system did not satisfy the per se requirements because it did not foreclose competing manufacturers of the GLC from participating in the market.[99] For the foregoing reasons, Fox and Meyers were complaining only of interference with their freedom of choice in purchasing the GLC.[100] Unfortunately for them, the antitrust laws were established to protect competition and not competitors.[101] Thus, the judgment of the lower court which held originally for Fox and Meyers was reversed.[102]

CONCLUSION

In both *Westman II* and *Fox Motors*, the Tenth Circuit was faced with allegations of vertical restraints on trade. When a vertical restraint on trade is so alleged, the courts are permitted to apply one of two standards: (1) the rule of reason standard (used to determine Sherman Act legality or illegality taking into account all factors which may impair competition);[103] and (2) the per se standard (under which certain re-

96. *Fox Motors*, 806 F.2d at 958.

97. Since Gulf had succeeded in moving its inventory of GLCs to dealers as a result of dealers' discount sales, the ultimate consumer obtained the advantage of the lowered price and helped successful dealers to obtain a greater number of RX-7s. *Id.*

98. Here, unlike the normal tying arrangement, a dealer had to depend entirely on consumer demand in order to obtain more RX-7s. Thus, for a dealer, any increase in retail purchases of the GLC flowed from legitimate dealer discounts or independent market factors. The ultimate consumer made his choice free of any tie, and most likely in accordance with the advantageous discount. *Id.*

99. The testimony of dual dealers in the lower court record revealed that there was no claim on their part that they were ever precluded from buying those vehicles competitive with the GLC as a result of the allocation system. There is also no evidence in the record that the alleged tying arrangement influenced the level of dealer purchases from competing manufacturers. *Id.*

100. *Id.*

101. *Id.* (citing, Atlas Bldg. Prods., Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959)). *Hyde* held: "[W]hen a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller . . . there can be no adverse impact on competition because no portion of the market which would otherwise have been available . . . has been foreclosed." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

102. *Fox Motors*, 806 F.2d at 959.

103. In using the rule of reason analysis, factors considered are: positive or negative economic effects of the restraint, the market power of the parties involved in the restraint, and the intent underlying the restraint. Friedman, *Permissable and Impermissible Vertical Re-*

straints are presumed to violate the the Sherman Act on their face without any proof of actual effect on competition).[104] In order for a party to prevail under a rule of reason analysis it is necessary to prove that the anticompetitive effect of the restraint outweighs the procompetitive effect.[105] On the other hand, per se analysis permits courts to make expedient determinations on the underlying assumption that some conduct, by its nature, gives way to serious anticompetitive consequences and is at the outset, without further consideration, deemed illegal.[106]

In both *Westman II*, where the court addressed an alleged conspiracy in restraint of trade and *Fox*, where the court addressed the proper approach to be given to an alleged tying arrangement, the Tenth Circuit rejected the lower court's findings. Both cases permitted the Tenth Circuit to reject the alleged per se violations and utilize the rule of reason standards to capitalize on the procompetitive effects of each vertical arrangement. Both *Westman II* and *Fox* are illustrative of the liberal rule of reason preferance given to the vertical arrangements when plaintiffs are unable to allege and prove that the anticompetitiveness of the circumstances falls within the per se standard.[107] Neither of these cases presents innovation with respect to antitrust laws as they are applied to vertical restraints, but rather, both follow the present law.[108]

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straints Under the Sherman Antitrust Act: Does "Justice" Care?, 63 DEN. U.L. REV. 127, 128 (1985); *see* Carter-Wallace, Inc. v. United States, 449 F.2d 1374 (Ct. Cl. 1971).

104. Friedman, *supra* note 103, at 128.

105. *Id.*

106. *Id.*

107. Restraints determined to be illegal per se include price fixing and tying arrangements. For further in-depth discussion see *supra* notes 6-28 and accompanying text.

108. *See, e.g.*, Carter-Wallace, Inc. v. United States, 449 F.2d 1374 (Ct. Cl. 1971); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

CIVIL PROCEDURE

OVERVIEW

Six significant cases testing the limits of federal court jurisdiction came before the Tenth Circuit during this survey term. A dispute originating in Utah between an oil company and an Indian tribe over oil and gas leases required delineation of the limits of tribal court sovereignty and the availability of the federal courts to a non-Indian plaintiff.[1] An action by several aliens challenging deportation practices of the Immigration and Naturalization Service limited the original jurisdiction of the circuit courts of appeals under section 106(a) of the Immigration and Nationality Act[2]. The personal jurisdiction cases for the term raised the questions of whether federal court diversity jurisdiction over necessary third parties can reach out of the forum state,[3] and whether a district court can inquire into its jurisdiction over parties *sua sponte*.[4] Intervention was denied a party whose interests were not sufficiently coterminous with those of the litigants in a case, resolving an apparent conflict in prior Tenth Circuit analyses of the interest requirement for intervention of right.[5] Finally, a state court's determination and enforcement of the statute of limitations against a section 1983 civil rights plaintiff was accorded res judicata effect.[6]

I. LIMITS OF INDIAN TRIBAL COURT JURISDICTION: *SUPERIOR OIL CO. V. UNITED STATES*

A. *Facts*

Superior Oil filed a complaint in federal district court arising from a dispute between it and the Navajo Indian Tribe over oil and gas leases granted by the tribe to Superior's predecessors in interest.[7] Sole authority to regulate oil and gas exploration on the tribal reservation was claimed by Superior to be vested in the Secretary of the Interior, preempting regulatory control by the tribe. Superior contended that the tribe intentionally sought to deprive it of property interests in the oil and gas leases by refusing to grant permits allowing seismic operations. Superior further alleged that the sole reason for the refusal was to cause the leases to expire, so that the tribe could negotiate new leases on more favorable terms. The tribe moved for summary judgment and dismissal

1. Superior Oil Co. v. United States, 605 F. Supp. 674 (D. Colo. 1985), *rev'd*, 798 F.2d 1324 (10th Cir. 1986).

2. 8 U.S.C. § 1105(a) (1982); Salehi v. District Director, INS, 575 F. Supp. 1237 (D. Colo. 1983), *rev'd*, 796 F.2d 1286 (10th Cir. 1986).

3. Quinones v. Pennsylvania Gen. Ins. Co., 804 F.2d 1167 (10th Cir. 1986).

4. Williams v. Life Sav. & Loan, 802 F.2d 1200 (10th Cir. 1986).

5. FDIC v. Jennings, 816 F.2d 1488 (10th Cir. 1987).

6. DeVargas v. Montoya, 796 F.2d 1245 (10th Cir. 1986).

7. Superior Oil Co. v. United States, 605 F. Supp. 674 (D. Colo. 1985), *rev'd*, 798 F.2d 1324 (10th Cir. 1986).

asserting that the court did not have subject matter jurisdiction and that its sovereign immunity shielded it from suit.[8] The district court dismissed the case agreeing that the determination of whether to issue seismic permits was within the tribe's sovereign authority. The court, therefore, did not have subject matter jurisdiction over Superior's claim.[9]

B. *The Tenth Circuit's Holding*

The Tenth Circuit reversed the dismissal of Superior's complaint relying on *National Farmer's Union Insurance Cos. v. Crow Tribe of Indians*,[10] which was handed down after the district court's decision. Although 28 U.S.C. § 1331[11] empowers a federal district court to review the federal question of whether a tribe's action has exceeded the limits of its sovereign authority, the Tenth Circuit held that the district court erred in reaching the question of whether the tribe's sovereign immunity shielded it from suit, without first requiring Superior to exhaust its claim in tribal court.[12] *National Farmers* was quoted for the proposition that exhaustion of tribal remedies is not required where tribal authority is asserted in bad faith. The court then held that Superior's claims concerning the tribe's motives for withholding the seismic permits were allegations of bad faith which, if proven, would be sufficient to vest jurisdiction in the district court before all tribal court remedies were exhausted.[13]

C. *Background*

Two obstacles must be overcome to challenge a tribe's assertion of its sovereign powers in a federal court action. The tribe's sovereign immunity must be circumvented, and the question presented must be one over which a federal district court has subject-matter jurisdiction.

1. Tribal Sovereignty

Indian tribes preceded the United States as North American political entities.[14] Tribal sovereignty (and its concomitant power of self-government) is recognized as inherent by virtue of the tribes' existence as independent political communities.[15] Limits are placed on tribal sov-

8. 605 F. Supp. at 676-77.

9. *Id.* at 686. The United States contended that it had no authority over the granting of seismic permits, and therefore the suit was dismissed on the ground that there was no case or controversy involving it. The Tenth Circuit did not address the question of the government's dismissal. 798 F.2d 1324, 1331.

10. 471 U.S. 845 (1985).

11. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1982).

12. *Superior Oil*, 798 F.2d at 1329.

13. *Id.* at 1330-31.

14. *See generally* Russell, *The Influence of Indian Confederations on the Union of the American Colonies*, 22 J. AM. HIST. 53 (1928).

15. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). *See also* F. Cohen, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 229-252 (1982). Cohen's book is the classical

ereignty because of the protectorate relationship existing between the United States and Indian tribes.[16] The limits derive from tribes' incorporation within United States territory and acceptance of its protection, federal statutes (which evidence Congress' plenary control over tribal sovereignty)[17] and treaties where sovereign powers have been given up voluntarily.[18]

Shaped through treaties, federal statutes, and to a lesser extent judicial decisions, tribal sovereignty over Indians includes the right to determine tribe membership,[19] and jurisdiction to try and punish Indians for criminal offenses committed on Indian lands, the power to legislate, and the right to determine the form of tribal government.[20] The power over non-Indians is more narrowly defined. It includes the power to exclude persons from tribal territory,[21] some degree of jurisdiction over civil disputes between Indians and non-Indians, and various other powers derived from inherent sovereignty which have not been withdrawn by treaty, statute or as a result of the Indians' dependent status on the United States.[22] The extent of this jurisdiction has not been "fully determined."[23]

For some time after the enactment of the Indian Civil Rights Act of 1968,[24] several tribes purported to exercise criminal jurisdiction over non-Indians.[25] In *Oliphant v. Suquamish Indian Tribe*,[26] the Supreme Court held that Indian tribes cannot try non-Indians for crimes committed in Indian country.[27] The Court held that tribal power to try non-Indians is inconsistent with Indian tribes' submission to the overriding sovereignty of the United States.[28]

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work in the area of federal Indian Law, and is recognized as authoritative by the courts. *See, e.g., Nat'l Farmer's*, 471 U.S. at 855 n. 17; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 139 nn.6, 8 (1982); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 199 n.9 (1978).

16. *See* F. COHEN, *supra* note 10, at 234; *Worcester*, 31 U.S. (6 Pet.) at 557. *See generally* Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 HASTINGS L.J. 89 (1978).

17. Conquest of tribes by the United States rendered them subject to its legislative power. *See* F. COHEN, *supra* note 10, at 241.

18. United States v. Wheeler, 435 U.S. 313, 323 (1978); Montana v. United States, 450 U.S. 544 (1981).

19. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); F. COHEN, *supra* note 10, at 248.

20. *See Oliphant*, 435 U.S. at 194-96. *See generally* F. COHEN, *supra* note 10, at 247-49.

21. *See Merrion*, 455 U.S. at 137.

22. *Wheeler*, 435 U.S. at 323. *See also Oliphant*, 435 U.S. 191. *See generally* McCoy, *The Doctrine of Tribal Sovereignty*, 13 HARVARD C.R.-C.L. L. REV. 357 (1978); Collins, *Implied Limitations on the Territorial Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979).

23. F. COHEN, *supra* note 10, at 253. *See generally* Note, *Implication of Civil Remedies Under the Indian Civil Rights Act*, 75 MICH. L. REV. 210 (1976).

24. Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. § 1302 (1982)).

25. *Oliphant*, 435 U.S. 191.

26. *Id.* Oliphant was a non-Indian resident of the reservation. He was arrested by tribal authorities at an annual tribal celebration and charged with assaulting a tribal officer and resisting arrest. *Id.* at 194.

27. "Indian country" has been defined as "all land within the limits of any Indian reservation . . . .", 18 U.S.C. § 1151 (1982).

28. *Oliphant*, 435 U.S. at 210. The Court's conclusions on tribal authority were based largely on congressional, executive and lower federal court opinions which hold that tribal courts do not have the power to try non-Indians. *Id.* at 206. Justice Rehnquist's majority

Two recent Supreme Court cases have helped delineate the authority of Indian tribes to exercise jurisdiction over civil disputes between Indians and non-Indians. In *Washington v. Confederated Tribes*,[29] the Colville tribal government refused to collect a Washington state sales tax on cigarettes sold on the reservation. Instead, the tribe collected a smaller tribal tax, enabling merchants on the reservation to undercut the prices of non-reservation competitors, with the result that non-Indians living nearby came to the reservation to buy cigarettes.[30] The tribe argued that the practice was justified because the revenue generated enabled it to provide necessary governmental services to tribal members on the reservation.[31] The Court rejected this argument, holding that the price differential achieved by refusing to collect the state tax was not generated by activities on the reservation in which the tribe had a significant interest; therefore, the action was not part of the inherent sovereignty retained by the tribe.[32]

The "significant interest" test was also employed in *Montana v. United States*,[33] where the issue was the authority of the Crow Tribe to regulate hunting and fishing by non-Indians on reservation lands owned by non-Indians.[34] Recognizing that a tribe retains inherent civil authority over the actions of non-Indians when those actions threaten or directly affect the political or economic security of the tribe, the Court held that the hunting and fishing rights in question were not of sufficient importance to justify the tribe's exercise of its sovereignty over them.[35]

As part of tribal sovereignty, Indian tribes possess the traditional common-law sovereign immunity from suit, similar to that enjoyed by the United States.[36] The immunity is subject to Congress' plenary control and may be expressly waived by Congress, or in limited situations, by the tribe itself.[37]

Tribal sovereignty was considered in *Santa Clara Pueblo v. Martinez*,[38]

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opinion contains an excellent historical outline of all three branches' views on the subject. *Id.* at 197-206.

29. 447 U.S. 134 (1980).

30. *Id.* Similar taxes on motor vehicles were challenged as well.

31. *Id.* at 154. The Court found that the tribes did have the sovereign power to collect their own taxes on the reservation, but the tribal power to tax did not oust the state's taxation power. *Id.* at 152, 155.

32. *Id.* at 155. The tribe based its challenge on federal statute, policies favoring tribal self-government, and the Indian Commerce Clause, all of which were discussed and found unsupportive of the tribe's position.

33. 450 U.S. 544 (1981).

34. *Id.* at 547.

35. *Id.* at 566. The Court overturned the Ninth Circuit's holding which stated that inherent sovereignty, and United States treaties with the Crow Tribe in combination with the federal trespass statute, 18 U.S.C. § 1165 (1982), both afforded the tribe regulatory power over the disputed hunting and fishing rights. Montana v. United States, 604 F.2d 1162 (1979).

36. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58; F. COHEN, *supra* note 10, at 324.

37. *See Santa Clara Pueblo*, 436 U.S. at 58; F. COHEN, *supra*, note 10, at 325-27.

38. 436 U.S. 49. Respondent Martinez brought suit challenging a tribal rule that excluded her children from membership in the tribe because their father was not a member. *Id.* at 52-53. The district court and Tenth Circuit both reached the merits of respondent's claim. The district court ruled that the tribe's membership rules did not violate the equal

an action brought by a member of the Pueblo against the Pueblo and its officers individually. The Court held that sovereign immunity protected the tribe, but did not extend to its officers.[39] In analyzing *Santa Clara Pueblo*, the Tenth Circuit relied on the principle that tribal immunity extends to its officers when the tribe's power to perform the action complained of is not disputed because the tribe has the necessary authority to act.[40] Where the sovereign's authority to make or enforce the law under which the official act is attacked, however, the official is subject to suit.[41]

Because of the potential for injustice in disputes between a tribe and a non-Indian where the tribe refuses access to its courts and asserts its sovereign immunity to suit in federal court, a narrow exception to sovereign immunity as described in *Santa Clara Pueblo*[42] has developed. This exception was promulgated in the Tenth Circuit's *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*[43] decision. The Dry Creek Lodge was closed by the tribe after a tribe member complained that the access road to the lodge infringed on his property. The tribal court refused to hear the lodge owners' case. Next, the lodge initiated a suit against the tribe in federal district court which was dismissed pursuant to the tribe's assertion of its immunity to suit.[44] The Tenth Circuit reversed, holding that sovereign immunity[45] should not be applied to leave a plaintiff without a forum.[46]

2. Federal Jurisdiction over Civil Disputes Between Indians and Non-Indians

Determining whether the exercise of jurisdiction by a tribal court is

protection language in the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(8). ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws . . ."), because the tribe was best situated to balance the competing interests of those seeking membership, with its own interests in preserving its cultural identity by controlling tribe membership. 402 F. Supp. 5, 18-19 (D.N.M. 1975). The Tenth Circuit reversed, holding that the tribe's interest in controlling its membership was not sufficient to justify the sexual discrimination inherent in the membership rules. 540 F.2d 1039, 1047-48 (10th Cir. 1976). On appeal the Supreme Court held that the equal protection clause of the ICRA did not expressly or impliedly waive the tribe's sovereign immunity; therefore, the tribe was competent to assert its immunity to bar respondent's action. 436 U.S. at 58, 60-73.

39. *Santa Clara Pueblo*, 436 U.S. at 59.

40. Tenneco v. Sac and Fox Tribe, 725 F.2d 572, 574 (10th Cir. 1984).

41. *Id.* The fact situation in *Tenneco* bears a close resemblance to that in *Superior Oil*. In *Tenneco*, the Sac and Fox Tribe attempted to impose new taxes and licensing requirements on oil and gas leases held by Tenneco and its predecessors in interest for over 50 years. 725 F.2d at 573-74. Like Superior, Tenneco bypassed tribal remedies for federal court. The Tenth Circuit held that there was federal question jurisdiction and remanded the case to the district court for a determination of the sovereign immunity issue. *Id.* at 574-75. Exhaustion of tribal remedies was not an issue because *Tenneco* was decided before *Nat'l Farmer's*. 471 U.S. at 845.

42. 436 U.S. 49, 58. *See also supra* text accompanying notes 33-36.

43. 623 F.2d 682 (10th Cir. 1980).

44. *Id.* at 683-84.

45. 436 U.S. 49, 58. The tribal sovereign immunity set forth in *Santa Clara Pueblo* is the traditional common law immunity, subject to Congress' power to waive it.

46. *Dry Creek Lodge*, 623 F.2d at 685.

lawful requires analysis of the limits of tribal sovereignty.[47] Petitioners in *National Farmers* successfully argued that because federal law regulates tribal sovereignty, questions relating to the limits of that sovereignty are within the jurisdiction of the federal courts.[48] Specifically, petitioners took the position that the right to be protected against an unlawful exercise of tribal jurisdiction has its source in federal law.[49]

A grant of exclusive federal jurisdiction in the civil area by the *National Farmer's* court, as the *Oliphant* court granted in the criminal area, would have foreclosed tribal court jurisdiction over claims involving non-Indians.[50] Owing to the lack of a congressional pronouncement on tribal exercise of civil jurisdiction over non-Indians, and the government's larger interest in protecting the rights at stake in criminal cases than in civil controversies, *Oliphant* was distinguished, enabling the *National Farmer's* court to hold that tribal court civil jurisdiction is not automatically foreclosed.[51] Instead, tribal authority to exercise jurisdiction over civil disputes involving non-Indians is first determined in the tribal court. In making the determination, the tribal court must conduct a careful analysis to determine that tribal sovereignty in the subject area has not been divested by treaties, executive branch policies, or judicial decisions.[52]

The requirement that tribal remedies be exhausted before a federal court will review the tribal court's exercise of jurisdiction has an analogue. Federal courts refuse to take jurisdiction of claims alleging violations of constitutional rights in a state court proceeding, or as a result of the enforcement of a state statute, when the complaining party has an opportunity to present those claims in a state court.[53] Situations where exhaustion of tribal remedies is not required derive from the same analogy. Where the exercise of tribal sovereign authority (by its courts or otherwise) is "motivated by a desire to harass or is conducted in bad faith," or where exhaustion would otherwise be futile, exhaustion of remedies is not required.[54]

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47. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court evaluated the tribe's retained inherent powers to determine its ability to try a non-Indian for a crime committed in Indian country.

48. National Farmer's Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850-51 (where petitioners' claim of federal jurisdiction was founded on 28 U.S.C. § 1331 (1982)). *See supra* note 10.

49. *Nat'l Farmer's*, 471 U.S. at 851. The Court reasoned that the jurisdiction question is a federal issue, because the Indian tribe's power to exert civil jurisdiction over a party is dependent on whether federal law has divested the tribe of that power. *Id.* at 852.

50. *Id.* at 854.

51. *Id.* The Court also relied on an 1855 advisory opinion by Attorney General Cushing, 7 Op. Att'y Gen. 175, 179-181 (1855), stating that Congress had only divested the tribes of jurisdiction in the criminal area.

52. *Nat'l Farmer's*, 471 U.S. at 855-56.

53. Younger v. Harris, 401 U.S. 37 (1971).

54. *Nat'l Farmer's*, 471 U.S. at 856 n.21 (quoting Juidice v. Vail, 430 U.S. 327 (1977) where the *Juidice* Court stated that the principles of Younger v. Harris, 401 U.S. 37 (1971), do not apply where exhaustion of state remedies for alleged Constitutional violations would be futile).

D. *Analysis*

The standard that applies to determinations of whether a tribal court's exercise of jurisdiction over a dispute involving non-Indians is lawful is the "significant interest" test.[55] In *Superior Oil*, the Tenth Circuit followed the reasoning set forth in *National Farmer's*, by holding that the first opportunity to determine the significance of the tribe's interest in its dispute with Superior rested with the tribe.[56] The court noted that the extent of tribal court jurisdiction over non-Indians is not well-defined, and that the requirement of exhaustion of tribal remedies[57] provides a method of determining that jurisdiction in a manner consistent with the "significant interest" test.[58] Congress' policy of encouraging tribal self-government,[59] and the value of the tribal court record in reviewing the significance of the tribe's interest[60] were also cited as favoring an initial tribal court determination of its authority over the dispute.[61]

Due to Superior's allegation of bad faith on the tribe's part, the Tenth Circuit had occasion to apply the exception of the exhaustion of tribal remedies requirement set forth in *National Farmer's*.[62] This exception apparently applies only to the extent of allowing a non-Indian plaintiff to take its dispute directly to federal district court. *National Farmer's* does not explicitly address what effect a tribal assertion of sovereign immunity to the federal court proceedings would have following the finding of a bad faith assertion of tribal jurisdiction over a claim. However, a review of the range of possible outcomes to the tribe's assertion of sovereign immunity verifies that the process[63] set forth in *National Farmer's* will not deny the non-Indian plaintiff a forum to air his complaint.

In one situation, the (non-Indian) plaintiff's complaint poses a challenge (which a federal district court is able to entertain because one of the *National Farmer's* requirements has been satisfied[64]) to some tribal action as being outside the bounds of its sovereignty. *Tenneco*[65] and

55. *See supra* text accompanying notes 24-30.

56. *Superior Oil*, 798 F.2d 1324, 1329. The Tenth Circuit also held that the district court could review the exercise of tribal court jurisdiction under federal question jurisdiction. *See Nat'l Farmer's*, 471 U.S. at 852-53.

57. *Nat'l Farmer's*, 471 U.S. at 857.

58. *Superior Oil*, 798 F.2d at 1329.

59. *See Nat'l Farmer's*, 471 U.S. at 856; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138; Washington v. Confederated Tribes, 447 U.S. 134.

60. *Nat'l Farmer's*, 471 U.S. at 856-57.

61. In light of the Tenth Circuit's observation that the reach of tribal court jurisdiction over non-Indians is "far from determined," *Superior Oil*, 798 F.2d at 1329, the value of tribal court guidance in evaluating the significance of the tribe's interest is all the more apparent.

62. 471 U.S. at 856 n.21. *See also supra* text accompanying note 47.

63. *See Superior Oil*, 798 F.2d at 1329. *Nat'l Farmer's* detailed the processes to evaluate the reach and extent of a tribal court's jurisdiction.

64. *See supra* text accompanying notes 47-48.

65. 725 F.2d 572 (10th Cir. 1984).

Santa Clara Pueblo[66] stand for the proposition that where the validity of a law under which a tribal officer purported to act is challenged, the officer is liable for the action, even though the tribe itself can successfully assert sovereign immunity.[67] In this situation, the federal courts serve as the final forum for relief.

In another situation, where the plaintiff is forced to concede that the tribe has the authority to act, *Santa Clara Pueblo* seems to foreclose access to a federal forum because the tribal officers are shielded by sovereign immunity.[68] If the tribe refuses to open its courts to the plaintiff, *Dry Creek Lodge*[69] comes into play. *Dry Creek Lodge* provides a narrow exception to the holding announced in *Santa Clara Pueblo* in that a non-Indian can sue a tribe in federal court when there would otherwise be no forum to adjudicate the controversy.[70] If the tribal court takes jurisdiction over the dispute, its decision is final. The review mechanism of *National Farmer's*[71] is inapposite, because by hypothesis, the tribe's action giving rise to the dispute is concededly within its sovereign powers.[72] Its courts, therefore, have exclusive subject-matter jurisdiction over the dispute.

The final situation to consider is dismissal of a case by the federal district court, pursuant to *National Farmer's*,[73] because the plaintiff has not exhausted all tribal remedies. Subsequent refusal by the tribal court to adjudicate the dispute presumably triggers the *Dry Creek* exception to *Santa Clara Pueblo* in order to avoid leaving the plaintiff without a forum.[74] Thus, although narrow, the *Dry Creek* exception serves as a safety net for plaintiffs who would otherwise be left without a remedy by the *National Farmer's* strict holding.

II. APPELLATE COURT JURISDICTION UNDER SECTION 106(A) OF THE IMMIGRATION AND NATIONALITY ACT: *SALEHI V. DISTRICT DIRECTOR, I.N.S.*

A. *Facts*

In a consolidated action, petitioners Salehi, Lahigani, and Hakimzadeh, all Iranian citizens living illegally in the United States, filed habeas corpus petitions in United States District Court after being arrested by the Immigration and Naturalization Service (INS).[75] The

66. 436 U.S. 49 (1978).
67. *Tenneco*, 725 F.2d at 574.
68. *Id.*
69. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).
70. 623 F.2d at 685. *See also supra* text accompanying notes 37-40.
71. *See supra* text accompanying notes 45-46.
72. The facts in *Dry Creek Lodge* provide an example of this situation. There the plaintiffs did not allege that the tribe did not have the authority to close the lodge, but that the tribe member's complaint resulting in the closure was without foundation. *Dry Creek Lodge*, 623 F.2d at 683-84.
73. *See supra* text accompanying notes 45-46.
74. *Dry Creek Lodge*, 623 F.2d at 685.
75. Salehi v. District Director, INS, 575 F. Supp. 1237 (D. Colo. 1983), *rev'd*, 796 F.2d 1286 (10th Cir. 1986).

court granted preliminary injunctions restraining the INS from detaining petitioners pending resolution of their claims. Petitioners claimed the right to apply for asylum, and the affirmative right not to be deported if section 243(h) of the Immigration and Nationality Act (Act),[76] or article 33 of the Protocol Relating to the Status of Refugees[77] were satisfied. They also alleged they had been denied due process of law because INS regulations failed to provide for a stay of deportation and automatic hearing upon application for asylum. Petitioner Salehi contended that INS denial of his application for a stay of deportation constituted an abuse of discretion.[78] The district court dismissed the action for lack of subject-matter jurisdiction under section 106(a) of the Act.[79]

B. *The Tenth Circuit's Holding*

The Tenth Circuit reviewed the district court's jurisdiction over both the habeas writ and petitioners' requests for declaratory relief.[80] The court held that section 106(a) of the Act did not operate to vest exclusive jurisdiction in the court of appeals because the petitioners did not directly challenge the validity of a final order of deportation. Since the district court was held to have jurisdiction over the general claims, the Tenth Circuit did not address the types of claims for relief that could be entertained in an action based exclusively on habeas corpus.[81] The district court also had jurisdiction over Salehi's abuse of discretion claim because again, the claim did not constitute a direct challenge to the validity of the final order of deportation outstanding against him.[82]

C. *Background*

In section 106(a), Congress provided for the judicial review of final orders of deportation entered by the INS pursuant to hearings authorized under section 242(b) of the Act.[83] The review procedure of section 106(a) vests exclusive jurisdiction over appeals of final deportation orders of the INS in the United States Courts of Appeals.[84] This judicial review mechanism is the method by which final orders of other adminis-

76. "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1982).

77. Protocol Relating to the Status of Refugees, 1968, art. 33, 19 U.S.T. 6223, 6276, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

78. *Salehi*, 575 F. Supp at 1238-9. *See generally Eligibility for Withholding of Deportation: The Alien's Burden Under the 1980 Refugee Act*, 49 BROOKLYN L. REV. 1193 (1983).

79. Section 106(a), 8 U.S.C. § 1105a(a) (1982), provides that the United States Courts of Appeals have exclusive jurisdiction to review final orders of deportation entered pursuant to administrative proceedings conducted under 8 U.S.C. § 1252(b) (1982).

80. *Salehi*, 796 F.2d at 1289.

81. *Id.*

82. *Id.* at 1290, 1292.

83. "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and . . . [and] shall make determinations, including orders of deportation." 8 U.S.C. § 1252(b) (1982).

84. *See* 8 U.S.C. § 1105a(a) (1982) and 28 U.S.C. § 2342 (1982). 28 U.S.C. § 2342 provides for circuit court jurisdiction over appeals of orders of several administrative

trative agencies are reviewed by the courts.[85] Congress justified its choice of the court of appeals as the initial forum for judicial review under section 106(a) on two grounds: the appeals courts' experience in reviewing orders of other administrative agencies and the House-Senate conference committee's conclusion that initial appellate court review would result in greater protection of the rights and security of the alien seeking review.[86] Because section 106(a) is somewhat vague[87] in specifiying exactly which INS orders are within the appeals courts' exclusive jurisdiction, the courts have undertaken to interpret it and its legislative history on a number of occasions.

1. Section 106(a) of the Act

Congress' stated intent in enacting section 106(a) was to "[c]reate a single, separate, statutory form of judicial review of administrative orders for the deportation . . . of aliens from the United States . . . ."[88] The need for a single form of review arose out of exploitation of the existing review procedure by aliens intent on frustrating their legitimate deportation.[89] The existing procedure allowed declaratory and habeas corpus review,[90] as well as injunctive relief[91] of final orders of deportation, resulting in a virtually unlimited appeal process.[92]

The right of an alien in custody to petition for habeas corpus is preserved by section 106(a)(9).[93] Such review is not limited to the courts of appeals.[94] In order to curtail dilatory appeals, however, section 106(c)[95] limits the circumstances under which appeals to deportation orders may be taken. Exhaustion of administrative remedies is required before an alien may seek habeas corpus or statutory review pursuant to section 106(a).[96] A petitioner is required to disclose whether the deportation order affecting him has been upheld in a prior judicial proceeding; petitions challenging orders which have been judi-

agencies and was adopted as the method for controlling review of INS determinations of deportability under section 106(a) of the Act, 8 U.S.C. § 1105a(a).

85. *See* 28 U.S.C. §§ 2341-2351 (1982).

86. H.R. REP. No. 1086, 87th Cong., 1st Sess. 27, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2972.

87. *See* Tai Mui v. Esperdy, 371 F.2d 772, 778, n.3 (2d Cir. 1966) *cert. denied*, 386 U.S. 1017 (1967). *See generally* Friendly, *The Gap in Lawmaking-Judges Who Can't and Legislators Who Won't*, 63 COL. L. REV. 787, 795-796 (1963).

88. H.R. REP. No. 1086, 87th Cong., 1st Sess. 21, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2966.

89. H.R. REP. No. 1086, 87th Cong., 1st Sess. 22-23, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2967-68. For a documented example of the delay tactics referred to in the House Report, *see* United States *ex rel.* Marcello v. District Director, INS, 634 F.2d 964, 973-977, app. (5th Cir.) *cert.denied*, 452 U.S. 917 (1981).

90. *See* Brownell v. Rubinstein, 346 U.S. 929 (1954) *mem.*, *aff'g*, 206 F.2d 449 (D.C. Cir. 1953).

91. *See* Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

92. *See Marcello*, 634 F.2d at 967 n.1.

93. 8 U.S.C. § 1105a(a)(9) (1982).

94. H.R. REP. No. 1086, 87th Cong., 1st Sess. 28, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2973.

95. 8 U.S.C. § 1105(c) (1982).

96. *Id.*

cially upheld will not be entertained. This limitation applies to both statutory review and habeas corpus.[97]

2. Judicial Interpretation of Section 106(a)

The Supreme Court has handed down several decisions addressing the breadth of appellate court jurisdiction under section 106(a).[98] The Court's first case to address a jurisdictional question arising under section 106(a) was *Foti v. INS*.[99] *Foti* addressed whether INS denials of discretionary relief in proceedings in which a final order of deportation is entered come under the statutory grant of appellate court jurisdiction in section 106(a).

In an opinion by Chief Justice Warren, the Court acknowledged that the phrase "final orders of deportation" in section 106(a) is susceptible to varying interpretations and therefore turned to the Act's legislative history to resolve the ambiguity.[100] *Foti* recognized that Congress' purpose in providing a single statutory form of review was to curtail dilatory appeals. The Court deemed this purpose best served by broadening the court of appeals' jurisdiction under section 106(a) to include all determinations made during and incident to administrative proceedings conducted pursuant to section 242(b).[101]

The holding of *Foti* expressly excluded the question of whether judicial review of a Board of Immigration Appeals' refusal to reopen deportation proceedings was included under section 106(a).[102] *Giova v. Rosenberg*[103] subsequently answered the question affirmatively in a brief memorandum opinion. The next case appearing before the Court which involved the application of section 106(a) illustrated that the *Giova* holding was a logical extension of *Foti*.[104]

In *Cheng Fan Kwok v. INS*,[105] the trend of broadening circuit court jurisdiction under section 106(a) established by *Foti* and *Giova* was

97. *Id. See generally* Note, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U.L. REV. 765 (1983).

98. *See* Foti v. INS, 375 U.S. 217 (1963); Giova v. Rosenberg, 379 U.S. 18 (1964), *mem. rev'g*, 308 F.2d 347 (9th Cir. 1962); Cheng Fan Kwok v. INS, 392 U.S. 206 (1968); INS v. Chadha, 462 U.S. 919 (1983).

99. 375 U.S. 217.

100. *Id.* at 224-5. The Court accepted statements made on the House floor during debates by three Congressmen who were "knowledgeable in deportation matters" as indicating that Congress knew that determinations of deportability and rulings on discretionary relief were commonly made in the same administrative proceedings. *Id.* at 223-24; *see* 105 CONG. REC. 12728 (statements of Reps. Walter, Lindsay and Moore). The Court based its analysis of legislative purpose on the House Judiciary Committee report concerning section 106(a). *Id.* at 224-25; *see* H.R. REP. NO. 1086, 87th Cong., 1st Sess. 22-23, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2967.

101. 375 U.S. at 229.

102. *Id.* at 231. The Court stated that the question of refusal to reopen hearings is somewhat different than determinations made during the hearings, because the determination of refusal to reopen is not made in the proceedings entering the final orders of deportation.

103. 379 U.S. 18 (1964), *mem., rev'g*, 308 F.2d 347 (9th Cir. 1982).

104. *See Cheng Fan Kwok*, 392 U.S. at 217 (1968).

105. *Id.* at 206.

halted. The issue in *Cheng Fan Kwok* was whether INS refusals of discretionary relief, not entered in the course of proceedings conducted under section 242(b), come within section 106(a).[106] Neither *Foti* nor *Giova* was held to be controlling, and the question of construction presented was remarked to be much closer than in either of those cases.[107] The Court rested its decision on the lack of any language in section 106(a) itself to indicate that the statutory judicial review process was to extend beyond determinations made during and incident to proceedings conducted under section 242(b). Reliance was also placed on the lack of any intent to so extend section 106(a) in the legislative history.[108]

The narrow holding of *Cheng Fan Kwok* sets forth that section 106(a) only applies to judicial review of determinations made in proceedings conducted under section 242(b), including determinations made incident to motions to reopen those proceedings.[109] Several circuit courts decided jurisdictional questions to which section 106(a) was urged to apply subsequent to *Cheng Fan Kwok*. A majority of those courts held that petitions for relief "not inconsistent with"[110] final orders of deportation (rather than those which posed a direct attack on such orders) were not within the jurisdictional grant of section 106(a).[111] The Third Circuit, however, read *Cheng Fan Kwok* as holding that section 106(a) covered only those issues that could be raised in section 242(b) proceedings.[112] In *INS v. Chadha*,[113] the Court resolved the conflict among the appeals courts. The appeal in *Chadha* involved a challenge to the constitutionality of 8 U.S.C. § 1254(c)(2), which provided that the House of Representatives could overturn INS decisions entered pursuant to proceedings conducted under section 242(b).[114] *Chadha* expressly adopted the test espoused by the majority of the circuits which had ruled on the issue and concluded that matters on which the validity of the final order is contingent are included within the appellate court jurisdiction granted by section 106(a).[115]

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106. *Id.* at 207-8. Petitioner was a seaman who had deserted his ship and remained unlawfully in the United States. In deportation proceedings conducted pursuant to § 242(b), 8 U.S.C. § 1252(b), he conceded deportability, but was granted permission to leave the United States voluntarily. After failing to depart, petitioner was ordered to surrender for deportation, at which time he requested a stay of deportation while he applied for discretionary relief from the order.

107. *Id.* at 211.

108. *Id.* at 213-15. For a review of immigration law at the time section 106(a) was enacted, *see* Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760 (1962).

109. *Cheng Fan Kwok*, 392 U.S. at 216.

110. *Id.* at 213 (quoting Tai Mui v. Esperdy, 371 F.2d 772, 777 (1966)).

111. *See* Pilapil v. INS, 424 F.2d 6 (10th Cir.), *cert. denied*, 400 U.S. 908 (1970); Tai Mui v. Esperdy, 371 F.2d 772 (1966) *cert. denied*, 386 U.S. 1017 (1967); Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982), *rev'd* on other grounds *sub nom.* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984); Waziri v. INS, 392 F.2d 55 (9th Cir. 1968).

112. *See* Dastmalchi v. INS, 660 F.2d 880 (3d Cir. 1981).

113. 462 U.S. 919 (1983). The implications of the *Chadha* holding are discussed in Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984).

114. Chadha v. INS, 634 F.2d 408 (9th Cir. 1981).

115. *Chadha*, 462 U.S. 919, 938. Several cases appeared before *Chada* which determined the application of section 106(a) by applying the test of whether an appeal stating

3. Expansion of Habeas Corpus

Changes in the availability of habeas corpus resulting from the redefinition of the phrase "in custody" have the potential of substantially increasing the use of the *habeas* writ as a vehicle for review of deportation orders.[116] At the time section 106 was enacted, custody as applied to *habeas corpus* meant physical detention.[117] That definition was substantially broadened by two subsequent Supreme Court cases. In *Jones v. Cunningham*,[118] the Court held that a person on parole was in custody for habeas purposes. Then, in *Hensley v. Municipal Court*,[119] a person free on his own recognizance was held to be in custody and therefore, eligible to sue out a writ of *habeas corpus*. *Jones* set forth the test stating that persons subject to governmentally imposed restraints not shared by the general public satisfied the custody requirement for habeas corpus relief.[120] *Hensley* applied the *Jones* standard to find that a person free on his own recognizance was subject to sufficient restraints to be eligible for habeas corpus because he could be ordered to appear at any time or place by a court of competent jurisdiction.[121]

In *United States ex rel. Marcello v. District Director, INS*, the Fifth Circuit, citing *Hensley*, held that an alien subject to a final order of deportation was in custody for *habeas* purposes.[122] Marcello challenged the validity of a final order of deportation through habeas corpus proceedings. Although noting that the use of *habeas corpus* in this fashion defeated the purpose of section 106(a), the Fifth Circuit went on to determine the merits of Marcello's challenge to the deportation order.[123] A situation similar to *Marcello* occurred in *Daneshvar v. Chauvin*,[124] decided by the Eighth Circuit. The court again held that the existence of an outstanding order of deportation was a sufficient restraint on liberty to make habeas corpus relief available.[125] The Eighth Circuit, however, con-

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constitutional grounds poses a direct challenge to the validity of the final order of deportation. *See* Pilapil v. INS, 424 F.2d 6 (10th Cir. 1970); Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979); Ferrante v. INS, 399 F.2d 98 (6th Cir. 1968).

116. *See Marcello*, 634 F.2d at 967; Daneshvar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981). *See generally* Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985).

117. *See Marcello*, 634 F.2d at 967.

118. 371 U.S. 236 (1963).

119. 411 U.S. 345 (1973).

120. *Jones*, 371 U.S. at 242.

121. *Hensley*, 411 U.S. at 351.

122. *Marcello*, 634 F.2d at 971. The petitioner in *Marcello* was perhaps the ultimate example of a litigant engaged in dilatory tactics. Marcello's habeas corpus petition followed nearly 30 years of litigation in the courts of the United States and Italy. The Fifth Circuit included a history of Marcello's attacks on his deportation orders in two appendices to its opinion. *See Marcello*, 634 F.2d at 973-79.

123. 634 F.2d at 972.

124. 644 F.2d 1248, 1249 (1981). Daneshvar had admitted his deportability during deportation proceedings, and was granted permission to leave the United States voluntarily. Rather than leaving within the time allowed, he moved to reopen the deportation proceedings. The writ of habeas corpus was filed after Daneshvar was arrested and jailed for failing to leave. His release on bail was ordered by the district court which held that it had jurisdiction over the actions of the INS in taking Daneshvar into custody, but no jurisdiction to review the validity of Daneshvar's final orders of deportation.

125. *Id.* at 1251.

strued section 106(a)(9) as only creating district court habeas jurisdiction when the petitioner's challenge does not directly attack the validity of a final order of deportation.[126] By having statutory review and *habeas corpus* apply to mutually exclusive situations, this holding preserves the integrity of the single statutory form of review intended in section 106(a).[127]

D. *Analysis*

In reaching its decision in *Salehi*,[128] the Tenth Circuit relied on the Supreme Court constructions of section 106(a), as set forth in *Foti*, *Giova*, *Cheng Fan Kwok* and *Chadha*. The Tenth Circuit first found that under *Foti*, *Giova* and *Cheng Fan Kwok*, it did not have exclusive jurisdiction of petitioners' asylum and due process claims because those claims did not constitute direct attacks on the validity of the final orders of deportation against the petitioners. The court then separately applied the standard developed in *Chadha*.[129]

Application of the *Chadha* standard also yielded the result that section 106(a) did not apply to the petitioners' claims. The rationale was that, even if successful, the petitioners would be entitled only to a hearing to determine their eligibility for asylum; therefore, the validity of the final orders was not contingent on the success of their claims.[130] The court also pointed out that a subsequent finding that the petitioners were eligible for asylum would not overturn the deportation order, rather it would constitute collateral relief from the order.[131]

From a factual perspective, *Salehi* and *Cheng Fan Kwok* bear a close resemblance to one another. It is not surprising that their holdings are also in accord. The consistency of outcomes in *Salehi* of the separate applications of the *Chadha* and *Cheng Fan Kwok* standards is also not surprising, considering that the Supreme Court set out to achieve a result in *Chadha* which was in accord with *Cheng Fan Kwok*. This observation leads to the conclusion that the *Salehi* decision could have been based on *Chadha* or *Cheng Fan Kwok* without losing its force of reason.

A broader issue raised by the *Salehi* decision is how effective it is in preserving the congressional intent of curtailing dilatory appeals to deportation orders. Admittedly, the *Salehi* holding does provide for an extra level of judicial review, which superficially appears to thwart the purpose of section 106(a). In addition, *Salehi* could open the door to evasion of the statutory review procedure by the use of habeas corpus. There are, however, considerations which support the Tenth Circuit's holding in *Salehi*.

126. *Id. See also* United States *ex rel.* Parco v. Morris, 426 F.Supp. 976 (E.D. Pa. 1977); Te Kuei Liu v. INS, 483 F. Supp. 107 (S.D. Tex. 1980).
127. *See supra* text accompanying note 83.
128. *Salehi*, 796 F.2d at 1286.
129. *See supra* text accompanying notes 109-111.
130. *Salehi*, 796 F.2d at 1291.
131. *Id.*

The *Salehi* holding is rather narrow. The types of challenges to which section 106(a) does not apply are limited to (1) applications for relief collateral to the final deportation order and (2) procedural attacks on INS practices. Respecting collateral challenges to final deportation orders, the Supreme Court decision in *Cheng Fan Kwok* held that such challenges were intended by Congress to be outside the application of section 106(a), foreclosing any appellate court discretion in the matter. Procedural attacks are of a sufficiently limited class that they do not provide a significant opportunity for delay oriented appeals. Procedural attacks are limited because they apply only to allegations that INS practices of general application are unconstitutional; section 106(a) presumably applies to appeals of procedural rulings in individual cases.[132]

The *Salehi* court avoided deciding whether section 106(a)(9) should be construed as limiting district court habeas jurisdiction to those claims not directly attacking deportation orders. The court noted that in *Pilapil*[133] it had suggested in dicta that section 106(a)(9) would permit direct attacks on deportation orders. The court also noted that there was authority to the contrary provided by *Daneshvar*.[134] Refusal to decide the issue in *Salehi*, coupled with the recognition that prior Tenth Circuit authority is not binding, leaves the court free to decide the question entirely on its own merits in a future case.

III. THE RULE 4(F) EXPANSION OF PERSONAL JURISDICTION OVER NECESSARY THIRD PARTIES: *QUINONES V. PENNSYLVANIA GENERAL INSURANCE CO.*

A. *Facts*

In an action commenced in the state court system of New Mexico, Quinones, a New Mexico resident, filed a claim for damages against Penn General under an uninsured motorist policy.[135] The claim arose out of an automobile accident that occurred in Texas between plaintiff and Mowad, a resident of Texas. Penn General removed the suit to the United States District Court for the District of New Mexico, and filed a third-party complaint under Rule 14[136] for subrogation against appellee Mowad. Mowad was served in Texas, pursuant to Rule 4(f)[137] at a point approximately forty miles from the federal court in Las Cruces, New Mexico. The district court dismissed the complaint against Mowad on his motion asserting that the court lacked personal jurisdiction.[138] Quinones appealed several evidentiary rulings and Penn General appealed the dismissal of the complaint against Mowad.

132. *See* Haitian Refugee Center v. Smith, 676 F.2d 1023, 1033 (5th Cir. 1982). For a discussion of due process in deportation proceedings, see Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141 (1984).
133. 424 F.2d 6, 8-9 (10th Cir. 1970).
134. 644 F.2d 1248 (8th Cir. 1981).
135. Quinones v. Pennsylvania Gen. Ins. Co., 804 F.2d 1167, 1169 (10th Cir. 1986).
136. FED. R. CIV. P. 14.
137. FED. R. CIV. P. 4(f).
138. *Quinones*, 804 F.2d at 1169.

B. *The Tenth Circuit's Holding*

The district court had disallowed testimony from several of the plaintiff's witnesses ruling that an adequate foundation had not been laid to establish the relevance of the testimony.[139] The Tenth Circuit upheld all of the trial court's rulings noting that it had not abused its discretion in making them.[140] Turning to the jurisdictional issue, the Tenth Circuit held that by providing for service of third-party defendants at locations outside the forum state, but within 100 miles of the federal courthouse, Rule 4(f) did confer personal jurisdiction over Mowad, even though he did not have any contacts with the forum state (New Mexico).[141]

C. *Background*

Before the promulgation of the Federal Rules of Civil Procedure, the Judiciary Act of 1789[142] limited the in personam jurisdiction of the federal district courts to parties served within the district.[143] Rule 4(f) as first promulgated provided for service "anywhere within the territorial limits of the state in which the district court is held."[144] The rule was amended in 1963 to provide for service of necessary third parties brought pursuant to Rules 14 and 19 who could be served within 100 miles of the forum court.

1. The Purpose Underlying the Amendment of Rule 4(f)

The advisory committee's note pertaining to the 1963 amendment of Rule 4(f) provides insight into the intentions behind the change.[145] In enacting the provision in Rule 4(f) that provides for extended service on necessary third parties (regardless of whether such parties are within the forum state), the stated intent was to "promote the objective of enabling the court to determine entire controversies."[146] Considering modern travel and communication capabilities, the advisory committee felt that extension of the territorial range in which service is allowed would not work hardship on parties summoned.[147] The advisory committee's note has been interpreted as intending that Rule 4(f) extend the

139. *Id.* at 1170-1172.

140. *Id.* The Tenth Circuit relied on several of its cases for the elementary proposition that a trial court ruling on evidence will not be disturbed absent a showing of abuse of discretion. *See*, Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1331 (10th Cir. 1984); Rasmussen Drilling, Inc. v. Kerr-Mcgee Nuclear Corp., 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978) (this case contains a veritable gold mine of evidentiary propositions along with Tenth Circuit supporting authority for them at 1148-1149). Because the evidentiary rulings in *Quinones* are neither controversial nor of first impression, they will not be discussed further.

141. *Quinones*, 804 F.2d at 1177.

142. 1 Stat. 73 (1789).

143. Robertson v. Railroad Labor Bd., 268 U.S. 619 (1925).

144. *See* Mississippi Publishing v. Murphree, 326 U.S. 438, 443 (1946).

145. *See* Sprow v. Hartford Ins. Co., 594 F.2d 412 (5th Cir. 1979); Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250 (2d Cir. 1968).

146. FED. R. CIV. P. 4(f) advisory committee's note.

147. *Id.*

territorial limits of district court jurisdiction, rather than merely providing for service on necessary third parties already subject to the jurisdiction of the forum state.[148]

2. Power to Determine the Limits of Federal Process

Determining that the intent in amending Rule 4(f) was to effect an increase in district court jurisdiction resulted in a need to decide whether the Supreme Court, acting through its advisory committee, had the power to make such a change.[149] In *Mississippi Publishing Corp. v. Murphree*,[150] the Supreme Court was faced with the analogous question of whether, under the original version of Rule 4(f), it had the power to promulgate a rule expanding district court service of process to encompass the whole of the forum state.

The Court, after pointing out that Congress could provide for service of process anywhere in the United States,[151] analyzed whether Congress had delegated that power to the Court.[152] The Act of June 19, 1934, authorizing the promulgation of the Federal Rules of Civil Procedure, provided that the rules were not to "abridge, enlarge or modify" the substantive rights of litigants.[153] In *Sibbach v. Wilson & Co.*,[154] the court held that the proper test for a rule's validity was not whether it might affect a litigant's rights, but whether it was directed at regulating "the judicial *process* for enforcing rights and duties recognized by substantive law . . . ."[155] *Mississippi Publishing* expressly recognized that rules fixing jurisdiction did affect the rights of litigants, but relied on *Sibbach* as allowing such abridgments if incidental to the operation of a procedural rule.[156] The Court then emphasized that a rule specifying a federal court's jurisdiction did nothing to change the rules of decision

148. *See* Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250, 251 ("If the amendment had done no more than [permit personal service on necessary third parties already subject to the court's jurisdiction] . . . it would have accomplished little."). *Id.* at 251-52.

149. *See Id.* at 252; Sprow v. Hartford Ins. Co., 594 F.2d 412, 416.

150. 326 U.S. 438, 440.

151. *Id.* at 442 (citing Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925); United States v. Union Pac. R.R. Co., 98 U.S. 569, 604 (1879); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838)). For a critical review of the constitutionality of nationwide service of process in diversity cases, *see* Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963).

152. *Mississippi Publishing*, 326 U.S. at 445.

153. 48 Stat. 1064 (1934).

154. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

155. *Id.* at 14 (emphasis added). Petitioner in *Sibbach* had originally brought a personal injury action against respondent. Petitioner had been jailed for contempt by the district court for refusing to submit to a court ordered medical examination for the purpose of determining the extent of her injuries. *Id.* at 6-7. Her only challenge to the district court's action was based on her claim that FED. R. CIV. P. 35(a), providing for medical examinations when physical condition is an issue, was invalid because it abridged her substantive rights. *Id.* at 11. The Court rejected this claim, but ordered the petitioner's release based on plain error, because the remedy for failure to submit to a medical examination ordered pursuant to rule 35(a), provided in FED. R. CIV. P. 37(b)(2), does not include punishment for contempt. *Id.* at 16.

156. *Mississippi Publishing*, 326 U.S. at 445-446 (citing *Sibbach*, 312 U.S. at 11-14).

used by the court to adjudicate the parties' rights.[157] Interpreting Rule 4(f) as extending federal court jurisdiction over necessary third parties beyond the forum state's borders presents an issue not covered in *Mississippi Publishing*. The doctrine of *Erie Railroad v. Tompkins*[158] has been interpreted as requiring that federal court in personam jurisdiction in an ordinary diversity case be determined with reference to state law.[159] In *Arrowsmith*, Judge Friendly, writing for the Second Circuit, held that in the absence of an overriding federal statute, rule or policy, a federal district court cannot assert personal jurisdiction over a party in a diversity case, unless a court of the forum state would assert its jurisdiction over that party.[160] The *Arrowsmith* court did not express an opinion on whether Rule 4(f) would be limited by the forum state's jurisdictional bounds.[161]

3. Constitutional Due Process

By providing for service of process beyond the borders of the forum state, Rule 4(f) raises questions of due process under the minimum contacts standard set forth in *International Shoe v. Washington*.[162] The specific issue is whether the area of minimum contacts analysis remains confined to the forum state, or expands beyond its borders. In *Coleman v. American Export Isbrandtsen Lines, Inc.*,[163] the Second Circuit held that out of state service on a party pursuant to Rule 4(f) is valid if the state in which service is made could serve the party there. This is equivalent to extending the area of minimum contacts analysis to the whole of the state of service.

The Second Circuit pointed out that limiting the minimum contacts area to the forum state would result in Rule 4(f) providing a federal court with nothing more than a method of utilizing the forum state's long-arm statute.[164] Under such a limitation, the amendment of Rule 4(f) would have little effect, since Rule 4(e) expressly provides for service pursuant to a state's long-arm statute.[165] The Second Circuit also found support for extension of the minimum contacts area by reading the advisory committee's note as intending to expand district court jurisdiction.[166]

Expansion of the minimum contacts area relating to Rule 4(f) was

157. *Id.* (citing Guarantee Trust Co. v. York, 326 U.S. 99 (1945)).
158. 304 U.S. 64 (1938).
159. *See* Arrowsmith v. UPI, 320 F.2d 219 (1963).
160. *Id.* at 223. The court held that federal law would only come into play in a challenge to the state's ability to constitutionally assert jurisdiction. *Id.* at 222.
161. *Id.* at 228 n.9. *See generally* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 623 (1958).
162. 326 U.S. 310 (1945).
163. Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 252, 253 (1968). The court indicated that out of state service pursuant to Rule 4(f) would "very likely" be valid only on persons over which the state of service would actually choose to exercise jurisdiction. *Id.* at 252.
164. *Id.* at 252.
165. *Id.*
166. *Id. See also supra* text accompanying notes 142-145.

deemed necessary by the Fifth Circuit in *Sprow v. Hartford Insurance Co.*[167] The court again found that confining Rule 4(f) to providing for service on parties having sufficient minimum contacts with the forum state would reduce it to a duplicate of Rule 4(e).[168] The Fifth Circuit also adopted the Second Circuit's interpretation of the purpose behind the amendment of Rule 4(f).[169]

Sprow and *Coleman* differ on the extent of expansion of the minimum contacts area under Rule 4(f). The *Sprow* court held that a third party must have minimum contacts with either the forum state or the 100 mile bulge to be amenable to service under Rule 4(f).[170] Keeping the minimum contacts area coincident with the territory of the forum's jurisdiction was put forth as the most logical method of adapting the *International Shoe* due process test to the expansion of diversity jurisdiction beyond state borders.[171] The Fifth Circuit also noted that it might be fundamentally unfair to subject certain parties served in the 100 mile bulge area to the jurisdiction of a federal court sitting in another state. The court's example of such a party was a corporation which had an agent for service of process in the state containing the bulge, but no contact with the forum state or the 100 mile bulge other than the agent's temporary presence within the bulge.[172] Under the Second Circuit's standard set forth in *Coleman*, since the same hypothetical corporation's agent could be served by a court in the state containing the bulge at any place within its borders, the agent could be served in the bulge by a federal district court of the forum state.

D. *Analysis*

Sprow and *Coleman* were reviewed with approval in *Quinones* as reaching what the Tenth Circuit considered to be the proper result.[173] Rather than relying on those holdings, however, the jurisdictional reach of Rule 4(f) was analyzed according to basic principles.

The Tenth Circuit first relied on *Sibbach v. Wilson* as authorizing Congress to delegate rule-making power to regulate federal court procedure to the Supreme Court.[174] The extension of common-law jurisdiction brought about by Rule 4(f) as originally promulgated was then reviewed.[175]

As the first case to consider the provisions of the original Rule 4(f),

167. 594 F.2d 412, 416 (1979).

168. *Id.* at 417.

169. *See supra* text accompanying note 162. The purpose behind the expansion in jurisdiction was seen by both the Second and Fifth Circuits as that expressed in the advisory committee's note to Rule 4(f). *Coleman*, 405 F.2d at 250 n.3; *Sprow*, 594 F.2d at 417. *See also supra* text accompanying notes 142-145.

170. 594 F.2d at 416.

171. *Id. See also* Kaplan, *Amendments of the Federal Rules of Civil Procedure*, 1961-1963, 77 HARV. L. REV. 601, 633 (1964).

172. *Sprow*, 594 F.2d at 416.

173. *Quinones*, 804 F.2d at 1173-1174.

174. *Id.* at 1174 (citing *Sibbach v. Wilson*, 312 U.S. at 9-10).

175. *Quinones*, 804 F.2d at 1174-1175.

Mississippi Publishing[176] was recognized as a road map for interpreting the extension of district court jurisdiction by a procedural rule of the Court. The central proposition of *Mississippi Publishing*, that Rule 4(f) accomplished a congressionally authorized enlargement of district court territorial jurisdiction,[177] was used to dispose of appellee's contention that Rule 4(f) merely described effective service, rather than the extent of the district court's in personam jurisdiction.[178] To extend *Mississippi Publishing* to the case at bar, reference was made to the advisory committee's note to ascertain that the 1963 amendment of Rule 4(f) was intended to expand the district court's territorial jurisdiction.[179] By direct analogy with *Mississippi Publishing*, the Tenth Circuit then held that the intended expansion of territorial jurisdiction was accomplished by Rule 4(f).[180]

The Tenth Circuit became the first circuit court to go through a reasoned discussion to support the holding that the Rule 4(f) extension of diversity jurisdiction beyond state lines is not precluded by the *Erie* doctrine.[181] As suggested in *Arrowsmith*,[182] the Tenth Circuit held that if a federal rule or policy so requires, a federal district court may assert personal jurisdiction in a diversity suit where a state court would not.[183] Reading Rule 4(f) in the light of its underlying federal policy of ending controversies with one lawsuit, convinced the court that there was sufficient justification for finding that the rule did extend the federal district court's jurisdiction beyond the borders of the forum state.[184]

The *Quinones* court followed *Sprow* by interpreting *International Shoe* as requiring minimum contacts with the territory of the forum, rather than minimum contacts with the forum state.[185] This reading mandated the finding that the area of minimum contacts analysis for Rule 4(f) is the forum state plus the 100 mile bulge area. Since Rule 4(f) is of federal origin, it makes sense to dispense with the concept that federal court territorial jurisdiction is inextricably linked to one or more states' borders. The Tenth Circuit's well-reasoned finding that the *Erie* doctrine does not compel adherence to state law in the case of Rule 4(f)[186] makes this conclusion all the more compelling. Thus, the interpretation

176. 326 U.S. 438. *See supra* text accompanying note 147.

177. *Mississippi Publishing*, 326 U.S. at 444-445. *Mississippi Publishing* also addressed the question of whether the Court's interpretation of Rule 4(f) as expanding territorial jurisdiction was inconsistent with FED. R. CIV. P. 82 which prohibits construing the rules to extend or limit district court jurisdiction. The Court in *Mississippi Publishing* found no inconsistency by interpreting Rule 82 as applicable to subject matter jurisdiction and venue, but not personal jurisdiction. *Id.* at 445. The appellee in *Quinones* advanced the same inconsistency argument, which the Tenth Circuit rejected in the same way. *Quinones*, 804 F.2d at 1175 n.6.

178. *Quinones*, 804 F.2d at 1175.

179. *See supra* text accompanying notes 142-145.

180. *Quinones*, 804 F.2d at 1175.

181. *Id.* at 1176-1177.

182. 320 F.2d 219, 226 (1963). *See also supra* text accompanying notes 155-156.

183. *Quinones*, 804 F.2d at 1177.

184. *Id. See also supra* text accompanying notes 142-145.

185. *Quinones*, 804 F.2d at 1177. *See also Sprow*, 594 F.2d at 416-417.

186. *See supra* text accompanying notes 177-180.

of the minimum contacts area in *Quinones* is preferable to that adopted in *Coleman*.[187] There may be little practical difference between the two standards because of the limited application of Rule 4(f),[188] and the scarcity of situations in which a party served in the bulge area would have minimum contacts with the state of service, but not the bulge itself.

IV. RES JUDICATA EFFECT OF STATE COURT DISMISSAL OF SECTION 1983 ACTION: *DEVARGAS V. MONTOYA*

A. *Facts*

The facts underlying plaintiff's claim were simple: DeVargas alleged that guards at the New Mexico State Penitentiary beat him while he was incarcerated there.[189] The procedural aspects of the ensuing litigation complicated matters considerably. The alleged beating occurred on September 21, 1976. On July 6, 1977, DeVargas filed a complaint in New Mexico state court alleging violation of his civil rights under 42 U.S.C. § 1983[190] by the state of New Mexico, its Department of Corrections, and several prison guards and officials.[191] Following defendants' motion to dismiss, DeVargas allowed the case to lie dormant for 28 months.[192] On August 5, 1980, plaintiff filed a pleading, entitled "Amended Complaint," altering the parties' defendant, referring by name to seven parties listed as "Does" in the original complaint and adding several claims for relief. The New Mexico Court of Appeals found the new complaint to be original and dismissed it on the defense's assertion of the statute of limitations.[193] DeVargas then turned to federal district court, filing a complaint containing claims brought in state court, several new claims, and alleging that the decisions on the statute of limitations by the state court of appeals were in error.[194] Defendants again raised the statute of limitations and the district court dismissed the action, relying on the doctrine of claim preclusion in adopting the state court's determination that the action was time-barred. On appeal to the Tenth Circuit, DeVargas claimed denial of due process and equal protection in the state court proceedings and asked for review of both the state court rulings that the action was time-barred and the federal dis-

187. *See supra* text accompanying note 159.

188. *See Quinones*, 804 F.2d at 1173.

189. DeVargas v. Montoya, 796 F.2d 1245, 1247 (10th Cir. 1986).

190. 42 U.S.C. § 1983 (1982) provides that:

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

191. *DeVargas*, 796 F.2d at 1247.

192. *Id.* The delay was allegedly due to an oral agreement with defense counsel to enter into settlement negotiations.

193. DeVargas v. State *ex rel* New Mexico Dept. of Corrections, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), *cert. quashed*, 97 N.M. 563, 642 P.2d 166 (1982).

194. *DeVargas*, 796 F.2d at 1248.

trict court's adoption of the state court decisions.[195]

B. *The Tenth Circuit's Holding*

Ruling on the applicability of claim preclusion, the Tenth Circuit first held that the state court dismissal of the action as time-barred constituted a determination on the merits for purposes of res judicata.[196] The Tenth Circuit found no error in the state court's choice of the applicable statute of limitations; therefore, the state court's refusal to extend the statute of limitations was entitled to res judicata[197] effect in federal court.[198] Finally, the court ruled that the plaintiff had not been denied due process or equal protection rights in the state courts.[199]

C. *Background*

1. Res Judicata

State court judgments are generally entitled to full faith and credit in federal court.[200] In determining whether to grant preclusive effect to a state court judgment under the doctrine of *res judicata*, 28 U.S.C. § 1738 directs a federal court to refer to the preclusive effect that the judgment would have in the state of its issuance.[201] *Res judicata* is not available to dispose of an issue or claim in federal court when the party against whom it is asserted did not have a full and fair opportunity to litigate the issue or claim in state court.[202] The operation of res judicata is also inapplicable when a federal statute expressly or impliedly effects a

195. *Id.* DeVargas alleged that defendants were estopped from asserting the statute of limitations because of alleged concealment and misrepresentation of information needed by DeVargas to cure defects in his original complaint. *Id.* at 1248. *See generally* Note, *Citizen Trust and Government Cover-up: Refining the Doctrine of Fraudulent Concealment*, 95 YALE L.J. 1477 (1986). DeVargas also appealed the dismissal of claims added to the complaint when it was filed in federal district court. *DeVargas*, 796 F.2d at 1248.

196. *DeVargas*, 796 F.2d at 1250.

197. The general term "res judicata" will be used here to encompass the more specific terms of "issue preclusion," referring to the effect of a judgment in barring relitigation of an issue previously adjudicated, and "claim preclusion," which bars relitigation of matters which should have been raised in a prior action. *See* Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 376, n.1 (1985); Migra v. Warren City School Dist., 465 U.S. 75, 77, n.1 (1984).

198. *DeVargas*, 796 F.2d at 1252-54.

199. *Id.* at 1254-56.

200. 28 U.S.C. § 1738 (1982) provides in relevant part that "[J]udicial proceedings [of any state] shall have the same full faith and credit in every court within the United States . . . as they have . . . in the courts of such State . . . ." The phrase "every court within the United States" has been construed to include the federal courts. *See* Huron Holding Corp. v. Lincoln Mine Operations Co., 312 U.S. 183, 193 (1941); Davis v. Davis, 305 U.S. 32, 40 (1938).

201. *See* Allen v. McCurry, 449 U.S. 90 (1980). *See also supra* text accompanying notes 19-20, 26-29.

202. The Court has recognized the full and fair opportunity to litigate exception in both the issue preclusion and claim preclusion contexts. With regard to issue preclusion, *see Allen*, 449 U.S. at 95; Montana v. United States, 440 U.S. 147, 153 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-29 (1971). With regard to claim preclusion, *see* Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982).

partial repeal of 28 U.S.C. § 1738.[203]

Because of the importance of the federal interest in protecting individual civil rights and a perception that state courts are an inadequate forum for their protection, it has been suggested that full faith and credit need not be given to all state court decisions in section 1983 actions.[204] In *Allen v. McCurry*,[205] the Supreme Court found that section 1983 does not contain an implied repeal of the 28 U.S.C. § 1738 doctrine of preclusion. The Court reached its conclusion of no implied repeal because Congress, in enacting section 1983, did not manifest a clear intent to override either 28 U.S.C. § 1738 or the common law doctrine of *res judicata*.[206]

Although rejecting the implied repeal theory, the *Allen* Court reaffirmed the policy of not allowing preclusion to be asserted against a party who did not have a full and fair opportunity to litigate the claim or issue in state court.[207] This policy was stated more generally in *Kremer v. Chemical Construction Corporation*,[208] where the Court held that a judgment not meeting the requirements of due process could have no *res judicata* effect. The Court reasoned that since a state could not grant preclusive effect to a judgment not meeting the requirements of due process, 28 U.S.C. § 1738 prevented the federal courts from allowing such a judgment to be used preclusively.[209]

Implicit in the due process prerequisite to the application of res judicata is the requirement that the judgment for which preclusive effect is sought was an adjudication on the merits of the claim or issue in question. A prior judgment need not have reached the substantive issues of

203. *See Kremer*, 456 U.S. at 468, *Allen*, 449 U.S. at 98-99. *See generally* Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. REV. 59, 110-111 (1984).

204. *See*, Preiser v. Rodriguez, 411 U.S. 475, 509 n.14 (1973) (Brennan, J., dissenting). *See also* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1973); Averitt, *Federal Section 1983 Actions after State Court Judgment*, 44 U. COLO. L. REV. 191 (1972); *Developments in the Law-Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1335-43 (1977).

205. 449 U.S. at 90, 99 (1980). Several of the circuit courts have suggested that in section 1983 actions, claim preclusion should not bar federal court litigation of a federal issue which was not, but could have been, raised in a prior state court proceeding. *See* Graves v. Olgiati, 550 F.2d 1327 (2nd Cir. 1977); Lombard v. Bd. of Education, 502 F.2d 631 (2nd Cir. 1974); Mack v. Florida Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970). The *Allen* Court noted but expressed no opinion on this narrow exception. *Allen*, 449 U.S. at 97 n.10. Another narrow exception to the operation of claim preclusion occurs when a plaintiff has multiple claims, some of which fall within the exclusive jurisdiction of the federal courts, arising out of a single set of facts. The Court has stated that an implied partial repeal of 28 U.S.C. § 1738 might be appropriate in such a case (depending on the congressional intent in conferring exclusive federal jurisdiction) if state preclusion rules would bar subsequent litigation of the exclusively federal claims. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 386 (1985).

206. 449 U.S. at 99. The Court required a clear intent to repeal 28 U.S.C. § 1738, because repeals by implication are disfavored. *Allen*, 449 U.S. at 99 (citing Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976)).

207. *Allen*, 449 U.S. at 101.

208. 456 U.S. 461, 482 (1982).

209. *Id. Kremer* was a Title VII action brought in federal court after dismissal of administrative and state court claims arising from the same alleged injury: the defendant's failure to rehire petitioner after being layed off, when several other employees laid off by defendant were rehired.

a claim in order to have provided a full and fair opportunity for the parties to litigate their claims.[210] In *Angel v. Bullington*,[211] the Court stated that an adjudication declining to reach the ultimate substantive issues may be sufficient to bar a subsequent action attempting to relitigate the same issues.

2. Due Process Limits on Full Faith and Credit

As suggested above, the fourteenth amendment due process clause assures that state judicial proceedings which do not afford a party a full and fair opportunity to litigate can not be used preclusively against that party.[212] For situations covered by 28 U.S.C. § 1738, *Kremer* provides that state court proceedings which meet the minimum due process requirements of the fourteenth amendment qualify for full faith and credit.[213]

Satisfaction of fourteenth amendment due process is determined in an individual case by examining the procedures available to a state court litigant in prosecuting his claim.[214] The Court has stressed that due process does not require a uniform type of procedure, nor is there a single model by which due process is to be judged.[215]

Due process review of state court judgments in order to determine their preclusive effect arises frequently when a litigant attempts to pursue federal claims subsequent to state court litigation arising out of the same alleged injury.[216] When this occurs, the federal courts assess whether a litigant had a full and fair opportunity to pursue his federal claim in the state court.[217] A determination that the state court pro-

210. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) ("the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule, citing Hammond Packing Co. v. Arkansas, 212 U.S. 322, 351 (1909)).

211. 330 U.S. 183, 190 (1947). Due process must be satisfied in an action dismissed on procedural grounds in order for it to bar a subsequent attempt to relitigate claims arising out of the same facts. *See supra* text accompanying notes 24-26.

212. *See supra* text accompanying notes 204-05. *See also Kremer*, 456 U.S. at 481.

213. *Kremer*, 456 U.S. at 482. The Court pointed out that under the Full Faith and Credit Clause of the Constitution, Art. IV, § 1, a full and fair opportunity to litigate entails the procedural requirements of due process. *Kremer*, 456 U.S. at 483 n.24 (citing Sherrer v. Sherrer, 334 U.S. 343, 348 (1948)); Baldwin v. Iowa Traveling Men's Ass'n, 283 U.S. 522, 524 (1931); Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 30 (1917). Interpreting the purpose underlying the enactment of 28 U.S.C. § 1738 as implementing the Full Faith and Credit Clause, provided the connection between due process and full faith and credit. *Kremer*, 456 U.S. at 483 n.24 (citing Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943)); Davis v. Davis, 305 U.S. 32, 40 (1938).

214. *See Kremer*, 456 U.S. at 483; Kiowa Tribe v. Lewis, 777 F.2d 587 (10th Cir. 1985).

215. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974); Stanley v. Illinois, 405 U.S. 645, 650 (1972); Cafeteria Workers v. McElroy, 367 U.S. 885, 895 (1961); NLRB v. Mackay Co., 304 U.S. 333, 351 (1938).

216. *See* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985); Spence v. Latting, 512 F.2d 93 (10th Cir. 1975).

217. *See Marrese*, 470 U.S. at 380. Even if there was not a full and fair opportunity to litigate the federal claim in state court, issue preclusion may still apply to issues common to the federal and state claims. *See Kremer*, 456 U.S. at 466-67, 485; *Marrese*, 470 U.S. at 381-82, 385. *See generally* Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. REV. 59 (1984).

ceedings did not provide an opportunity to litigate the federal claim does not necessarily mean that full faith and credit can not bar the federal action. Assuming that state preclusion rules would bar the subsequent federal action if it were brought in state court, analysis of whether 28 U.S.C. § 1738 is expressly or impliedly partially repealed by the federal statute creating the claim must be undertaken.[218] Even though adherence to full faith and credit may bar a federal action without the plaintiff having had any previous opportunity to pursue the federal claim, the rigorous "implied repeal" test, which developed in cases where the federal claim was litigated in state court,[219] is applied.[220]

3. Statutes of Limitations Applicable to Section 1983 Actions

In section 1983 actions, 42 U.S.C. § 1988 requires that federal courts refer to state law in deciding issues not provided for by federal law.[221] There is no federal statute of limitations applicable to section 1983; therefore, state law must provide the statute of limitations. Prior to *Wilson v. Garcia*,[222] courts entertaining section 1983 claims adopted the statute of limitations applicable to the most analogous state cause of action.[223] The Tenth Circuit's approach before *Garcia* was to analyze the nature of the claim's allegations and adopt the statute of limitations applicable to the comparable state action.[224] In *Garcia*, the Supreme Court resolved the inconsistencies in the methods used by courts to determine the most similar state action, holding that state statutes of limitations applicable to personal injury actions were to apply to section 1983.[225]

One important exception to the adoption of state statutes of limitations in civil rights actions is the proviso that the state limitations statute

218. *See Marrese*, 456 U.S. at 383.

219. *See supra* text accompanying notes 201-02.

220. *See Marrese*, 456 U.S. at 381, 385. As the Court noted in *Marrese*, since most state preclusion laws do not apply where the subject matter jurisdiction of the initial court was not competent to entertain the subsequent claim, the potential for unfairness due to the rigor of the "implied repeal" test is lessened. *Id.* at 382.

221. 42 U.S.C. § 1988 (1982) provides that federal statutory civil rights shall be enforced in conformity with the laws of the United States. If the laws of the United States are deficient in an area, state law is to be used, as long as it is not inconsistent with the Constitution and laws of the United States.

222. 471 U.S. 261 (1985). For a discussion of the applicability of tort remedies to fill in the gaps in federal section 1983 law, *see* Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

223. *See* Robertson v. Wegmann, 436 U.S. 584 (1978).

224. *See* Clulow v. Oklahoma, 700 F.2d 1291, 1299-1300 (10th Cir. 1983) (section 1983 action alleging wrongful confinement in a mental hospital); Zuniga v. AMFAC Foods, Inc., 580 F.2d 380, 383 (10th Cir. 1978) (action for wrongful discharge from employment). The Third Circuit followed the same procedure as the Tenth Circuit. *See* Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 900-903 (3d Cir. 1977). The Seventh Circuit rejected the case-by-case determination method in favor of a uniform limitation for all claims founded on federal civil rights statutes. *See* Beard v. Robinson, 563 F.2d 331, 336 (7th Cir. 1977).

225. *Garcia*, 471 U.S. at 276. *See generally* Note, *Statutes of Limitations in Civil Rico Actions after Wilson v. Garcia*, 55 FORDHAM L. REV. 529 (1987).

not be applied if it is inconsistent with federal law.[226] Inconsistency is to be determined by reference to the Constitution, federal statutes, and the policies underlying both.[227] Despite the acknowledged "broad sweep"[228] of section 1983, the Court, in *Robertson v. Wegmann*,[229] held that there is nothing in section 1983 or its underlying policies that is inconsistent with a state law causing an action to abate.[230]

The Court has required that federal courts honor not only state statutes of limitations, but also state rules on how the statutes are to be tolled. In *Board of Regents v. Tomanio*,[231] a New York rule providing that the statute of limitations is not tolled during a period when a plaintiff pursues a related but independent claim, was upheld to bar a federal action resting on section 1983.[232] Writing for the Court, Justice Rehnquist applied the test that absent an inconsistency between the New York tolling rule and the policies underlying section 1983, the state tolling rule was to be followed in federal court.[233]

Relying on the foundation laid by *Robertson*,[234] the Court noted that there is no presumption or policy in federal law disfavoring state policies of repose.[235] Recognizing that the two principal purposes behind section 1983 are deterrence and compensation,[236] the Court found that the New York rules of repose did not hamper a plaintiff's ability to obtain relief under section 1983.[237]

In contrast to the uniform federal acceptance of state tolling rules, several circuits determine the accrual of actions according to federal law.[238] The Tenth Circuit views accrual as analogous to tolling, and in

226. This exception is contained in 42 U.S.C. § 1988 (1982). *See supra* note 217. *See also Robertson*, 436 U.S. at 589-90; *cf.* UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) (choice of statute of limitations in suits on collective bargaining contracts under the Labor Management Relations Act, 29 U.S.C. § 185 (1982)).

227. *See Robertson*, 436 U.S. at 590; Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975).

228. *Robertson*, 436 U.S. at 590 (citing Griffin v. Breckenridge, 403 U.S. 88, 97 (1971)).

229. 436 U.S. 584 (1978).

230. In *Robertson*, the Court was concerned with a Louisiana statute that caused the deceased plaintiff's action to abate because he was not survived by a spouse, parents, siblings or children. *Robertson*, 436 U.S. at 587.

231. 446 U.S. 478 (1980).

232. *Id.* at 480 (plaintiff was a practicing chiropractor in New York, but was unable to pass a state board examination required by a newly enacted state statute. Plaintiff claimed that the state's refusal to waive the examination requirement, in view of her professional experience, violated due process of law).

233. *Id.* at 485-86.

234. *See supra* text accompanying notes 222-26.

235. *Tomanio*, 446 U.S. at 488.

236. *See Robertson*, 436 U.S. at 590-91.

237. *Tomanio*, 446 U.S. at 488. The Court also rejected the argument that federal uniformity in the area of tolling rules was of sufficient importance to justify striking down New York's rule. *Id.* at 489.

238. *See* Sevier v. Turner, 742 F.2d 262, 272 (6th Cir. 1984); Keating v. Carey, 706 F.2d 377, 382 (2d Cir. 1983); Perez v. Laredo Junior College, 706 F.2d 731, 733 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); Gowin v. Altmiller, 663 F.2d 820, 822 (9th Cir. 1981); Bireline v. Seagondollar 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979).

Clulow v. Oklahoma,[239] held that questions of accrual are to be answered by reference to state law. The court reached its holding by reading *Tomanio* and *Johnson v. Railway Express Agency*[240] as directing federal courts to follow state rules relating to limitations statutes as well as the statutes themselves, unless there is an inconsistency between the state rules and federal law.[241]

D. *Analysis*

In *DeVargas v. Montoya*,[242] the Tenth Circuit, was faced with a federal action issue, as well as a collateral attack on prior state court adjudications. Defenses of res judicata and failure to comply with the statute of limitations were asserted to bar both actions. The court analyzed the actions separately, and that format will be adopted here as well.

1. Original Federal Action

The New Mexico Court of Appeals, in dismissing DeVargas' complaint, never reached the substantive issues;[243] therefore, the first task before the Tenth Circuit was to determine whether the state court dismissal constituted an adjudication on the merits.[244] Following the well established rule that a federal court refer to the preclusive effect a judgment would have in the state of its issuance,[245] the Tenth Circuit determined that the dismissal was a judgment on the merits pursuant to state law,[246] and that New Mexico adhered to the majority rule that claim preclusion was applicable both to issues which were and which could have been raised.[247] These basic issues were dispensed with essentially in summary fashion by the court.

DeVargas's only serious challenge to the applicability of res judicata was that the federal courts' independent powers to determine issues such as tolling, waiver and estoppel somehow avoided the mandate of full faith and credit.[248] In disposing of this argument, the Tenth Circuit undertook a brief analysis of the extent of independent federal power. It was noted that the Supreme Court settled conclusively that state toll-

239. 700 F.2d 1291 (1983).

240. 421 U.S. 454 (1975).

241. *See Clulow*, 700 F.2d at 1300. In *Clulow*, the Tenth Circuit went on to find that there was no conflict between the section 1983 or its underlying policies and Oklahoma's accrual rules. *Id.* at 1301.

242. 796 F.2d 1245 (10th Cir. 1986).

243. DeVargas v. State *ex rel.* New Mexico Dept. of Corrections, 97 N.M. 447, 642 P.2d 166 (1982).

244. *DeVargas*, 796 F.2d at 1249.

245. *See supra* text accompanying note 197.

246. *DeVargas*, 796 F.2d at 1249. The court cited Campos v. Brown, 85 N.M. 684, 515 P.2d 1288 (N.M. Ct. App. 1973) and Adams v. United Steelworkers of America, 97 N.M. 369, 640 P.2d 475 (1982) for their holdings that a dismissal with prejudice constitutes an adjudication on the merits.

247. *DeVargas*, 796 F.2d at 1251. The court relied on First State Bank v. Muzio, 100 N.M. 98, 666 P.2d 777 (1983) as authority for New Mexico's view on applicability of claim preclusion to issues which could have been raised.

248. *DeVargas*, 796 F.2d at 1250.

ing rules are to be followed in section 1983 actions.[249] *Clulow v. Oklahoma* was cited for the proposition that a claim of estoppel due to concealment of information[250] was a question of accrual, and also for the Tenth Circuit's position that accrual is determined according to state rules.[251]

Because of the well established consistency between state policies of repose and section 1983,[252] no investigation concerning the success with which state rules fulfilled the purposes of federal statutes was undertaken in *DeVargas*. The Tenth Circuit assumed the existence of independent federal power to determine issues of tolling or accrual, but promptly discarded the idea of using such federal power, because claim preclusion barred relitigation of the New Mexico decision, refusing to recognize any extension of the limitations period. Presumably, in a case where a party was able to put forth a claim in which the consonance of state law and federal statute was not settled, the court would have undertaken an analysis similar to that in *Tomanio*[253] to determine whether the state law was inconsistent with a federal statute or its underlying purpose.

2. Collateral Attacks on State Court Proceedings

DeVargas attacked the state court proceedings based upon theories of inconsistency with federal law and denial of due process. The inconsistency theory was grounded mainly upon *Gunther v. Miller*,[254] which was claimed to establish a binding determination that the four-year New Mexico statute of limitations applied to section 1983 actions.[255] *Gunther* was distinguished by the Tenth Circuit as holding only that the two-year limitations period of the New Mexico Tort Claims Act[256] did not apply.[257]

After the dismissal of plaintiff's action by the New Mexico courts, the Supreme Court handed down *Garcia v. Wilson*,[258] which mandates use of state personal injury limitations statutes in section 1983 actions. Retroactive application of *Garcia* would not have helped *DeVargas*, who needed the four-year statute for miscellaneous actions, not the three-year personal injury statute.[259] Probably because of the court's interest

249. *Id.* at 1252. *See supra* text accompanying note 221.
250. *See supra* note 7.
251. *See supra* text accompanying notes 235-37.
252. *See supra* text accompanying note 229.
253. 446 U.S. 478. *See supra* text accompanying note 230-33.
254. 498 F. Supp. 882 (1980).
255. The four-year statute, N.M. STAT. ANN. § 37-1-4 (1978), is a catch-all provision for miscellaneous actions not covered by specific limitations statutes. Other relevant statutes of limitations are the two-year period set by the New Mexico Tort Claims Act, N.M. STAT. ANN. § 41-4-12 (1978), and the three-year period for personal injury actions, N.M. STAT. ANN. § 37-1-8 (1978).
256. N.M. STAT. ANN. § 41-4-12 (1978).
257. *Gunther*, 498 F. Supp. at 882-83.
258. 471 U.S. 261 (1985). *See supra* text accompanying notes 218-21.
259. *See supra* note 251. *See also* Note, *Wilson v. Garcia and Statutes of Limitations in Section 1983 Actions: Retroactive or Prospective Application?*, 55 FORDHAM L. REV. (1986).

in allowing a chance for DeVargas to obtain an adjudication of his section 1983 claim on its substantive merits, the Tenth Circuit declined to apply *Garcia* retroactively.[260]

In situations where the Tenth Circuit has determined state statutes of limitations applicable to federal laws, part of their analysis has centered upon analogous state court holdings.[261] The *DeVargas* court agreed with the plaintiff's assertion that the characterization of an action, brought in federal court under federal law for purposes of determining the applicable state statute of limitations, is a question of federal law. The burdens of a federal policy not disfavoring state statutes of repose[262] and the existence of a state court decision on the exact federal issue before the federal court, in a circuit with a policy of actively adopting state court rulings on statute of limitations matters, proved to be insurmountable to DeVargas.

The Tenth Circuit made it clear that the state court determination carried great weight. Consequently, the inconsistency claim was again dismissed summarily with no analysis of underlying federal purpose.[263] Such deference to state law characterizations of federal statutes is consistent with the Supreme Court decisions in *UAW v. Hoosier Cardinal Corporation*,[264] *Tomanio* and *Marrese*. *Hoosier* stated the general proposition that state law characterizations of federal law ought to be respected by federal courts, unless inconsistent with federal law.[265] *Tomanio* applied this proposition by accepting state tolling rules as part of state statutes of limitations.[266] *Marrese* indicated the potential ultimate extent of deference to the states by postulating that a plaintiff might be precluded by a prior state court action from bringing a subsequent exclusively federal claim.[267]

DeVargas's due process attack on the state court proceedings was very broad, challenging every adverse decision made by the New Mexico courts.[268] The Tenth Circuit stated the general proposition that full faith and credit required only that the minimum procedural requirements of due process be satisfied.[269] Therefore, no detailed analysis of plaintiff's constitutional claims was pursued. The court pointed out that plaintiff was responsible for the delays in the state court litigation. Because of the Supreme Court's exclusive jurisdiction over such appeals, it was within the court's power to refuse to address the constitutionality of

260. *DeVargas*, 796 F.2d at 1253.

261. Zuniga v. AMFAC Foods, Inc., 580 F.2d 380, 386 (10th Cir. 1978). *See supra* text accompanying notes 219-20.

262. Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980). *See supra* text accompanying note 231.

263. *DeVargas*, 796 F.2d at 1254.

264. 383 U.S. 696 (1966).

265. *Id.* at 706.

266. *Tomanio*, 446 U.S. at 483.

267. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 386 (1985).

268. *DeVargas*, 796 F.2d at 1244-45.

269. *See supra* text accompanying notes 208-13.

the state court proceedings in areas other than the due process issue.[270]

V. INTERVENTION OF RIGHT: *FDIC v. JENNINGS*

A. *Facts*

This case arose out of the insolvency of Penn Square Bank, N.A. The Federal Deposit Insurance Corporation (FDIC) was appointed receiver for Penn Square and filed suit against former bank officers and directors for breach of fiduciary duty.[271] The complaint was amended to join the accounting firm Peat, Marwick, Mitchell, & Co. ("Peat Marwick"), which was charged with negligence and breach of contract arising out of an audit of Penn Square's financial statements.[272] Penn Square's holding company, First Penn Corporation, moved to intervene in the action pursuant to rule 24(a)(2),[273] alleging both derivative and direct injuries arising from Peat Marwick's audit of Penn Square.[274] The derivative claims sought recovery for losses incurred by First Penn as a shareholder in Penn Square. The direct claims alleged losses suffered by First Penn in transactions with Penn Square which resulted from First Penn's reliance on Peat Marwick's audit of Penn Square.[275] The district court denied the motion to intervene[276] and First Penn appealed.[277]

B. *The Tenth Circuit's Holding*

The Tenth Circuit disposed of the threshold issue of mootness, which arose because of the settlement between the FDIC and Peat Marwick, holding that the settlement did not moot every issue of the action.[278] First Penn dropped its derivative claims; therefore, the Tenth Circuit addressed intervention with respect to the direct claims only.[279] After reviewing the merits of First Penn's intervention claim in detail, the court upheld the district court's dismissal of the motion to intervene.[280]

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270. *DeVargas*, 796 F.2d at 1245. The Tenth Circuit based its lack of jurisdiction over this appeal regarding the constitutionality of the state court decision on District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983), and 28 U.S.C. § 1257 (1982), which grants exclusive jurisdiction over Constitutional appeals from state courts to the Supreme Court.

271. FDIC v. Jennings, 816 F.2d 1488, 1490 (10th Cir. 1987).

272. *Id.*

273. FED. R. CIV. P. 24(a)(2).

274. *Jennings*, 816 F.2d at 1490.

275. *Id.*

276. FDIC v. Jennings, 107 F.R.D. 50 (W.D. Okla. 1985).

277. *Jennings*, 816 F.2d at 1490. FDIC and Peat Marwick settled while First Penn's appeal was pending.

278. *Id.* at 1491. The court viewed settlement in a case where an appeal to intervene was pending as posing a particular risk of injustice to a party with a legitimate intervention claim.

279. *Id.*

280. *Id.* at 1493. The court approved both the verdict and reasoning employed by the district court.

C. *Background*

Rule 24(a)(2) sets out standards for intervention by right.[281] The prospective intervenor must claim an interest relating to the property or transaction which is the subject of the action and he must be so situated that the disposition as a practical matter will impede his ability to protect the interest.[282] Intervention is warranted under these circumstances unless the applicant's interest is adequately represented by existing parties to the action.[283] The analysis in intervention cases typically proceeds by analyzing the interest, its impairment, and the adequacy of representation as separate, but frequently related, elements.[284]

1. Intervenor's Interest in the Action

Since the 1966 amendment of Rule 24(a)(2) to its present form, courts have had a difficult time formulating a precise test for the interest necessary to justify intervention.[285] Soon after the rule's amendment, the Tenth Circuit adopted what appeared to be a narrow view, requiring that the interest be specifically legal or equitable.[286] The Supreme Court, in *Donaldson v. United States*,[287] used an approach similar to the Tenth Circuit's, refusing intervention to an applicant who did not have a "significantly protectable interest."[288]

Shortly after the Tenth Circuit's attempt to clarify the meaning of interest, the District of Columbia Circuit, in *Nuesse v. Camp*[289] allowed an applicant asserting a general interest to intervene. The applicant in *Nuesse* was the Wisconsin Banking Commissioner, who sought to intervene in an action between the American State Bank, a Wisconsin chartered bank, and the United States Comptroller of the Currency.[290] American challenged the Comptroller's approval of a national bank's application

281. *See*, FED. R. CIV. P. 24(a)(2), which provides for intervention:
> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

282. *See* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1343 (10th Cir. 1978).

283. *See* National Farm Lines v. ICC, 564 F.2d 381, 384 (10th Cir. 1977).

284. *See Natural Resources*, 578 F.2d at 1344-45; Jet Traders Inv. Corp. v. Tekair, Ltd., 89 F.R.D. 560 (D. Del. 1981).

285. *See* Sanguine, Ltd. v. United States Dept. of the Interior, 736 F.2d 1416, 1420 (1984) ("[C]ourts have enjoyed little success in attempting to define precisely the type of interest necessary for intervention"); Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849, 850 n.3 (10th Cir. 1981) ("[A]ttempts to add content to Rule 24(a)(2)'s 'interest' requirement have met with questionable success."); Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).

286. *See* Toles v. United States, 371 F.2d 784 (10th Cir. 1967).

287. 400 U.S. 517 (1971).

288. *Id.* at 531. Donaldson sought to intervene in an action between his former employer, Acme, and the Internal Revenue Service. The IRS sued to enforce summons served on Acme and its accountant requiring them to testify on matters relating to Donaldson's tax liability. Donaldson moved to intervene in the action, citing his potential tax liability as a sufficient interest. *Id.* at 518-19.

289. 385 F.2d 694 (1967).

290. *Id.* at 698.

to open a branch office. The Commissioner's asserted interest was based on his authority to enforce the state banking laws relied on by American in bringing its action.[291] The District of Columbia Circuit rejected a narrow approach in defining "interest," choosing instead to rely on the purpose behind the interest test.[292] The court perceived that the interest test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[293]

Despite the Tenth Circuit's apparently limited formulation of what constitutes a sufficient interest, it has made statements tending to suggest a broader outlook than the "specific legal or equitable interest" test would suggest.[294] In *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*,[295] the Tenth Circuit allowed intervention by a party with a general economic interest in the action. In *Natural Resources*, the Natural Resources Defense Council sued to prevent the Nuclear Regulatory Commission (NRC) and the New Mexico Environmental Improvement Agency (NMEIA) from licensing a uranium mill operated in New Mexico by United Nuclear Corporation without first preparing environmental impact statements.[296] Kerr-McGee Nuclear Corporation moved to intervene, claiming an interest in the action because it operated a uranium mill in New Mexico, and had an application for renewal of its operating license pending before the NMEIA.[297]

Describing the nature of interest meriting intervention, the Tenth Circuit stated that the applicant need not have a direct interest in the outcome of the action.[298] The court relied on *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,[299] a Supreme Court case where the state of California was allowed to intervene in an antitrust action because the outcome of the action might affect California's natural gas supply.[300] The specific legal or equitable interest test was not abandoned in *Natural*

291. *Id.*

292. *Id.* at 700. *See* FED. R. CIV. P. 19 advisory committee's note ("persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made.") and FED. R. CIV. P. 24(a)(2) advisory committee's note ("the amendment draws upon the revision of . . . [Rule 19] and the reasoning underlying that revision."). *See generally*, Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061 (1985).

293. *Nuesse*, 385 F.2d at 700.

294. *See National Farm Lines*, 564 F.2d at 384 ("Our court has tended to follow a somewhat liberal line in allowing intervention."); Dowell v. Board of Ed. of Okla. City, 430 F.2d 865, 868 (10th Cir. 1970) ("[I]ntervention . . . should be freely granted so long as it does not seriously interfere with the actual hearings.").

295. 578 F.2d 1341 (10th Cir. 1978).

296. *Id.* at 1342-43.

297. *Id.* at 1344. The American Mining Congress also sought to intervene on behalf of its members who were or might become uranium mill operators in New Mexico.

298. *Id.*

299. 386 U.S. 129 (1967).

300. *Id.* The Court had previously ordered that El Paso Natural Gas divest itself of the Northwest Pipeline Corporation. *See* United States v. El Paso Natural Gas Co., 376 U.S. 651, 662 (1964). The instant action was to assure that Pacific Northwest, a natural gas supplier subsidiary of Northwest Pipeline, be restored to a competitive position in the California Market. *Cascade*, 386 U.S. at 132.

Resources; however, Kerr-McGee's interest was of a more general and attenuated nature than previously merited intervention in the Tenth Circuit.[301]

2. Impairment of Interest

The existence of an interest justifying intervention and the issue of its impairment are not entirely separable.[302] Finding an interest has been conditioned on whether it would be impaired by the outcome of an action.[303] One issue analyzed solely in terms of impairment is the effect of stare decisis on a prospective intervenor's ability to protect his interest in a subsequent action.

Stare decisis was recognized as a sufficient "practical disadvantage"[304] to warrant intervention of right soon after the 1966 amendment of the Federal Rules.[305] *Atlantis Development Corp. v. United States*[306] was an early case on stare decisis impairment. The issue before the *Atlantis* court was one of first impression, a factor upon which considerable emphasis was placed in finding impairment based primarily on stare decisis.[307] The Fifth Circuit reasoned that the issue of first impression, in the present action, would be a part of any subsequent claim brought by Atlantis (the applicant for intervention); therefore, the principal action constituted a trial on the merits of Atlantis's claim in a practical sense.[308]

The applicability of stare decisis to a finding of impairment of inter-

301. In Sanguine, Ltd. v. United States Dept. of Interior, 736 F.2d 1416 (1984), the Tenth Circuit adopted the underlying purpose analysis of *Nuesse*, 385 F.2d 694. This adoption indicated conclusively that the specific legal or equitable interest criterion would not be applied literally. One court has noted that intervention is granted more freely in "cases seeking injunctive relief where the grant of the relief sought would have broad social or economic ramifications" than in actions seeking damages. *See* Jet Traders Inv. Corp. v. Tekair, Ltd., 89 F.R.D. 560 (D. Del. 1981). The Tenth Circuit's decisions seem to line up roughly along this guideline. Thus, intervention was allowed in *Natural Resources*, where the intervenor (American Mining Congress) represented many companies which might be impacted if the Natural Resources Defense Council prevailed. *See supra* text accompanying notes 291-93. Intervention was also granted in *Sanguine*, 736 F.2d at 1416, where the applicant was an Indian tribe affected by a proposed change in the interpretation of oil and gas leases of Indian lands by the Bureau of Indian Affairs. *Sanguine*, 736 F.2d at 1417-18. *But see* Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849 (1981), where intervention was denied. The applicant leased land containing coal deposits to Rosebud. The royalty rate of the lease was tied to the royalty rate that the Department of Interior charged Rosebud on federal lands. Rosebud was disputing an increase in the federal royalty rate and subsequently, the applicant claimed an interest since its royalty rate was tied to the federal rate. *Rosebud*, 644 F.2d at 849-50.

302. *See Natural Resources*, 578 F.2d at 1345.

303. *Id.* at 1344 (citing *Cascade*, 386 U.S. at 135-36).

304. FED. R. CIV. P. 24(a)(2).

305. *See* Atlantis Dev. Corp. v. United States, 379 F.2d 818, 826-29 (5th Cir. 1967); *Nuesse*, 385 F.2d at 702.

306. 379 F.2d 818 (5th Cir. 1967).

307. *Atlantis*, 379 F.2d at 826. At stake in *Atlantis* was the ownership of a number of reefs off the coast of Florida. The United States sued Acme, apparently at Atlantis' behest, to enjoin Acme from building structures on the reefs without first obtaining a permit from the United States Corps of Engineers. Atlantis was also interested in building on the reefs, and moved to intervene. *Id.* at 820-21.

308. *Id.* at 826.

est has been addressed in a number of cases since *Atlantis*, resulting in refinement and definition of the doctrine.[309] Federal courts do not see stare decisis as having any significant impairment effect in cases where the precedent would only have persuasive effect in a subsequent action by the applicant for intervention.[310] Lack of identity of legal issues between the action and the applicant's claim, and federal court actions based on state law, where the applicant's action would be tried in state court, are two principal areas where the stare decisis effect does not rise to the level of practical impairment.[311]

3. Inadequate Representation of an Intervenor's Interest

A footnote in a 1972 Supreme Court case set the standard for evaluating whether the existing parties to an action adequately represent the proposed intervenor's interests. In *Trbovich v. United Mine Workers of America*,[312] the Court stated that an applicant need only show that the representation of his interest by existing parties may be inadequate.[313] The Court went on to say that the applicant's burden in showing inadequacy is minimal.[314]

Prior to *Trbovich*, at least one court had put the burden of showing adequate representation by existing parties on those parties opposing intervention.[315] Even after *Trbovich*, a few courts continued to indicate a preference for saddling parties opposing intervention with the burden of showing adequate representation.[316] In *National Farm Lines v. ICC*,[317] the Tenth Circuit was encouraged by a petitioner for intervention to put

309. *See Jet Traders*, 89 F.R.D. at 569; CRI, Inc. v. Watson, 608 F.2d 1137 (8th Cir. 1979); *Natural Resources*, 578 F.2d at 1341; Florida Power Corp. v. Granlund, 78 F.R.D. 441 (M.D. Fla. 1978); Blake v. Pallan, 554 F.2d 947, 954 (9th Cir. 1977); New York Pub. Interest Research Group, Inc. v. Regents of the Univ. of New York, 516 F.2d 350 (2nd Cir. 1975); Martin v. Travelers Indem. Co. 450 F.2d 542 (5th Cir. 1971).

310. *See* Blake v. Pallan, 554 F.2d 947, 954 (1977); *Jet Traders*, 89 F.R.D. 560.

311. *Jet Traders*, 89 F.R.D. at 569.

312. 404 U.S. 528 (1972). The Secretary of Labor brought suit under § 482(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 482(b) (1982), to overturn the results of a United Mine Workers election. Trbovich had initiated the complaint with the Secretary, which led to the suit. *Trbovich*, 404 U.S. at 529. The Court pointed out that the Secretary's statutory duty included protecting both the rights of individual union members and the public's interest in fair union elections. Intervention was granted because the Court perceived the Secretary's dual protectorate role could conceivably result in a conflict. *Trbovich*, 404 U.S. at 538-39.

313. *Id.* at 538 n.10.

314. *Id.*

315. *Nuesse*, 385 F.2d at 702.

316. *See* Corp. v. Merchandise Mart of S.C., Inc., 61 F.R.D. 684 (D. S.C. 1974); Holmes v. Government of Virgin Islands, 61 F.R.D. 3 (D. St. Croix 1973).

317. 564 F.2d 381 (10th Cir.1977). National Farm Lines sought to intervene in an action brought by the National Motor Freight Traffic Association against the ICC, attacking the constitutionality of ICC regulations on motor carriers. *Id.* at 382. In assessing the adequacy of the ICC's representation of National Farm Lines (National Farm Lines benefitted from the reduced competition brought about by the regulation), the Tenth Circuit emphasized the significance of business knowledge and experience possessed by private concerns which a government agency would not have, and the conflict inherent in the agency's desire to protect the interest of both the private business and the general public. *Id.* at 383-84.

the adequacy of representation burden of proof on the opposing party.[318] The court followed *Trbovich*, holding that the burden of showing inadequate representation, though slight, was on the petitioner.[319]

Perhaps the more significant effect of *Trbovich* is its characterization of the intervening applicant's burden as minimal. The Tenth Circuit's interpretation of minimal was defined in *Natural Resources* as finding inadequacy of representation unless "there is no way to say that there is no possibility that . . . [the interests of the intervenor and the existing parties] will not be different . . . ."[320] Having parties before the court in order to bind them to the result as well as to protect prospective intervenors' rights, were relied upon in *Natural Resources* as favoring a near presumption of inadequacy of representation.[321]

D. *Analysis*

Since First Penn dropped its derivative claims against Peat Marwick, the Tenth Circuit only addressed whether First Penn's direct claims entitled it to intervene in the action between the FDIC and Peat Marwick.[322] The court narrowed its analysis to the interest and impairment requirements for intervention after a brief discussion of the FDIC's ability to represent First Penn's interests in the direct claims.[323]

In advancing its direct claims, First Penn would have had to prove that, absent Peat Marwick's alleged negligence in preparing the audit, it would not have entered into certain loan transactions with Penn Square.[324] On the other hand, the FDIC's case did not depend on First Penn's injuries allegedly incurred in reliance on the audit. Because the facts clearly indicated at least a partial lack of overlap in the FDIC's and First Penn's claims, the finding of inadequacy of representation depended on the facts and required no legal analysis.

Turning to the issue of interest in the action, in particular, how to assess a prospective intervenor's interest, the court adopted the previous Tenth Circuit requirement that the interest asserted be a specific legal or equitable one, but stated that the test of interest is determined with reference to the purpose underlying the interest requirement.[325] This juxtaposition of propositions, that had been considered inconsistent by the District of Columbia Circuit in *Nuesse*,[326] indicates that the Tenth Circuit's specific legal or equitable interest requirement does not mean specific in the sense of reliably known at the time of intervention; but rather it means specific in the sense of legally cognizable within the

318. *Id.* at 383.
319. *Id.*
320. *Natural Resources*, 578 F.2d at 1346.
321. *Id.*
322. *Jennings*, 816 F.2d at 1491.
323. *Id.*
324. *Id.* at 1490-91.
325. *Id.* at 1491. *See supra* text accompanying notes 282 and 289.
326. Neusse v. Camp, 385 F.2d 694, 700 (1967).

context of the action in which intervention is requested.[327]

While the divergence of issues worked to First Penn's favor on the adequacy of representation issue, too great a divergence would preclude finding that First Penn had a sufficient interest in the litigation to justify intervention. The court did note that First Penn's claim would interject new issues into the action.[328] In keeping with the recognized interrelationship between interest and impairment, however, the Tenth Circuit addressed impairment before determining how burdensome the introduction of new issues would be; essentially implying that a finding of serious impairment would justify a larger burden on the existing litigation.[329]

The divergence of issues worked to First Penn's detriment in the impairment analysis. The court noted that stare decisis could be sufficient to satisfy the impairment requirement; however, the difference in First Penn's and the FDIC's theories of recovery minimized the stare decisis effect. Furthermore, Oklahoma law controlled First Penn's claims, again minimizing the precedential impact of a federal court ruling.[330]

After finding the impairment of First Penn's claims to be minor, the Tenth Circuit adopted the district court's finding that the introduction of new issues would burden the existing action substantially. Citing the burden on the existing action, the lack of stare decisis impairment, and the divergence of the issues, the Tenth Circuit upheld the district court's determination that First Penn was not entitled to intervene in the action.[331]

VI. SUA SPONTE DISMISSAL FOR LACK OF PERSONAL JURISDICTION: *WILLIAMS V. LIFE SAVINGS AND LOAN*

A. *Facts*

Plaintiff Pamela Williams, acting pro se, filed a Title VII employment discrimination action against her former employer in the Colorado federal district court.[332] Defendant was a Rockford, Illinois bank, over which the court could not obtain personal jurisdiction.[333] The complaint was filed on April 26, 1985 and dismissed sua sponte by the district court on April 29, 1985, for lack of personal jurisdiction over Life Savings.[334]

327. *See supra* text accompanying notes 285-93. *Cf.* Allard v. Frizzell, 536 F.2d 1332 (10th Cir. 1976) (intervention denied to applicants whose interest in the action was an interest held by the public generally which would not be impeded by the disposition of the action).

328. *See supra* text accompanying note 306. *See also Natural Resources*, 578 F.2d at 1345.

329. *Jennings*, 816 F.2d at 1492. *See also supra* text accompanying note 306-07.

330. *Jennings*, 816 F.2d at 1492. *See also* FDIC v. Jennings, 107 F.R.D. 50, 55 (1985).

331. *Jennings*, 816 F.2d at 1493.

332. Williams v. Life Sav. & Loan, 802 F.2d 1200, 1202 (10th Cir. 1986).

333. *Id.*

334. *Id.*

B. *The Tenth Circuit's Holding*

The Tenth Circuit noted that the complaint was dismissed before the date on which the defendant was required to appear or file a responsive pleading.[335] In a per curiam opinion, the court held that a district court's power to inquire sua sponte into its jurisdiction over the parties is not to be exercised until a point is reached in the proceedings where a default judgment could be entered.[336] Because Life Savings was not in default when the complaint was dismissed, the district court's dismissal was reversed, and the case remanded.[337]

C. *Background*

1. Sua sponte dismissal

In certain circumstances, the limited jurisdiction of the federal courts and considerations of judicial economy and fairness permit sua sponte dismissal by the court. A federal court must dismiss an action over which it does not have subject-matter jurisdiction, regardless of whether or not the issue is raised by the parties.[338] A judgment rendered by a court lacking jurisdiction over the subject matter of the action is void,[339] and therefore, legally ineffective.[340] Because subject-matter jurisdiction can never be conferred by waiver or consent,[341] and a judgment rendered in its absence has no legal effect, a court is bound to inquire into its jurisdiction before rendering judgment.[342]

Sua sponte dismissal for lack of prosecution is supported by the policy of judicial efficiency. In *Link v. Wabash R.R. Co.*,[343] the Supreme Court upheld a district court's dismissal of a dilatory plaintiff's action.[344] Writing for the Court, Justice Harlan recognized that a court's authority to control its docket was inherent, and governed by the control necessary to "achieve the orderly and expeditious disposition of

335. *Id.* FED. R. CIV. P. 12(a) provides that:

> [a] defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state.

336. *Williams*, 802 F.2d at 1203. FED. R. CIV. P. 55(a) provides for the entry of a default judgment "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise. . . ."

337. *Williams*, 802 F.2d at 1203.

338. *See* Mansfield, C. & L. Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884); Fiedler v. Clark, 714 F.2d 77, 78-79 (9th Cir. 1983).

339. *See* Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938); Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 465 (1873) (a court must have "jurisdiction of parties and cause" for its judgment to be valid); Misco Leasing, Inc. v. Vaughn, 450 F.2d 257 (10th Cir. 1971).

340. *See* Williams v. North Carolina, 325 U.S. 226 (1945); Kalb v. Feuerstein, 308 U.S. 433 (1940).

341. *See* Mitchell v. Maurer, 293 U.S. 237, 243 (1934).

342. *See Mansfield*, 111 U.S. at 382.

343. 370 U.S. 626 (1962).

344. *Id.* at 633.

cases."[345]

With respect to sua sponte dismissal, defects in personal jurisdiction differ from defects in subject-matter jurisdiction and action by a plaintiff which merits dismissal. Waiver of personal jurisdiction by a party may be made as expressly provided for in the Federal Rules of Civil Procedure, or otherwise, subject only to due process protections. Waivers which are not dependent on the Federal Rules include voluntary appearance,[346] and consent to subject oneself to the *in personam* jurisdiction of a particular court by contact.[347]

Under Rule 12(h)(1),[348] the defense of lack of personal jurisdiction is waived if it is not raised in a pre-answer pleading or in the answer itself. Thus, lack of personal jurisdiction is a personal defense, as is the assertion of the statute of limitations to bar an action.[349] Because it is incumbent upon a party to raise the issue of defective jurisdiction over his person, the court is precluded from raising it on his behalf.[350]

A court's assertion of its lack of personal jurisdiction over a defendant in order to dismiss a plaintiff's action is distinguishable from a court's dismissal of an action for reasons which are within the plaintiff's control. In the case of jurisdiction, a sua sponte dismissal requires the court to assert another party's rights against the plaintiff, on behalf of the party. In the case of dismissal for failure of prosecution, the court is essentially asserting its own right to control its docket against the plaintiff.[351]

2. Lack of Personal Jurisdiction in a Default Judgment

Default judgments present a peculiar situation in which a court may, sua sponte, inquire into its jurisdiction over the parties. In determining whether to enter a default judgment, a court has discretion to consider whether it would later have to set it aside on a motion by the defendant.[352] Under Rule 60(b),[353] a court may relieve a party from a final judgment in a number of situations, one being when the judgment is

345. *Id.* at 630-31. Justice Harlan characterized the power of a court to dismiss an action for lack of prosecution as having ancient origins in both law and equity. *Id.*

346. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

347. *See* National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964); Petrowski v. Hawkeye Security Ins. Co., 350 U.S. 495 (1956) (personal jurisdiction may be conferred by consent of the parties).

348. FED. R. CIV. P. 12(h)(1).

349. *See* Zelson v. Thomforde, 412 F.2d 56 (3d Cir. 1969); Wagner v. Fawcett Publications, 307 F.2d 409, 412 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963) (the statute of limitations is a personal defense, which is waived if not raised by the defendant).

350. *See Zelson*, 412 F.2d at 56. Improper venue is also subject to waiver, and the court is similarly unable to dismiss an action sua sponte for want of venue. *See* Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371 (2d Cir. 1966).

351. *See supra* text accompanying note 341.

352. *See* Henry v. Metropolitan Life Ins. Co., 3 F.R.D. 142 (W.D. Va. 1942). A defendant's attack on a default judgment for lack of personal jurisdiction may be made collaterally in the court rendering the judgment, or in a court where the plaintiff attempts to enforce the judgment. *See* Covington Industries, Inc. v. Resintex, A. G., 629 F.2d 730, 733-34 (2d Cir. 1980).

353. FED. R. CIV. P. 60(b).

void. The relief under Rule 60(b) is discretionary in a number of situations; however, there is no discretion in granting relief from a void judgment.[354]

The certainty that a default judgment rendered by a court lacking personal jurisdiction is void and will be vacated in a collateral attack,[355] provides ample justification for a court's sua sponte inquiry into its jurisdiction over the parties before entering a default judgment.[356] After refusing to enter a default judgment, a court has the option of dismissing the action[357] or transferring the action to a district court where it could have been brought.[358]

D. *Analysis*

The law on dismissal of actions pursuant to a court's sua sponte inquiry into its jurisdiction over the parties is well established in both cases and policy.[359] The district court's dismissal of Williams's action prior to the time of the defendant's default[360] was clearly inconsistent with the prevailing rule that a court not dismiss an action (other than an action for a default judgment) for lack of personal jurisdiction on its own motion. As might be expected from the well settled state of the law, the Tenth Circuit spent few words on its reversal of the dismissal.

Any lasting significance that *Williams* might enjoy will be due to the court's dicta approving the transfer of actions which have reached the default judgment stage with defects in personal jurisdiction.[361] By transferring rather than dismissing default judgment actions, both judicial economy and the interests of litigants are advanced. Judicial economy benefits because the action is transferred to a forum where it may be pursued on its merits or dismissed with prejudice. Litigants benefit for much the same reason. Defendants' interest in disposing of litigation expeditiously is furthered because the court to which the action is transferred has the power to make a final disposition of the action.

Plaintiffs bringing actions with such blatant jurisdictional defects as those in *Williams* are usually acting pro se.[362] By transferring the action, a court may further the naive plaintiff's ability to obtain an adjudication of his claim on its merits. Alternatively, in the case of a pro se plaintiff whose action is brought for reasons other than obtaining relief from a

354. *See* V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 n.8 (1979); Austin v. Smith, 312 F.2d 337 (D.C. Cir. 1962); Hicklin v. Edwards, 226 F.2d 410 (8th Cir. 1955).

355. *See Covington Industries*, 629 F.2d at 732.

356. *See* First Nat'l Bank of Louisville v. Bezema, 569 F. Supp. 818, 819 (S.D. Ind. 1983); Bross Utils. Serv. Corp. v. Aboubshait, 489 F. Supp. 1366, 1368 n.3 (D. Conn. 1980).

357. *See, e.g., Bross Utilities*, 489 F. Supp. at 1368.

358. *See Bezema*, 569 F. Supp. at 821.

359. *See supra* text accompanying notes 344-46.

360. *See Williams*, 802 F.2d at 1202.

361. *Id.* at 1203.

362. Prisoners are a common example of pro se plaintiffs. *See* Brandon v. District of Columbia Bd. of Parole, 734 F.2d 56 (D.C. Cir. 1984); Redwood v. Council of the Dist. of Columbia, 679 F.2d 931 (D.C. Cir. 1982); Lewis v. State, 547 F.2d 4 (2d Cir. 1976).

legally cognizable injury, transferring the action furthers the public policy of discouraging litigation for its own sake.[363]

CONCLUSION

On the whole, the cases considered in this article serve to increase the availability of the federal courts to plaintiffs. *Superior Oil* will enhance a non-Indian's ability to utilize the federal courts in disputes with Indians when tribal remedies prove inadequate. The holding in *Salehi* grants full access to the federal court system to aliens with legitimate complaints about Immigration and Naturalization Service practices, particularly those practices affecting their constitutional rights.[364] *Quinones* recognized and furthered the federal policy of resolving controversies in one action by extending diversity jurisdiction in an area where significant rights are not threatened by the expansion. *Williams* is perhaps the clearest expression of the Tenth Circuit's desire to reduce the procedural complexities and resulting inscrutability of the federal courts to non-lawyers.

DeVargas and *Jennings* do not run counter to the trends of simplifying litigation and enhancing the accessibility of the federal courts. *DeVargas* did deny the plaintiff access to the federal courts; however, he had already had his day in state court. Enforcing the policy of repose serves to facilitate access to those whose complaints have yet to be heard. *Jennings* denied a potential plaintiff access not to the courts in general, but to a particular action. A major underpinning for the denial in *Jennings* was the procedural complexity that would be introduced into the case upon the plaintiff's intervention.

None of the Tenth Circuit's holdings in these cases are indicative of a desire to throw open the federal court's doors to all plaintiffs. Rather, the slight expansions of subject-matter and personal jurisdictional bounds seem intended and should serve to ease some of the procedural complexities inherent in accessing and conducting proceedings in the federal courts.[365]

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363. Transfer of an action to a forum where jurisdiction over the parties can be perfected may work a hardship on a plaintiff; however, this hardship is inherent in the requirements of due process, not in the transfer policy advocated by the Tenth Circuit. *See generally* Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982).

364. *See generally Developments in the Law-Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1395-99 (1983).

365. For an interesting perspective on federal jurisdiction in general, see Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 47 LA. L. REV. 493, 495-97, 503-05 (1987).

CIVIL RIGHTS

Overview

Five decisions rendered by the Tenth Circuit during the 1986-1987 survey period in the area of civil rights addressed a number of important issues arising from the context of employment discrimination. In deciding these rather diverse issues, the Tenth Circuit Court of Appeals generally relied on cautious, conservative interpretations of statutory, regulatory, and case law resulting in largely predictable conclusions.

Sex discrimination was examined in two distinct contexts: "no-spouse" rules under Title VII of the Civil Rights Act of 1964[1] (Title VII) and parental or marital status under Title IX of the Education Amendments of 1972[2] (Title IX). The court affirmed a ruling of no discrimination based on sex under a company "no-spouse" rule in *Thomas v. Metroflight, Inc.*[3] In so ruling, the court reviewed the efficacy of statistical analysis of the disparate impact standard. The dismissal of a claim of sex discrimination arising from a termination based in part on the employee's parental or marital status brought under Title IX was affirmed under the principal of issue preclusion in *Mabry v. State Board of Community Colleges and Occupational Education*.[4] In addition, the court established the application of Title VII substantive standards to Title IX employment discrimination claims.

Age discrimination was examined in the application of mitigation principles to the Age Discrimination in Employment Act[5] (ADEA) in *Giandonato v. Sybron Corporation*.[6] In that case, an employee's rejection of reinstatement offers made by the employer was held to end the accrual of back pay damages.

Freedom of speech under the first amendment was considered in *Wren v. Spurlock*[7] in which the court, employing a classic balancing of interests, affirmed a damages award to a public school teacher arising from a violation of her first amendment rights. In another first amendment case, the court reversed a damages award to a county employee in *Ewers v. Board of County Commissioners of the County of Curry*.[8] Applying basic due process principles, the *Ewers* court also reversed damages based on deprivation of a liberty interest in reputation.

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1982).
2. 20 U.S.C. §§ 1681-1686 (1982).
3. 814 F.2d 1506 (10th Cir. 1987); *see infra* notes 19-37 and accompanying text.
4. 813 F.2d 311 (10th Cir.), *cert. denied*, 108 S. Ct. 148 (1987); *see infra* notes 38-69 and accompanying text.
5. 29 U.S.C. §§ 621-634 (1982).
6. 804 F.2d 120 (10th Cir. 1986); *see infra* notes 70-98 and accompanying text.
7. 798 F.2d 1313 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1287 (1987); *see infra* notes 99-137 and accompanying text.
8. 802 F.2d 1242 (10th Cir. 1986), *reh'g granted in part*, 813 F.2d 1583 (1987), *cert. denied*, 56 U.S.L.W. 3460 (1988); *see infra* notes 138-72 and accompanying text.

I. SEX DISCRIMINATION

A. *No-Spouse Rules*

1. Background

No-spouse rules are a common means by which employers seek to avoid nepotism in their employment practices. Typically, no-spouse rules prohibit hiring spouses of employees or retaining both spouses after co-workers have married. Most no-spouse rules are facially neutral, often allowing co-workers who marry to choose who will quit or terminating the spouse with less seniority in the absence of a choice.[9] No-spouse rules exist throughout the employment spectrum, affecting blue-collar, white-collar, and professional employees alike, as well as all sizes of employers. Several reasons are given for the necessity of no-spouse rules: (1) spousal problems are brought into the workplace; (2) spousal morale is affected when one spouse is dissatisfied; (3) fairness is questioned when one spouse supervises the other; (4) spouses may be favored during lay-offs; (5) scheduling of shifts, vacations, and leaves creates problems; (6) discipline of a spouse may create problems; (7) tardiness and absenteeism may be compounded by spouses commuting together and; (8) spouses may disregard the safety of others in emergencies.[10] With the reasonable exception of supervisory situations, commentators question the validity of these reasons in the face of discrimination based on marriage which prevents the employment of qualified workers.[11]

Despite their facial neutrality, no-spouse rules frequently discriminate against women.[12] Challenges to no-spouse rules have generally been brought under Title VII of the Civil Rights Act of 1964[13] (Title VII), which prohibits discrimination based on sex in employment.[14] Although the United States Supreme Court has yet to consider no-spouse rules, the circuit courts have encountered no-spouse rules in a

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9. Wexler, *Husbands and Wives: The Uneasy Care for Antinepotism Rules*, 62 B.U.L. REV. 75 (1982); Comment, *(Mrs.) Alice Doesn't Work Here Anymore: No-Spouse Rules and the American Working Woman*, 29 UCLA L. REV. 199 (1981).

10. Kovarsky and Hauck, *The No-Spouse Rule, Title VII, and Arbitration*, 32 LAB. L.J. 366, 368-69 (1981).

11. Bierman and Fisher, *Antinepotism Rules Applied to Spouses: Business and Legal Viewpoints*, 35 LAB. L.J. 634, 636 (1984); Kovarsky and Hauck, *supra* note 10, at 368.

12. Wexler, *supra* note 9, at 92; Comment, *supra* note 9, at 202; Kovarsky and Hauck, *supra* note 10, at 369; *see also* Yuhas v. Libby-Owens Ford Co., 562 F.2d 496, 498 (7th Cir. 1977) ("substantial discriminatory impact" established when 71 of 74 applicants excluded by no-spouse hire rule were women), *cert. denied*, 435 U.S. 934 (1978); EEOC Dec. 75-239, EEOC Dec. 1983 (CCH), Par. 6492, at 4260-61 (March 2, 1976) (discrimination established where 65 of 66 women applicants were rejected because of no-spouse rule); World Airways, 74-2 Lab. Arb. Awards (CCH) Par. 8655, at 5471 (1975) (in all cases where employer applied its no-spouse rule, except present case, the women had resigned).

13. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

14. 42 U.S.C. § 2000e-(2)(a) (1982) provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

handful of cases. In *Harper v. Trans World Airlines*,[15] the Eighth Circuit ruled that the plaintiff had insufficient proof to establish discrimination under a no-spouse rule where four out of five applications of the rule resulted in job losses to women. However, in *Yuhas v. Libby-Owens Ford Co.*,[16] the Seventh Circuit held that "substantial discriminatory impact" was established where seventy-one out of seventy-four applicants excluded by a no-spouse rule were women.

Discrimination under Title VII can be proved by a showing of either disparate treatment, where an employer intentionally treats employees or applicants differently, or by a showing of disparate impact, where facially neutral employment practices result in adverse effects. The United States Supreme Court ruled in *Griggs v. Duke Power Co.*[17] that a showing of disparate impact alone was sufficient to establish a prima facie case of discrimination. Once the plaintiff has established a prima facie case, the burden of proof shifts to the employer to show that the employment regulation or practice in question is justified by business necessity.[18]

2. Disparate Impact: *Thomas v. Metroflight, Inc.*

In a case of first impression, the Tenth Circuit held in *Thomas v. Metroflight, Inc.*,[19] the plaintiff had provided insufficient evidence to establish prima facie sex discrimination under Metroflight's no-spouse rule. The holding demonstrates the difficulty of proving the discriminatory nature of no-spouse rules, particularly in small business settings.

Metroflight, Inc. is a small commercial airline with about 500 employees. Thomas was a secretary at Metroflight working twenty-five percent in the flight operations department and seventy-five percent in the maintenance department when she married a Metroflight pilot working in flight operations. Metroflight's no-spouse rule prohibits spouses from working in the same department and allows affected employees to choose which spouse will quit. If no choice is made, Metroflight then fires the spouse with less seniority. Neither Thomas nor her husband quit, so Metroflight fired Thomas since she had less seniority.[20] Prior to Thomas' firing, co-workers at Metroflight had married eight other times. In seven instances, the no-spouse rule was not violated because the employees worked in different departments or the company accommodated them by either allowing one to transfer departments or simply ignoring enforcement. In the remaining instance, the female employee was fired.[21]

15. 525 F.2d 409 (8th Cir. 1975).
16. 562 F.2d 496, 498 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978).
17. 401 U.S. 424 (1971).
18. International Bd. of Teamsters v. United States, 431 U.S. 324, 335-36 n. 15 (1977).
19. 814 F.2d 1506 (10th Cir. 1987).
20. *Id.* at 1507-08.
21. *Id.*

a. *Analysis*

Since the challenged practices or regulations characterizing most no-spouse rules are facially neutral, disparate impact must be demonstrated by statistics.[22] In the context of a large business or institution, a no-spouse rule may be shown to be discriminatory simply by examining the actual number of women versus men affected by application of the rule.[23] However, no-spouse rules may be infrequently applied by smaller businesses, resulting in statistically insignificant numbers of employees affected.[24] This was precisely the circumstances under which *Thomas* was brought. In such a situation, the plaintiff must rely on other forms of statistical proof to establish a prima facie case. For instance, the plaintiff can compare the number of employees affected to a larger relevant population such as the analogous population of the surrounding metropolitan area.[25] In *Thomas*, since the sample of two women fired in two applications of the no-spouse rule was too small to be statistically significant, the plaintiff employed a statistics expert to analyze potential applications of the no-spouse rule to the entire employee population of Metroflight.[26] Despite the expert's testimony, the court ruled that Thomas had only presented evidence sufficient to prove that salary or seniority were controlling factors in a couple's decision as to who would quit, but that Thomas had not established that salary or seniority were in fact the predominantly controlling factors.[27]

In light of the United States Supreme Court decision in *Dothard v. Rawlinson*[28] and the Eighth Circuit's decision in *Harper v. Trans World Airlines, Inc.*,[29] it is unfortunate that the Tenth Circuit demanded a higher standard than the simple existence of disparate impact. The Supreme Court first applied the *Griggs* disparate impact analysis to sex discrimination in *Dothard*,[30] holding that the disparate impact of a height/weight regulation on the general female population was sufficient to show discriminatory impact.[31] Addressing a no-spouse rule, the *Harper* court required that the plaintiff prove disparate income potentials to establish disparate impact.[32] The *Thomas* court, however, additionally demanded that the plaintiff prove that salary or seniority actually controlled the decisions of affected employees. The bottom line of a no-

22. *See generally* Wexler, *supra* note 9, at 98-110; Comment, *supra* note 9, at 217-24.
23. *See* Yuhas v. Libby-Owens Ford Co., 562 F.2d 496, 497 (7th Cir. 1977); EEOC Dec. 75-239; EEOC Dec. 1983, at 4260.
24. *See* Harper v. Trans World Airlines, Inc., 525 F.2d 409, 412 (8th Cir. 1975).
25. *See* Wexler, *supra* note 9, at 101-02; Comment, *supra* note 9, at 222-24.
26. 814 F.2d at 1510. Thomas established statistically that considering all possible marriages between employees in the same departments, more women than men would terminate on the basis of preserving the higher salary and seniority. Based on a universe of 3687 possible marriages, women had lower salaries in 62.1% and less seniority in 52.4% of the possibilities.
27. *Id.* at 1510-11.
28. 433 U.S. 321 (1977).
29. 525 F.2d 409 (8th Cir. 1975).
30. 433 U.S. at 328.
31. 525 F.2d at 413.
32. *Id.*

spouse rule is the criteria by which one spouse is terminated by the employer. In the instant case, the deciding factor was lower seniority. Thomas made a successful showing that a significantly higher number of women had lower seniority in the universe of possible interdepartmental marriages, thus establishing potential disparate impact.[33] That showing should have been sufficient for a prima facie case of discrimination under the standard of *Griggs* and *Dothard*.

b. *Implications*

The decision in *Thomas* is a clear example of the difficulty plaintiffs will continue to encounter when trying to demonstrate the disparate impact of no-spouse rules, particularly in small business settings. This is unfortunate because no-spouse rules not only discriminate in their own right against women, but also tend to perpetuate other forms of sexual inequality as well. Where couples choose which spouse will terminate, the choice will most often be the woman because men tend to have higher seniority, higher salaries, and better advancement potential, all of which would be considered significant factors.[34] Also, many couples will choose for the woman to terminate regardless of their relative status because they prefer the husband to support the family.[35] Thus, by denying women the chance to advance their employment status, no-spouse rules tend to reinforce the stereotypical roles of women as unequal in the working place.

The court claimed it affirmed on the issue "reluctantly because we suspect . . . that 'no-spouse' rules in practice often result in discrimination against women . . . . "[36] This observation was perhaps a veiled implication that a legislative solution would be a superior method of dealing with no-spouse rules, particularly in view of the small business context. An amendment to Title VII proscribing no-spouse rules by prohibiting discrimination based on marital status is one viable solution which would still allow employers to control supervisory circumstances.[37] However, until such legislation becomes reality, women discriminated against under no-spouse rules will bear difficult burdens of statistical proof when seeking judicial relief in the Tenth Circuit and elsewhere.

B. *Title IX*

1. Background

Title IX of the Education Amendments of 1972[38] (Title IX) was en-

33. 814 F.2d at 1510 n. 4. Although the court disputed "whether a statistically significant disparate impact is in all cases legally significant," it conceded that a showing of 52.4% women having lower seniority was statistically significant under Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n. 14 (1977).

34. Comment, *supra* note 9, at 224.

35. *Id.*

36. 814 F.2d at 1509.

37. *See, e.g.*, Comment, *supra* note 9, at 237.

38. 20 U.S.C. §§ 1681-1686 (1982).

acted for the purpose of eliminating discrimination on the basis of sex in educational institutions receiving financial assistance from the federal government.[39] It was patterned after Title VI of the Civil Rights Act of 1964[40] (Title VI), which prohibits discrimination on the basis of race, color, religion, and national origin in programs receiving federal funding. Both Title VI and Title IX are enforced through the ultimate sanction of funding termination.[41] Under Title IX, however, any agency providing federal financial assistance to an educational institution is also authorized to promulgate regulations designed to insure adherence to Title IX's non-discrimination goals.[42] Pursuant to Title IX's authorization of such regulatory power, the Department of Education (ED) in 1975 issued regulations governing the operation of federally funded educational institutions.[43] Included were regulations which specifically addressed employment discrimination, an area not expressly provided for in the implementing legislation.[44]

Six United States courts of appeals subsequently handed down conflicting decisions on the validity of the ED's Title IX employment regulations.[45] The Second Circuit alone ruled that the ED's regulations were valid as promulgated and within the scope of Title IX in *North Haven Board of Education v. Hufstedler*.[46] In order to resolve the conflict among the circuits, the United States Supreme Court granted certiorari and ruled that the ED does have authority to regulate employment and pro-

39. 20 U.S.C. § 1681(a) (1982) provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

40. 42 U.S.C. § 2000d (1982).

41. 42 U.S.C. §§ 2000d to 2000d-4 (1981); 20 U.S.C. § 1682 (1982).

42. 20 U.S.C. § 1682 (1982).

43. The regulations were actually issued by the Department of Health, Education and Welfare (HEW). However, in 1979, the Department of Education (ED) assumed the functions of HEW relating to Title IX. 20 U.S.C. § 3441(a)(3) (1982).

44. *Contra* Title VI, which expressly excludes employment from its coverage. 42 U.S.C. §§ 2000d to 2000d-4 (1982). For text of the regulations relevant to the instant case, *see infra* note 56 and accompanying text.

45. Four of the federal courts of appeals ruled that employment regulation was not within the scope of Title IX. *See* Seattle Univ. v. United States Dept. of Health, Educ. and Welfare, 621 F.2d 992 (9th Cir. 1980) (gender discrimination in salaries paid to faculty members in School of Nursing), *vacated sub. nom.*, Bell v. Dougherty County School Sys., 456 U.S. 986 (1982); Romeo Community Schools v. United States Dept. of Health, Educ. and Welfare, 600 F.2d 581 (6th Cir.) (school refuses to alter maternity leave policy to conform to ED's regulations), *cert. denied* 444 U.S. 972 (1979); Junior College Dist. v. Califano, 597 F.2d 119 (8th Cir.) (discrimination in salaries), *cert. denied*, 444 U.S. 972 (1979); Islesboro School Committee v. Califano, 593 F.2d 424 (lst Cir.) (pregnancy not treated in same manner as other temporary disabilities by school's leave of absence policy), *cert. denied*, 444 U.S. 972 (1979). The Fifth Circuit ruled that although employment could be regulated under Title IX, ED's regulations were invalid because they did not limit the regulated employment to positions directly funded by federal monies. *See* Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980) (salary supplement paid to industrial arts teachers, but not to home economics teachers), *vacated sub. nom.*, Bell v. Dougherty County School Sys., 456 U.S. 986 (1982).

46. 629 F.2d 773 (2d Cir. 1980), *aff'd sub. nom.*, North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). Two Connecticut school systems challenged ED's regulatory authority in *North Haven*. Alleged discrimination related to maternity leave policy, job assignments, working conditions, and renewal of employment contracts.

hibit discrimination based on sex by educational institutions receiving federal funding under Title IX.[47]

2. Interaction of Title IX and Title VII: *Mabry v. State Board of Community Colleges and Occupational Education*

The Tenth Circuit held in *Mabry*[48] that a claim of discrimination based on sex was not actionable under Title IX where brought in addition to a claim under Title VII which was unsuccessful at the trial level.[49] The holding ultimately strengthens and clarifies Title IX's application to employment.[50]

The plaintiff, Patricia Mabry, was employed as a physical education instructor and coach at Trinidad State Junior College (Trinidad) from 1974 to 1982. She was terminated from her position at Trinidad due to a reduction in force necessitated by declining enrollment at the college. Two other instructors in the department, both male and with greater seniority than Mabry, were retained. The President of Trinidad, Thomas Sullivan, conceded that one factor in his decision to terminate Mabry was that the other two instructors were married and had families.[51] After exhausting all administrative remedies available to her, Mabry brought suit under Title VII, Title IX, and 42 U.S.C. § 1983 against Sullivan, the State Board of Community Colleges and Occupational Education, and its individual members. She sought damages, reinstatement with back pay and benefits, attorney's fees, and costs.[52] On defendants' motion for partial summary judgment, the district court dismissed the Title IX and § 1983 claims on the grounds that the areas in which Mabry taught were not federally funded programs within the meaning of Title IX, and that the sufficiency of remedies under Title IX precluded suit under § 1983.[53] Subsequently, in deciding the Title VII claim, the district court found that Mabry's termination was not based on discriminatory consideration of her sex, regardless of any consideration given to marital or familial status. Mabry chose to appeal only the dismissal of the Title IX claim.[54]

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47. North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). For discussion of *North Haven*, *see* Note, *Title IX Applies to Employees*, 5 CAMPBELL L. REV. 249 (1982); Comment, *Title IV as a Tool for Eliminating Gender-based Employment Discrimination at Educational Institutions*, 14 N.C. CENT. L.J. 215 (1983); Note, *Title IX Proscribes Sex-based Employment Discrimination in Federally Funded Education Programs*, 17 SUFFOLK U.L. REV. 117 (1983); Comment, *"Person" in Title IX of the 1972 Education Amendments Includes Employees of Federally Funded Programs—HEW Regulations to Enforce Title IX are Valid*, 12 U. BALT. L. REV. 548 (1983); Comment, *Title IX and Employment Discrimination: North Haven Board of Education v. Bell*, 17 U. RICH. L. REV. 589 (1983); Comment, *Employment Included in Title IX*, 22 WASHBURN L.J. 131 (1982).

48. 813 F.2d 311 (10th Cir. 1987).

49. *Id.* at 314.

50. *See infra* notes 67-69 and accompanying text.

51. 813 F.2d at 313.

52. *Id.*

53. Mabry v. State Bd. for Community Colleges and Occupational Educ., 597 F. Supp. 1235 (D. Colo. 1984).

54. 813 F.2d at 313.

a. *Analysis*

The Tenth Circuit Court of Appeals, affirming the trial court, based its decision on three primary factors: (1) that the discrimination claim based on marital status was actionable under Title VII; (2) that the regulation under Title IX prohibiting discrimination based on marital status was overbroad; and (3) that the finding of no discrimination under Title VII by the trial court precluded the litigation of the same issue under Title IX. In her appeal on the dismissal of the Title IX claim, Mabry argued that her allegation of discrimination based on marital, familial, or wage earner status was not actionable under Title VII according to an EEOC guideline which stated that such policies were relevant only where discrimination was ultimately based on sex.[55] Mabry then relied on the Title IX regulation relating to marital, familial, parental, or wage earner status to support the viability of her discrimination claim under Title IX. The regulation states:

> (a) General. A recipient shall not apply any policy or take any employment action:
>
> (1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex;
>
> (2) Which is based upon whether an employee or applicant for employment is the head of a household or principal wage earner in such employee's or applicant's family unit.[56]

The court rejected her argument, reasoning that subsection (1) treats discrimination based on marital, parental, or family status precisely the same as Title VII because discrimination is ultimately based on sex. Thus, if Mabry based her claim on subsection (1), the claim would necessarily be actionable under Title VII.[57] If, however, Mabry based her claim on subsection (2), it would at first appear that a distinct right of action based solely on head of household or principal wage earner status was available. The court foreclosed this argument, however, by holding that Mabry's interpretation of subsection (2) was overbroad.[58]

In reaching that decision, the court began with the principle that in order for a regulation to be valid, it must be "reasonably related to the enabling legislation."[59] The court then pointed out that Title IX prohibited discrimination on the basis of sex, but that the regulation prohibited conduct that did not necessarily result in sex discrimination.

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55. *Id.* at 314. The guidelines referred to appears at 29 C.F.R. § 1604.4(a) (1986), which states:

> The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

56. 34 C.F.R. § 106.57 (1986).

57. 813 F.2d at 315.

58. *Id.* at 315-16.

59. *Id.* (quoting Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973)).

The court thus concluded that Mabry could not rely on her interpretation of subsection (2) because it imposed a standard broader than that of the enabling statute.[60]

According to the court, then, the only claim available to Mabry under Title IX was that she was discriminated against on the basis of her sex, a claim clearly actionable under Title VII. Since the district court found no sex discrimination under the Title VII claim actually brought by Mabry, she was therefore precluded from raising the identical issue under Title IX by fundamental preclusion principles.[61] In order to come to that conclusion, however, the court stated that the substantive standards used to determine discrimination must be the same under both Title VII and Title IX.[62] The question of applicable substantive standards under Title IX has scarcely been discussed by the courts.[63] The Tenth Circuit reasoned that since Title IX's application to employment essentially duplicates the purpose of Title VII, and since a well-developed body of case law exists concerning Title VII, the substantive standards of Title VII logically apply to Title IX.[64] Thus, the court concluded that "Title IX certainly sweeps no broader than Title VII."[65] Consequently, it held that Mabry was not entitled to an additional opportunity to prove discrimination under Title IX based on the identical facts of her Title VII claim.[66]

b. *Implications*

Discrimination claims brought under Title IX, particularly those involving employment, represent a confusing and evolving area of civil rights law. The Tenth Circuit's decision in *Mabry* provides both clarification and orientation for Title IX claims. Germane to the impact of *Mabry* is the court's adoption of Title VII substantive standards to Title IX claims.[67] At first blush this development appears to thwart the application of Title IX to employment discrimination claims; however, sex discrimination is actually more easily established with the express adoption of Title VII substantive standards. This is so because the plaintiff need only show disparate impact to establish discrimination and need

60. *Id.* at 316.

61. *Id.*

62. *Id.*

63. Although under Title VII discrimination need only be proved by disparate impact, *see supra* notes 17-18 and accompanying text, the Seventh Circuit ruled in Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981), that disparate intent must be shown in a Title IX claim. However, the Supreme Court upheld a showing of disparate impact under Title VI, on which Title IX is patterned, in Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). Additionally, EEOC regulations state that agencies shall "consider Title VII case law . . . in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice." 28 C.F.R. § 42.604 (1986).

64. 813 F.2d at 317.

65. *Id.* at 318.

66. *Id.*

67. *See supra* notes 62-64 and accompanying text.

not show disparate intent.[68] Once discrimination is successfully established, Title IX's powerful sanction of funding termination may be invoked in addition to Title VII's equitable remedies.[69] Thus, by allowing a plaintiff to employ the same substantive standards under both Title VII and Title IX, the *Mabry* decision more effectively discourages employment discrimination based on sex in federally funded educational institutions. Although the plaintiff in *Mabry* did not successfully establish sex discrimination, future plaintiffs will have a more clearly defined task of how to do so and, ultimately, easier access to Title IX's powerful remedies.

II. MITIGATION AND THE ADEA

A. *Background*

The Age Discrimination in Employment Act[70] (ADEA) was adopted by Congress in 1967 for the purpose of eliminating discrimination by employers on the basis of age. Passed only three years after Title VII of the Civil Rights Act of 1964[71] (Title VII), the prohibitory provisions of the ADEA parallel those of Title VII, and the primary goal of both acts is to end discriminatory employment practices.[72] A major difference between the two acts, however, is the way in which the acts are enforced. Whereas Title VII provides only for equitable "relief,"[73] the ADEA provides for "such legal or equitable relief as will effectuate the purposes of this Chapter."[74] Furthermore, the ADEA expressly incorporates the remedies and procedures of the Fair Labor Standards Act of 1938[75]

68. *See supra* notes 17-18 and accompanying text.
69. *See supra* note 41 and accompanying text.
70. 29 U.S.C. §§ 621-634 (1982).
71. 42 U.S.C. §§ 2000e to 2000e-17 (1982).
72. 29 U.S.C. § 623 (1982). In pertinent part, the legislation states:
(a) Employer practices. It shall be unlawful for an employer
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) to reduce the wage rate of any employee in order to comply with this chapter.
73. 42 U.S.C. § 2000e-5(g) (1982).
74. 29 U.S.C. § 626(c)(l) (1982).
75. 29 U.S.C. § 626(b) (1982). In pertinent part the legislation states:
The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, [sections 11(b), 16 and 17 of the Fair Labor Standards Act of 1938] and subsection (c) of this section.
For general discussion of ADEA remedies, *see* Marion, *Legal and Equitable Remedies Under the Age Discrimination in Employment Act*, 45 MD. L. REV. 298 (1986); Nosler and Wing, *Remedies under the Federal Age Discrimination in Employment Act*, 62 DEN. U.L. REV. 469 (1985); Richards, *Monetary Awards for Age Discrimination in Employment*, 30 ARK. L. REV. 305 (1976); Comment, *Coming of Age: Unique and Independent Treatment of the ADEA*, 7 AM. J. TRIAL ADVOC. 583 (1984); Note, *Damage Remedies under the Age Discrimination in Employment Act*, 43 BROOKLYN L. REV. 47 (1976); Comment, *Age Discrimination: Monetary Damages Under the Federal Age Discrimination in Employment Act*, 58 NEB. L. REV. 214 (1979); Comment, *Damages in Age Discrimination Cases—The Need for a Closer Look*, 17 U. RICH. L. REV. 573 (1983). For a discus-

(FLSA).

Although the ADEA officially adopts the FLSA remedies,[76] many courts have chosen to follow Title VII precedent due to the similarities of the non-discrimination goals of the two acts. While this practice causes considerable confusion in some areas, it is not illogical. Since the FLSA primarily addresses problems related to unfair wage and hour practices, its remedial procedures are at times poorly suited to discriminatory practices. Mitigation of damages by the plaintiff is not addressed by either the provisions of the ADEA or the incorporated provisions of the FLSA. Title VII, however, explicitly states that back pay be set off by amounts "earnable with reasonable diligence."[77] Therefore, the courts have been forced to turn to Title VII precedent in considering mitigation issues.[78]

The United States Supreme Court held in *Ford Motor Co. v. Equal Employment Opportunity Commission*[79] (EEOC) that, absent special circumstances, the rejection by the claimant of an employer's unconditional offer of the job previously denied ends the accrual of back pay liability. The Court reasoned that tolling back pay upon such a rejection was in keeping with Title VII's primary goal of ending employment discrimination by encouraging employers to compromise with claimants by making unconditional job offers.[80] Since the ADEA's primary goal is likewise to end discrimination through compromise wherever possible, *Ford* has been the basis for a number of subsequent ADEA decisions.[81]

B. *Title VII Standard of Mitigation*: Giandonato v. Sybron Corporation

Relying on *Ford Motor Co. v. EEOC*, the Tenth Circuit held in *Giandonato v. Sybron Corp.*[82] that the plaintiff's rejection of reinstatement offers made by the employer ended the accrual of back pay damages.[83] By so holding, the Tenth Circuit reinforced the ADEA's primary goal of

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sion of the legislative history of ADEA remedies, *see* Note, *Set-offs Against Back Pay Awards Under the Federal Age Discrimination in Employment Act*, 79 MICH. L. REV. 1113 (1981).

76. The Supreme Court confirmed the adoption of FLSA remedies by the ADEA in Lorillard v. Pons, 434 U.S. 575 (1978), holding that the ADEA provided for a jury trial via its express incorporation of FLSA remedies.

77. 42 U.S.C. § 2000e-5(g) (1982).

78. *See, e.g.*, O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543 (11th Cir. 1984); Dickerson v. DeLuxe Check Printers, Inc., 703 F.2d 276 (8th Cir. 1983); Cowan v. Standard Brands, Inc., 572 F. Supp. 1576 (N.D. Al. S.D. 1983); Fiedler v. Indianhead Truck Line, 670 F.2d 806 (8th Cir. 1982); EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); *see also* Note, *Set-Offs Against Back Pay Awards Under the Federal Age Discrimination in Employment Act*, 79 MICH. L. REV. 1113 (1981).

79. 458 U.S. 219, 241 (1982).

80. *Id.* at 228. For criticism of *Ford*, *see* Note, *Ford Motor Company v. EEOC: A Setback for Victims of Discrimination*, 44 U. PITT. L. REV. 707 (1983).

81. *See, e.g.*, Cowan v. Standard Brands, Inc., 572 F. Supp. 1576 (N.D. Al. S.D. 1983) (employee's refusal of reinstatement offer ended accrual of back pay); Dickerson v. DeLuxe Check Printers, Inc., 703 F.2d 276 (8th Cir. 1983) (employer's job offer did not toll accrual of back pay where job not substantially equivalent to job originally sought).

82. 804 F.2d 120 (10th Cir. 1986).

83. *Id.* at 125.

ending discrimination through compromise. As stated in *Ford*, "the victims of job discrimination want jobs, not lawsuits."[84] Thus damages are a secondary remedy intended to compensate victims of discrimination when employers are unwilling to eliminate discriminatory practices.

The plaintiff in *Giandonato* worked as a salesman for Sybron for over fourteen years when, due to a slow period in the industry, Sybron offered Giandonato his choice of early retirement or a three month probation. Giandonato resigned and filed suit under the ADEA complaining he had been harassed and constructively fired by Sybron based on his age.[85] Following Giandonato's resignation, Sybron paid him severance pay, commenced pension benefits, and extended his insurance coverage in order to allow coverage for his terminally ill wife. After the filing of the complaint, Sybron offered to reinstate Giandonato three times, ultimately offering to reinstate him without loss of service time, without a probationary period, under a different supervisor, and without Giandonato's repayment of severance pay.[86] Sybron argued that Giandonato's rejection of their reinstatement offers forfeited his right to back pay under the ruling of *Ford Motor Co. v. EEOC*. Giandonato argued, however, that he was entitled to reject the offers of reinstatement due to special circumstances. The circumstances claimed by Giandonato were that the offers contained uncertainties, his wife was terminally ill, and his supervisor was unsatisfactory.[87] After a jury verdict awarded Giandonato $327,357.00 in damages, the Tenth Circuit of Appeals reversed.

1. Analysis

In deciding *Giandonato*, the Tenth Circuit relied exclusively on Title VII precedent, presumably due to the absence of mitigation provisions in both the ADEA and the FLSA. Furthermore, the court characterized *Ford* as a "mandate" requiring ADEA claimants to minimize damages by accepting reinstatement offers that are "substantially equivalent" to the previous job.[88] It was undisputed that Sybron had made bona fide, unconditional reinstatement offers to Giandonato which were substantially equivalent to his former job and that he had rejected them.

Under the Title VII standard, then, the ultimate issue resolved by the court was whether Giandonato rightfully rejected Sybron's offers based on special circumstances. The court relied on two ADEA cases in holding that Giandonato's circumstances did not comply with the Title VII standard and did not justify his refusal of Sybron's offers.[89] In *Fiedler v. Indianhead Truck Line, Inc.*,[90] the Eighth Circuit held that an employee was not entitled to reject a reinstatement offer because he wanted

84. 458 U.S. at 230.
85. 804 F.2d at 121.
86. *Id.*
87. *Id.* at 122.
88. *Id.* at 124.
89. *Id.*
90. 670 F.2d 806 (8th Cir. 1982).

EEOC investigations to continue, was grieving over the death of his wife, and did not want to give up a new job.[91] Likewise, the South Dakota District Court held in *Cowan v. Standard Brands, Inc.*[92] that an employee was not entitled to refuse an offer because he did not believe it bona fide and his feelings were hurt.[93] The Tenth Circuit further reasoned that since Sybron agreed at Giandonato's request to additional conditions, the negative effect of Giandonato's refusal was "magnified."[94] Significantly, Sybron's offer included no loss of seniority, a condition which the Supreme Court expressly excluded under *Ford*.[95]

2. Implications

Giandonato demonstrates that the Tenth Circuit will apply Title VII standards of mitigation in cases brought under the ADEA. Considering the lack of guidance provided by either the ADEA itself or the FLSA concerning mitigation of damages by plaintiffs, this is the logical course to take; however, an explanation to that effect would have been helpful in clarifying why application of Title VII is necessary in the face of the ADEA's explicit adoption of the FLSA remedies. Although the court correctly applied Title VII, the reliance on *Ford Motor Co. v. EEOC* may prove to be a mixed blessing for victims of age discrimination in the Tenth Circuit. The basic rationale of *Ford* is that Title VII's primary goal of eliminating discrimination is best met by encouraging employers to compromise by offering unconditional reinstatement or employment as often as possible. Damages are considered a secondary remedy applicable only when employers refuse to comply.[96] An analogous application to the ADEA would likewise further the goal of getting and keeping people employed. However, the question is whether plaintiffs who must rely on damages for relief will be fairly compensated under *Ford's* holding that seniority need not be included in a job offer. In situations where a claimant has begun another job before the defendant employer makes an offer of reinstatement not including retroactive seniority, the claimant may be forced to choose between refusing the offer to retain some measure of seniority at the new job thereby cutting off damages from the defendant, and accepting the defendant's offer thereby sacrificing seniority.[97] Particularly because claimants in ADEA cases are more likely to have built up considerable seniority, such sacrifices could be extreme. Finally, allowing employers to make reinstatement offers lacking retroactive seniority could affect the deterrent aspect of the ADEA

91. *Id.* at 808-09.

92. 572 F. Supp 1576 (N.D. Al. 1983).

93. *Id.* at 1581.

94. 804 F.2d at 124-25. Sybron agreed to: fully reinstate Giandonato with no reduction in salary or loss of service; hire a new district manager; make no changes in Giandonato's territory, accounts, or sales quotas except by written agreement; and require no repayment of severance pay Giandonato had received.

95. 458 U.S. at 232.

96. *Id.* at 230.

97. *See* Note, *supra* note 80, at 726-27.

because potential damages to employers are greatly reduced.[98] Thus, employers who chose to take a "wait and see" attitude would not be as effectively discouraged from discriminating against employees on the basis of age.

III. First Amendment in Public Employment

A. *Background*

Public employees are guaranteed freedom of speech under the first amendment of the United States Constitution[99] and its application to the states through the fourteenth amendment.[100] This guarantee was not recognized by the Supreme Court until relatively recently, however. Under the "right-privilege doctrine," the courts formerly considered public employment a privilege that the government could withhold regardless of first amendment rights.[101] In a series of cases beginning with *Pickering v. Board of Education*[102] the United States Supreme Court has defined the application of first amendment rights to public employees.[103] Under *Pickering*, an employee's exercise of the right to speak on issues of public concern could not be the basis of dismissal.[104] The Court also adopted the defamation standard established in *New York Times Co. v. Sullivan*,[105] holding that when an employee made statements with knowledge of their falsity or reckless disregard for their truth or falsity, the adverse action would be upheld.[106] The most pervasive aspect of the Court's holding in *Pickering*, however, was the emphasis on a

98. *Id.* at 719.

99. The first amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ." U.S. CONST. amend. I.

100. The fourteenth amendment states:

> 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. U.S. Const. amend. XIV, § 1.

101. *See* Justice Holme's discussion of the doctrine in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), and the rejection of the doctrine in Keyishian v. Board of Regents, 385 U.S. 589 (1967). For general discussions of the right-privilege doctrine, *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1741-44 (1984).

102. 391 U.S. 563 (1968). In *Pickering*, a public school teacher was dismissed after writing a letter to the editor of the local newspaper criticizing the allocation of school funds and the concealment of information regarding tax revenues by the school board.

103. *See Developments in the Law—Public Employment*, *supra* note 101; Eagle, *First Amendment Protection for Teachers Who Criticize Academic Policy: Biting the Hand that Feeds You*, 68 CHI.[-]KENT L. REV. 229 (1984); Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597 (1986).

104. 391 U.S. at 574.

105. 376 U.S. 254 (1964).

106. 391 U.S. at 574. For discussion of *Pickering*, *see* Recent Decisions, *Constitutional Law: Balancing Test Applied to Teacher's Criticism of School Board*, 35 BROOKLYN L. REV. 270 (1969); Comment, *Free Speech: Dismissal of Teacher for Public Statements*, 53 MINN. L. REV. 864 (1969).

balancing of interests between the employee and the state.[107]

The Supreme Court refined the requirements set forth in *Pickering* in *Mt. Healthy City School District Board of Education v. Doyle*.[108] Since the teacher in *Mt. Healthy* had a controversial record of prior behavior, the Court sought to avoid placing the teacher in a better position simply by virtue of his exercise of first amendment rights. Therefore, the Court held that once the employee has established that the disputed speech was both constitutionally protected and a motivating factor in the employer's action, the burden of proof then shifts to the employer to show that the action would have been taken as a result of other factors regardless of the protected speech.[109] Two years later, the Supreme Court increased the first amendment protection afforded public employees in *Givhan v. Western Line Consolidated School District*[110] by holding that private as well as public communications between employee and employer are protected.[111] In so holding, however, the Court required that when private speech is at issue, the time, place, and manner of its delivery are relevant.[112]

Connick v. Myers[113] represented a significant narrowing of first amendment protection for public employees. In a frequently criticized decision, the Supreme Court strictly construed the meaning of the "matters of public concern" standard announced in *Pickering*.[114] The Court held that a questionnaire about working conditions in the office distributed by a district attorney was not involved with matters of public concern, but was an extension of an internal dispute not entitled to protection under the first amendment.[115] The Court reasoned that the issue of whether an employee's speech was a matter of public concern should be determined as a matter of law by its "content, form and con-

107. 391 U.S. at 568. The Court stated, "[t]he problem in any case is to arrive at 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." The Court noted that the need for confidentiality and the effectiveness of working relationships were two factors which could be considered relative to the state interest. *Id.* at 570 n. 3.

108. 429 U.S. 274 (1977). In *Mt. Healthy* a teacher called a local radio station and divulged information from an administrative memorandum concerning teacher dress and appearance which was then broadcast as a news item. The teacher was subsequently reprimanded and not recommended for rehiring.

109. *Id.* at 285-87. For discussion of *Mt. Healthy*, *see* Lane, *The Effect of Mt. Healthy City School District v. Doyle Upon Public Sector Labor Law: An Employer's Perspective*, 10 J.L. & EDUC. 509 (1981); Wolly, *What Hath Mt. Healthy Wrought?*, 41 OHIO ST. L. J. 385 (1980).

110. 439 U.S. 410 (1979).

111. *Id.* at 415-16.

112. *Id.* at 415 n. 4. For discussion on *Givhan*, *see* Comment, *Private Expression is Subject to Constitutional Protection*, 30 MERCER L. REV. 1079 (1979); Comment, *First Amendment Rights—Public Employees May Speak a Little Evil*, 3 W. NEW ENGL. L. REV. 289 (1980).

113. 461 U.S. 138 (1983).

114. 391 U.S. at 568; *see supra* note 107.

115. 461 U.S. at 147, 149-50. Matters addressed by the questionnaire included: confidence and trust in supervisors, office morale, need for a grievance committee, and pressure to work in political campaigns. In a single exception to their holding, the Court stated that the issue of pressure to work in political campaigns was a matter of public concern, but declined to give the entire questionnaire constitutional protection solely on that basis.

text . . . as revealed by the whole record."[116] The Court then concluded that, balanced against the state's interest in the efficient operation of the district attorney's office, the plaintiff's "limited First Amendment interest" did not require that her employer tolerate expressions which he reasonably felt would disrupt office functions and working relationships.[117] Thus, *Connick* effectively shifted the balance of interests in favor of public employers by demanding that the "matters of public concern" standard be strictly construed.

Tenth Circuit decisions on first amendment issues have relied on the landmark decisions of *Pickering* and *Mt. Healthy*, focusing primarily on the *Pickering* balancing test. In *Childers v. Independent School District No. 1 of Bryan County*,[118] *National Gay Task Force v. Board of Education of the City of Oklahoma City*,[119] and *Saye v. St. Vrain Valley School District RE-1J*,[120] the Tenth Circuit balanced the need to protect public employees' first amendment rights against the disruptive effect of first amendment expressions on official functions. In addition, the Tenth Circuit considered *Connick* when establishing whether expressions were matters of public concern in *Saye*[121] and *Wilson v. City of Littleton*.[122]

B. *Balancing of Interests*

1. *Wren v. Spurlock*

Chiefly following the balancing of interests standard set forth in *Pickering*, the Tenth Circuit held in *Wren v. Spurlock*[123] that a public school teacher's first amendment rights were violated by her principal when he harassed her in retaliation for her statements to the Wyoming

116. *Id.* at 147-48.

117. *Id.* at 154.

118. 676 F.2d 1338 (10th Cir. 1982). *Childers* involved the claim of a teacher that the School Board had reassigned him in retaliation for his support of a candidate for the Board and his activity involving union organization. The court stated in dictum that altered employment conditions could be considered an unconstitutional infringement of protected first amendment activity. *Id.* at 1342.

119. 729 F.2d 1270 (10th Cir. 1984). *National Gay Task Force* involved the challenge of certain Oklahoma statutes proscribing homosexual activity and advocacy by public school teachers. The court held that Okla. Stat. tit. 70, § 6-103.25 prohibiting the advocacy, encouragement, or promotion of homosexual activity was unconstitutionally overbroad. *Id.* at 1274.

120. 785 F.2d 862 (10th Cir. 1986). *Saye* involved the claim of a teacher that the school district had not renewed her teaching contract in retaliation for her criticism of the allocation of teacher aide time and her activities as a union representative. The court held that the criticism was "tangential to a matter of public concern" and sufficiently disruptive to foreclose first amendment protection. *Id.* at 866. The court held further that the plaintiff's union activities were entitled to protection and that a question of fact had been raised as to whether the union activities were a motivating factor in her non-renewal. *Id.* at 867.

121. *Id.* at 866.

122. 732 F.2d 765 (10th Cir. 1984). *Wilson* involved the claim of a policeman that his termination for refusal to obey an order to remove a black shroud on his badge was an unconstitutional infringement of his first amendment rights. The court held that the wearing of the shroud to express grief and solidarity over the death of a police officer from another town was an expression of a "personal feeling of grief" which was not a matter of public concern. Furthermore, the court stated that unless the expression is a matter of public concern, the *Pickering* balancing test is not reached. *Id.* at 769.

123. 798 F.2d 1313 (10th Cir. 1986).

Education Association. The decision demonstrates the ability of this Tenth Circuit panel of Judges McKay, McWilliams and Logan, to apply accurately and fairly the precedents of the major Supreme Court cases in this area to date: *Pickering*, *Mt. Healthy* and *Connick*.

The plaintiff, Lois Wren, taught for several years at the only public school in Baggs, Wyoming, where the defendant, Nyles Spurlock, was the principal. Although their professional relationship over the years was at best strained, it deteriorated significantly in April of 1980 when Wren and nine other teachers requested in a letter containing some thirty-five separate issues that the Wyoming Education Association (WEA) investigate Spurlock.[124] Following the district teachers' association's endorsement of the request for investigation, Wren was suspended with pay for a half day, and following the WEA investigation of Spurlock, which resulted in a reprimand, Spurlock recommended that Wren's contract not be renewed. The school board rejected Spurlock's recommendation and granted Wren's request for a leave of absence without pay on the advice of her psychiatrist. Subsequently, the school board denied an extension of the leave, but never formally acted on Wren's status even though she did not return to teach.[125] Wren then brought a civil rights action under 42 U.S.C. § 1983[126] against Spurlock, the school district, and the superintendent alleging they retaliated against her for her exercise of first amendment rights. The school district and the superintendent settled with Wren for $125,000 and were dismissed from the action, and a jury awarded Wren $113,000 compensatory and $7,500 punitive damages against Spurlock.[127] The Tenth Circuit Court of Appeals affirmed the trial court's decision.

a. *Analysis*

In affirming the district court decision, the Tenth Circuit faithfully followed both its own precedent[128] and that of the Supreme Court. The court expressed its standard as a basic two-step process derived from *Mt. Healthy* and *Pickering* under which the plaintiff must show (1) the speech was protected under the first amendment, and (2) the speech was a motivating factor in the employer's negative action.[129] Under the first step, which the court emphasized must be decided as a matter of law,[130] protection under the first amendment applies only if the speech is a mat-

124. *Id.* at 1316.
125. *Id.*
126. The statute states in pertinent part:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (1982).
127. 798 F.2d at 1315-16.
128. *See supra* notes 118-22 and accompanying text.
129. 798 F.2d at 1317.
130. *Id.* (citing *Connick v. Myers*, 461 U.S. at 148 n. 7, 150 n. 10). The Supreme Court

ter of public concern and if the constitutional right outweighs the employer's right to control official functions.[131] The court reasoned that under *Connick* the contents of the teachers' letter to the WEA were matters of public concern due to the small size of the town and the relative importance of the public school.[132] The court then applied the basic balancing test of *Pickering* and reasoned that since school officials were apparently satisfied with Wren's teaching performance, her statements did not sufficiently disrupt official functions to preclude their protection under the first amendment.[133] Although this issue erroneously went to the jury at the trial level, the court of appeals ruled no reversible error had occurred because they agreed with the outcome as decided by the jury.[134]

Having established that Wren's statements were constitutionally protected, the court went on to examine whether the speech was a motivating factor in Wren's adverse treatment. The court stated that Wren presented sufficient evidence on the issue for the jury to reasonably conclude that her first amendment activity was at least a substantial motivating factor in Spurlock's actions.[135] Unlike the first step, the court pointed out that the motivation issue was properly one of fact for the jury.[136] The remaining issue under *Mt. Healthy* of whether the employer would have reached the same result due to factors other than the protected speech[137] was not litigated in this case presumably because the defendants disagreed over Wren's quality of teaching performance.

b. *Implications*

The decision in *Wren v. Spurlock* indicates that the Tenth Circuit is capable of applying the *Connick* limitations to "matters of public concern" without emasculating the first amendment rights of public employees. Particularly in situations where views of public employment may still conjure up remnants of the "right-privilege" doctrine and first amendment rights may consequently receive less than full consideration, a cautious interpretation of *Connick* is critical to their survival. Thus, to assure the future relative security of first amendment rights for public employees in the Tenth Circuit, the court should continue to pursue the prudent, well-crafted reasoning of *Wren v. Spurlock*.

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stated explicitly that both elements of the first step should be decided as a matter of law and that the second step should be decided as a matter of fact.

131. *Id.*

132. *Id.* at 1317-18. The issues presented in the WEA letter included complaints of high teacher turnover and sexual harassment of students and teachers. Furthermore, the letter was signed by a majority of the school's teachers.

133. *Id.* at 1318.

134. *Id.*

135. The facts pointed to several connections between Wren's conduct and Spurlock's actions. Wren was suspended the day after the district association endorsed the WEA investigation; she was recommended for non-renewal approximately two months after Spurlock's reprimand; and she was more frequently remanded by Spurlock after the WEA letter.

136. *See supra* note 130.

137. *See supra* notes 108-09 and accompanying text.

2. *Ewers v. Board of County Commissioners of the County of Curry*

a. *Summary*

Since the Tenth Circuit Court of Appeals addressed both a first amendment issue and a deprivation of liberty issue in *Ewers v. Board of County Commissioners of the County of Curry*,[138] the facts of the case will be presented first. The plaintiff, Walter Ewers, was employed from 1977 to 1981 by Curry County, New Mexico, as road superintendent to supervise road maintenance and advise the Commission on related matters. Two members of the three member Board of County Commissioners, Gattis and Merrill, were elected in November of 1980 after campaigning for increased efficiency of county government, improved roads, and the elimination of the road superintendent position. Consequently, after Gattis and Merrill assumed office on January 1, 1981, the Board declined to rehire Ewers and subsequently eliminated the position of road superintendent, effective March 1, 1981.[139] At the following meeting of February 2, 1981, the Board told Ewers that it was concerned with the amount of time taken to complete certain "co-op" projects with the State Highway Department, and agreed to meet with officials from the State Department at its next meeting to discuss the issue. Thereafter, at the February 10, 1981 meeting, Merrill stated that "someone was 'dragging out' the co-op projects and 'padding the books.' "[140] Ewers replied that the statement was false, and a State Highway Department employee stated that "he did not believe that anyone had been dishonest."[141]

Following his termination as road superintendent, Ewers was unsuccessful at finding employment after considerable effort. He acknowledged that poor health, a limited education, and age were contributing factors in his inability to find a job.[142] Ewers subsequently brought an action under 42 U.S.C. § 1983[143] against the Board of County Commissioners, and Gattis and Merrill individually, alleging that he was terminated in retaliation for his exercise of speech under the first amendment, that he had been deprived of equal protection by a conspiracy of the Board, that he had been deprived of a liberty interest in his reputation by the Board, and that he had been deprived of a property interest without due process by the Board.[144] Only the first amendment and liberty interest issues went to trial; Ewers was awarded general damages of $160,000 by the jury and attorneys' fees of $39,500 by the court. On appeal, the Tenth Circuit reversed the general verdict and judgment

138. 802 F.2d 1242 (10th Cir. 1986).

139. *Id.* at 1244. The Board refused to rehire Ewers at the January 5, 1981 meeting and abolished the road superintendent position at the January 19, 1981 meeting. County employees could only be terminated for good cause or due to the elimination of a position.

140. *Id.*

141. *Id.* at 1245.

142. *Id.*

143. *See supra* note 126.

144. 802 F.2d at 1245. The defendants were granted summary judgment by the trial court on the claims of conspiracy and deprivation of a property interest.

of the jury as well as the court order for attorneys' fees.[145]

b. *The First Amendment Claim*

i. Analysis

The Tenth Circuit held that the first amendment instruction submitted to the jury by the trial court was overbroad in that it did not specifically identify the speech at issue. Thus, the court concluded that the jury had insufficient facts for a damage award based on the first amendment.[146] The court reasoned that in order for the jury to determine whether the protected speech was a motivating factor in Ewer's termination as required by *Mt. Healthy*[147] the jury must have precise knowledge of the nature of the protected speech.[148] The court based this conclusion on the appropriate jury instruction, but pointed out that the relevant evidentiary materials were not considered because they were not included in the record on appeal.[149] Thus, the court concluded that there was insufficient evidence for an award of damages based solely on the instruction, not on the record as a whole which would indicate the complete basis for the jury's decision.

An error in jury instructions distinct from the question of overbreadth was not addressed by the Tenth Circuit. Under *Connick*, the issue of whether the plaintiff's interest in protected speech outweighs the employer's interest in efficiency of operation is to be decided as a matter of law by the court, not as a matter of fact by the jury.[150] In the instant case, the court failed to point out that the trial court erroneously submitted that element to the jury.[151] Although the trial court's error was a possible basis for reversal at the appellate level, the Tenth Circuit's failure to address the error resulted in an inconsistent application of first amendment precedent.

ii. Implications

The opinion in *Ewers* demonstrates that adjudication of first amendment rights is a vastly inconsistent area in the Tenth Circuit. Whereas the panel deciding *Wren v. Spurlock*[152] gave careful, step-by-step consideration to applicable precedent in reaching a well-reasoned decision, the panel in *Ewers*[153] gave cursory, inaccurate consideration to precedent

145. *Id.* at 1245, 1250.
146. *Id.* at 1247.
147. *See supra* notes 108-09 and accompanying text.
148. 802 F.2d at 1246.
149. *Id.*
150. *See supra* notes 130-31 and accompanying text.
151. 802 F.2d at 1246. Jury instruction number three read: "[the Plaintiff must establish] . . . [t]hat Plaintiff's interest in commenting upon matters of public concern outweighed the Defendants' interest in restricting Plaintiff's expression of his views because such expression hampered or obstructed the efficient operation of the Road Department." *Id.*
152. 798 F.2d 1313 (10th Cir. 1986). The panel consisted of McKay, McWilliams, and Logan, Circuit Judges.
153. 802 F.2d 1242. The panel consisted of Holloway, Chief Judge, Barrett, Circuit

and the record in reaching a decision which is at best questionable as to its fairness. Remand would have been a far more thoughtful and equitable solution to the poor record and improper instructions which were the basis of the trial court's decision. The public employees residing and working in the Tenth Circuit deserve as much.

c. *Liberty Interest*

i. Analysis

The court held that there was insufficient evidence to support the jury verdict awarding damages for the deprivation of a liberty interest in reputation and accordingly reversed the trial court's denial of a directed verdict. In reaching this decision, the court followed the two-part standard of *McGhee v. Draper*[154] to determine what constitutes deprivation of a liberty interest. First, the complained of action must have stigmatized or otherwise damaged the plaintiff's reputation, and second, such damage must have been involved with a tangible interest such as employment.[155] Once reputational damage associated with employment has been established, the plaintiff must be afforded a hearing to clear his name.[156] Under *McGhee*, the constitutional sufficiency of such a hearing is to be determined by the court as a matter of law.[157] Once again, the *Ewers* court failed to point out that the trial court erroneously submitted this issue to the jury.[158]

The court of appeals then analyzed the liberty issue in terms of the five-part jury instruction given by the trial court.[159] No precise authority for the jury instruction was stated although in a general sense the elements could be extrapolated from *McGhee*. After determining that Ewers had satisfied the first two elements of the jury instruction, the court stated that he had failed to prove, under the third element, a connection between the Board's accusations and the elimination of the position, because the accusations came after the official elimination of the job.[160] Contrary to the court's holding, time sequence of such a connec-

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Judge, and Sam, United States District Judge for the District of Utah, sitting by designation.

154. 639 F.2d at 639, 643 (10th Cir. 1981).

155. 802 F.2d at 1247.

156. *See* Curry, *Name Clearing Hearings: Two Wrongs Make a Right*, 14 URB. LAW. 303 (1982); Price, *Name-Clearing Hearings: Public Interest Versus Personal Liberty*, 16 COLO. LAW. 253 (1987); Toman, *Practical Considerations for Liberty Interest Hearings in Public Employee Dismissals*, 14 URB. LAW. 325 (1982).

157. 639 F.2d at 643.

158. 802 F.2d at 1248. *See also supra* notes 150-51 and accompanying text.

159. 802 F.2d at 1248. The instruction read:

> Ewers . . . must prove . . . that: (1) defendants falsely accused him of padding time records and dragging out cooperative road projects; (2) the accusations were made in public; (3) the accusations were made in connection with the abolition of his job; (4) the accusations stigmatized him and effected [sic] his future employment opportunities; and, (5) the defendants deprived him of an opportunity for a hearing at which he could defend against the stigma which added injury to his good name, reputation, honor and integrity.

Id.

160. *Id.*

tion is irrelevant, and the jury had sufficient facts to believe such a connection existed.[161]

Under the fourth element, the court ruled that Ewers had not proved that the statements stigmatized him and affected his ability to obtain employment. For the concept of stigmatization, the court relied on *Asbill v. Housing Authority of Choctaw Nation*[162] stating that in order for statements to be stigmatizing, "they must rise to such a serious level as to place the employee's good name, reputation, honor, or integrity at stake."[163] The court then conceded that the Board's false accusations that Ewers had been "padding the books" and "dragging out" cooperative projects were stigmatizing under the *Asbill* standard, but held that the statements did not have the "general effect of curtailing" his employment opportunities under the trial court's instruction.[164] It is difficult indeed to understand how such clearly damaging and stigmatizing statements could fail to have, at the very least, a "curtailing" effect on future employment in a predominantly rural area where job opportunities tend to be scarce in the first place.[165] Furthermore, there is no requirement under *Asbill* or *McGhee* that stigmatizing statements be the exclusive factor affecting employment opportunities; the *McGhee* court, relying on the *Board of Regents v. Roth*,[166] stated that a liberty interest had been violated where employment opportunities were "diminished."[167] Thus, the Tenth Circuit failed to properly consider the effect of statements it agreed were stigmatizing on the plaintiff's employment opportunities.

Finally, the court concluded that Ewers had not proved that he was denied an opportunity for a hearing to clear his name.[168] Although the court reasoned that Ewers had sufficient notice of the accusations and an adequate opportunity to respond to them, this failed to meet the standards set under the precedent of *McGhee*. The *McGhee* court affirmed as law of the case an earlier court of appeals decision holding that the plaintiff had not been given a sufficient opportunity for a hearing to clear her name.[169] Under *McGhee I* the necessary due process factors for a name-clearing hearing include reasonable notice of the substance of the charges, opportunity to confront and cross-examine the accusers, and indication of the proof relied on by the accusers.[170] Although Ewers had an opportunity to confront and cross-examine his accusers at the Board meeting of February 10, 1981, there was no adequate notice of

161. *See supra* notes 139-42 and accompanying text.
162. 726 F.2d 1499 (10th Cir. 1984).
163. 802 F.2d at 1249 (citing Board of Regents v. Roth, 408 U.S. 564, 573 (1972)). The case actually quoted language from Asbill v. Housing Authority of Choctaw Nation, 726 F.2d 1499, 1503 (10th Cir. 1984).
164. 802 F.2d at 1249.
165. Curry County is located in eastern New Mexico, on the Texas border. Its county seat is Clovis, population 31,000.
166. 408 U.S. 564 (1972).
167. 639 F.2d at 643.
168. 802 F.2d at 1249.
169. 639 F.2d at 643, *aff'd in part*, 564 F.2d 902 (10th Cir. 1977).
170. 564 F.2d at 911-12.

the substance of the charges because the accusations of "padding the books" and "dragging out" the cooperative projects were made at the same meeting. Thus, Ewers had no opportunity to prepare a response or consult counsel regarding the statements.[171] Additionally, there is no indication that any evidence was offered by the Board supporting its charges. Thus, the Board's meeting of February 10, 1981, failed to meet the due process requirements of reasonable notice and indication of proof. Furthermore, the sufficiency of the February 10th meeting as a name-clearing hearing should have been decided as a matter of law by the trial court.

ii. Implications

The Tenth Circuit's conclusion that there was no violation of a liberty interest in reputation was based on an inaccurate application of the Tenth Circuit precedent of *Asbill* and *McGhee*. The court effectively ignored the facts of the case and affirmed the dismissal of an employee which occurred under circumstances smacking of personal or political vendetta.[172] The decision amounts to a deplorable abuse of the very due process liberty rights of which public employees in the plaintiff's position are so desperately in need.

CONCLUSION

The Court of Appeals for the Tenth Circuit addressed a variety of civil rights issues during the survey period. The task of applying and reconciling the myriad federal civil rights statutes is often complex due to their interdependence and overlap. The affirmation of no discrimination in *Thomas* set a precedent in the Tenth Circuit concerning no-spouse rules, but the court left the door open for further challenge. The effectiveness of Title IX employment claims was potentially strengthened by the *Mabry* court's decision to allow the application of Title VII substantive standards to such claims. No other court of appeals to date has so clearly endorsed that approach, and the decision represents the Tenth Circuit's boldest effort of the survey period.

On the other hand, the court held a predictable and conservative

171. No further Board meetings are reported to have addressed the matters relevant to the instant case. Although the plaintiff did not request further hearings, the court stated that "[n]one were necessary under these facts." 802 F.2d at 1249. In *McGhee I*, the plaintiff was similarly aware of rumors against her, but had no notice of specific allegations prior to the hearing in front of the school board where the accusations were made. The court stated that "[a] hearing where the plaintiff was faced with such a blast of complaints, and not knowing which incidents she needed to discuss, did not satisfy due process." 564 F.2d at 911.

172. In addition to the fact that Commissioner Merrill stated in her campaign that the county did not need a road superintendent, Commissioner Stockton informed Ewers that he thought Merrill did not like Ewers. 802 F.2d at 1244. Furthermore, the duties of the road superintendent were included in the newly created job of county manager, which required a college degree, and in the jobs of the district crew foremen. *Id.* at 1245. Thus, it is questionable whether abolishing the position of road superintendent actually saved the county money.

course in examining the role of mitigation in ADEA claims in *Giandonato* by closely following the Supreme Court's ruling in *Ford Motor Co. v. EEOC*. Although the opinion followed precedent logically, it also demonstrated the Tenth Circuit's unwillingness to question or limit the holding in *Ford*.

The *Ewers* court turned out a disappointing decision in its reversal of both a deprivation of a liberty interest in a reputation claim and a first amendment claim by basing its poorly crafted decision on the inaccurate application of important principles of case law. In contrast, the court in *Wren* produced a conservative but careful and protective application of precedent to a first amendment issue. As a result, first amendment claimants are justified in approaching the Tenth Circuit with extreme prudence.

Martha Cox

COMMERCIAL AND CORPORATE LAW

The increasing number of corporations having debt problems is clearly evident in the cases decided by the Tenth Circuit Court of Appeals during this survey period. Among the commercial and corporate law cases before the court, three were in the area of secured transactions under Article 9 of the Uniform Commercial Code (UCC). *In re Tri-State Equipment, Inc.*[1] and *United States v. Collingwood Grain, Inc.*,[2] addressed the effect of unclear or incomplete descriptions of collateral in the financing statement. In *Maxl Sales Co. v. Critiques, Inc.*,[3] the court applied the provisions of Article 9 concerning perfection in proceeds in the event of insolvency proceedings.

In the area of banking, the case of *In re Continental Resources Corp.*[4] highlighted the impact on a participating bank's security interest under a loan participation agreement when the third-party debtor goes bankrupt. In *Federal Deposit Insurance Corp. v. Palermo*,[5] the court decided the validity of a fraud counterclaim in a suit to recover on a promissory note, where a loan officer misrepresented the loan value of an interest in real property.

Outside of the debtor-creditor field entirely is *McKinney v. Gannett Co.*,[6] in which the court resolved the issue of a parent company's liability for breaching a subsidiary-employee contract.

I. SECURED TRANSACTIONS UNDER ARTICLE 9

In recent years, Article 9 has been a heavily litigated portion of the UCC. For the Tenth Circuit this past year was no exception. The Tenth Circuit cases reflect that creditors continue to be plagued by their own errors. Carelessly prepared financing statements are a particular problem.

A. *Description of Collateral in the Financing Statement*

1. Background

Filing a financing statement is the most common method of perfecting a security interest in personal property. While perfection is not a status that is relevant with respect to the creditor's rights as against the debtor, a secured creditor generally must be perfected to have priority against third-party claimants.[7] Perfection results only when the creditor

1. 792 F.2d 967 (10th Cir. 1986).
2. 792 F.2d 972 (10th Cir. 1986).
3. 796 F.2d 1293 (10th Cir. 1986).
4. 799 F.2d 622 (10th Cir. 1986).
5. 815 F.2d 1329 (10th Cir. 1987).
6. 817 F.2d 659 (10th Cir. 1987).
7. T. CRANDALL, R. HAGEDORN & F. SMITH, JR., DEBTOR — CREDITOR LAW MANUAL ¶ 7.06[1] (1985).

can show: (1) the security interest is attached, and (2) a permissible "applicable step" has been taken.[8] The applicable step usually takes the form of filing a financing statement.[9]

Whether a description of collateral in a financing statement is sufficient for purposes of perfection is determined primarily by applying UCC section 9-402(1)[10] and section 9-110.[11] In interpreting these sections, most courts have focused on Official Comment 2 to section 9-402. This comment makes clear that the filing system of the UCC is a notice filing system, where the financing statement indicates merely that the secured party may have a security interest in the collateral described. The presumption is that prospective creditors will have to make further inquiry to discover the complete state of affairs regarding the debtor's property. As a result, courts generally approve the creditor's use of the appropriate generic term used by the UCC drafters to classify collateral, although creditors run into trouble when the description is too general.[12] Other problems may arise when a description is incorrect[13] or ambiguous.

2. Description Need Only Provide Enough Notice of a Security Interest to Lead Later Creditors to Make Further Inquiry: *In re Tri-State Equipment, Inc.*

a. *Case in Context*

Tri-State Equipment[14] deals with the problem of an ambiguous de-

8. *Id.* Concerning attachment, U.C.C. § 9-203(1) (1978) provides: "[A] security interest is not enforceable . . . and does not attach unless: (a) the collateral is in the possession of the secured party pursuant to *agreement*, or the debtor has signed a security *agreement* . . . (b) *value* has been given; and (c) the debtor has *rights* in the collateral." (emphasis added). Without an enforceable, attached security interest, a creditor has no Article 9 rights.

9. Depending on the type of collateral involved, possession of the collateral or "automatic perfection" may constitute the applicable step. *See* U.C.C. § 9-303(1) (1978).

10. U.C.C. § 9-402(1) (1978) provides in part:

> A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and *contains a statement indicating the types, or describing the items, of collateral.*

(emphasis added).

11. U.C.C. § 9-110 (1978) provides: "any description of personal property or real estate is sufficient whether or not it is specific if it *reasonably identifies* what is described." (emphasis added).

12. *See* B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 2.9[5][c] (1980). *Compare* In re Fuqua, 461 F.2d 1186, 1188 (10th Cir. 1972) ("all personal property" too broad) *with* Leasing Serv. Corp. v. American Nat'l Bank & Trust Co., 19 U.C.C. Rep. Serv. (Callaghan) 252, 263 (D.N.J. 1976) ("any and all property, wherever located" was sufficient); *see also* In re Mitchell Bros. Constr., 52 Bankr. 92, 93 (W.D. Wis. 1985) ("all business assets" not too broad). There are nine generic types of collateral. *See* U.C.C. § 9-105 (1978) (chattel paper, documents, and instruments); *id.* § 9-106 (accounts, and general intangibles); *id.* § 9-109 (consumer goods, equipment, farm products, and inventory).

13. An erroneous description in the financing statement will prevent the security interest from being perfected unless the error is "not seriously misleading." U.C.C. § 9-402(8) (1978).

14. 792 F.2d 967 (10th Cir. 1986) (applying Colorado law).

scription of collateral. The Tenth Circuit held that a description of inventory was sufficient even though there were three possible different interpretations of what was covered.[15] The court concluded that leniency was appropriate in light of Article 9's notice filing system. The important principle established by the case is that ambiguities in a financing statement are to be construed in favor of the secured party.[16]

b. *Statement of the Case*

Two secured creditors each claimed priority in a bankrupt farm equipment dealer's inventory of used farm implements. The creditor who filed first described the collateral as: "The debtor's inventory of new and used Farm Equipment . . . and proceeds therefrom manufactured by or offered for sale by Allis-Chalmers Corporation now owned or hereafter acquired. . . ."[17]

In the bankruptcy court, this description was found to be sufficient to perfect a security interest only in trade-ins the creditor had manufactured. The bankruptcy judge held that the financing statement did not sufficiently describe used equipment not manufactured or sold by the creditor so as to provide inquiry notice to third parties of a possible security interest in the equipment.[18] The district court affirmed the decision.[19]

c. *Discussion and Analysis of the Tenth Circuit's Opinion*

On appeal, the Tenth Circuit reversed the lower courts by holding that the earlier financing statement gave legally sufficient notice of a security interest in all trade-ins, not just those manufactured by the creditor.[20]

The court framed the issue to be whether the description was sufficient to put hypothetical later creditors on notice of a possible security interest in all used farm implements traded in to the debtor.[21] In resolving this type of issue, most courts are faithful to the broad notice filing concept.[22] Some courts have relied on UCC section 9-402(8) which provides that a financing statement "substantially complying with the requirements of [§ 9-402] is effective even though it contains minor errors which are not seriously misleading."[23]

The dominant trend in this area is represented by the Eighth Cir-

15. *Id.* at 970-72.

16. Professor Clark takes this position. B. CLARK, *supra* note 12, ¶ 2.9[5][b] n.167.6 (cum. supp. no. 1, 1987).

17. *Tri-State Equip.*, 792 F.2d at 969.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. This basically means that the function of the financing statement is to merely indicate that the secured party *may* have a security interest in the collateral described. *See* Official Comment 2 to U.C.C. § 9-402 (1978).

23. *See* B. CLARK, *supra* note 12, at ¶ 2.10 (citing cases).

cuit's decision in *Thorp Commercial Corp. v. Northgate Industries*.[24] In *Thorp*, a financing statement covering accounts receivable was held valid even though it described the collateral as "assignment accounts receivable." Under the broad notice filing philosophy of Article 9, the use of the extraneous word "assignment" did not prevent perfection in accounts acquired in the future. The court held that the financing statement served its purpose of alerting subsequent creditors of the need for further inquiry into the exact collateral covered.[25]

The Tenth Circuit's decision in *Tri-State Equipment* (under Colorado law) is consistent with *Thorp*. In Colorado, the rule is that the description "need only put other creditors on notice of a possible security interest in the collateral in question."[26] The burden is then placed on subsequent creditors to protect themselves by making further inquiry into any prior security agreements flagged by the financing statement; in fact, they are *obligated* to make further inquiry.[27]

Extensive authority exists for the proposition that a marginally adequate description imposes an obligation upon a prospective creditor to make further inquiry before accepting property offered by a debtor as collateral.[28] For example, in *In re Kline*,[29] the court held that if the description is sufficient to permit a course of inquiry concerning the property allegedly covered, the later creditor will be charged with notice of all facts ascertainable by pursuing such an inquiry.

The Tenth Circuit supported its conclusion by stating that the description was not "seriously misleading."[30] In this regard, Professor Clark states that the test should be whether the error was serious enough to throw a third-party searcher off the trail.[31] The court apparently adopted this test when it held that the notice was not so misleading as to "simply stop future creditors from making the further inquiries they were obligated by the U.C.C. to make."[32]

In light of the lenient policy behind the UCC's notice filing system, the *Tri-State Equipment* decision is at least defensible. It does, however, stretch this policy to the limit. The bankruptcy judge's interpretation appears to be the most plausible of the three possible interpretations. A

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24. 654 F.2d 1245 (8th Cir. 1981).

25. *Id.* at 1249-53. *See also* United States v. Southeast Miss. Livestock Farmers Ass'n, 619 F.2d 435, 438-39 (5th Cir. 1980).

26. *Tri-State Equip.*, 792 F.2d at 971 (quoting Platte Valley Bank v. B & J Constr., 44 Colo. App. 21, 22, 606 P.2d 455, 456 (1980) (quoting Mountain Credit v. Michiana Lumber & Supply, 31 Colo. App. 112, 116, 498 P.2d 967, 969 (1972)).

27. *See generally* Annotation, *Sufficiency of Description of Collateral*, 100 A.L.R.3d 10, 59 (1980).

28. *Id. See* Biggins v. Southwest Bank, 490 F.2d 1304 (9th Cir. 1973); *In re* Hodgin, 7 U.C.C. Rep. Serv. (Callaghan) 612 (W.D. Okla. 1970).

29. 1 U.C.C. Rep. Serv. (Callaghan) 628 (E.D. Pa. 1956). *See also* Leasing Service Corp. v. American Nat'l Bank & Trust, 19 U.C.C. Rep. Serv. (Callaghan) 252 (D.N.J. 1976); *In re* Hodgin, 7 U.C.C. Rep. Serv. (Callaghan) 612 (W.D. Okla. 1970); Cargill, Inc. v. Perlich, 31 U.C.C. Rep. Serv. (Callaghan) 1159 (Ind. App. 1981).

30. *Tri-State Equip.*, 792 F.2d at 972; *see* U.C.C. § 9-402(8) (1978).

31. B. CLARK, *supra* note 12, at ¶ 2.9[5][6].

32. *Tri-State*, 792 F.2d at 972.

later creditor could very well have looked at the financing statement and concluded, as did the bankruptcy judge, that the words "inventory of new and used Farm Equipment . . . and proceeds therefrom manufactured by or offered for sale by Allis-Chalmers Corporation"[33] meant that Allis-Chalmers only claimed a security interest in the trade-ins that it manufactured or sold. But the financing statement did give other notice. The creditor had checked a box indicating simply that "proceeds of collateral are also covered."[34] Additionally, the words "*new and used* Farm Equipment" preceded the reference to proceeds.[35]

d. *Implications of Holding*

Tri-State Equipment indicates that the financing statement must be read as a whole and that ambiguities are construed in favor of the secured party. Thus, the normal contract rule that documents should be construed against the drafter[36] is simply inappropriate to the question of whether a financing statement contains an adequate description. Since the court took a fairly extreme position in finding for the first-to-file creditor, it is not likely that a more lenient decision will be forthcoming from the Tenth Circuit.[37]

B. *Description of Crops in the Financing Statement*

1. Background

When the collateral involved is a crop, UCC sections 9-203(1)(a) and 9-402(1) require in the security agreement and financing statement, respectively, a description of the real estate upon which the crop is grown or will be grown. Most of the controversy concerning the adequacy of descriptions relating to crops arises over the sufficiency of the description of the real estate upon which the crops are grown, or will be grown, rather than the sufficiency of the description of the crops themselves.[38] UCC section 9-110 provides that the description of both collateral and real estate is sufficient if it "reasonably identifies" what is

33. *Id.* at 969.

34. *Id.*

35. *Id.* (emphasis added). These cases are almost always lessons in drafting. The following corrected version of the collateral description would probably have prevented this case from arising: "The debtor's inventory of new and used Farm Equipment . . . now owned or hereafter acquired. . . ." A creditor does not have to mention the term "proceeds" in either the financing statement or the security agreement. U.C.C. § 9-203(3) (1978).

36. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979).

37. For another recent decision that is also very lenient see Mid City Bank v. Omaha Butcher Supply, 222 Neb. 671, 385 N.W.2d 917, 922 (1986), where the court upheld a description even though the creditor mixed up Article 9 categories by describing inventory as "all equipment, supplies, and parts."

38. The question of the adequacy of a crop description was touched upon in United States v. Big Z Warehouse, 311 F. Supp. 283 (S.D. Ga. 1970) (reference to "crops" growing or to be grown adequate to describe a tobacco crop where all crops grown on the land were collateral for the debt).

described. Full blown legal descriptions are not necessary.[39] However, omitting a real estate description altogether is not a *de minimus* error under section 9-402.

Courts have become lenient in applying the "reasonable identification" test. Most courts have held that a description is clearly sufficient if it contains the name of the owner or lessor of the real estate, acreage, county, township, and range of the real estate where the crops are growing.[40] More general descriptions often suffice.

Consistent with section 9-110's reasonable identification standard, two courts have provided some vague but at least partially helpful guidance for determining how precise the description must be. In *Chanute Production Credit Association v. Weir Grain & Supply*,[41] the Kansas court stated that a creditor should not be required to make a general search of the record or a general inquiry in the county as to the land involved.[42] In *United States v. Oakley*,[43] the court held that the description need not be of such specificity to enable a stranger to locate the property; a description is sufficient if it enables third persons, aided by inquiries which the financing statement itself suggests, to identify the property.[44]

2. Description Must Provide Clues Sufficient that Third Persons by Reasonable Care and Diligence Might Ascertain the Property Covered: *United States v. Collingwood Grain, Inc.*

a. *Case in Context*

In *Collingwood Grain*,[45] the Tenth Circuit held that a real estate description in a financing statement was sufficient to perfect a security interest in the debtors' crops, even though the description did not give the name of the land owner nor include a legal description. The description still provided clues that were sufficient to enable third persons to reasonably identify the property covered. The court departed from prior law[46] only in holding that the description need not contain the name of the land owner.

39. *See, e.g.*, Chanute Prod. Credit Ass'n v. Weir Grain & Supply, 210 Kan. 181, 499 P.2d 517 (1972); *Big Z Warehouse*, 311 F. Supp. at 283.

40. United States v. Oakley, 483 F. Supp. 762 (E.D. Ark. 1980); *In re* Colbert, 22 U.C.C. Rep. Serv. (Callaghan) 511 (Bankr. N.D. Miss. 1977); *Big Z Warehouse*, 311 F. Supp. 283; *In re* McMannis, 39 Bankr. 98 (Bankr. D. Kan. 1983).

41. 210 Kan. 181, 182, 499 P.2d 517, 518 (1972). The financing statement, which was held to be insufficient, contained the following description: "Crops: Annual and perennial crops . . . on land owned or leased by debtor in Cherokee County, Kansas."

42. *Id.* at 182, 499 P.2d at 518.

43. 483 F. Supp. at 764. The description at issue in *Oakley* contained the name of the owner of the realty, approximate number of acres of land involved, county and state where the realty was located, and the distance and direction of the realty from a named town. The description was upheld.

44. *Id.*

45. 792 F.2d 972 (10th Cir. 1986) (applying Kansas law).

46. *See supra* note 40 and accompanying text.

b. *Statement of the Case*

The debtors gave two different creditors a security interest in growing crops on farm land leased by the debtors. The creditor who was first to file a financing statement described the tract by including the percentage interest, number of acres, section, township, range, county, and state.[47] The district court found the financing statement insufficient because it did not list the record owner of the land and failed to identify precisely which tract within the specified section was encumbered.[48]

c. *Discussion and Analysis of the Tenth Circuit's Opinion*

In holding that the description was sufficiently precise to give the requisite notice, the Tenth Circuit reversed the decision of the district court.[49]

i. Name of land owner not necessary

The court first ruled that a creditor does not have to include in the financing statement the name of the land owner as part of the real estate description.[50] Under existing Kansas law, a real estate description in connection with crops is sufficient if it contains: (1) the name of the land owner, (2) the approximate number of acres, (3) the county of the location of the land, and (4) the approximate distance and direction of the land from the nearest town or city.[51] The court noted that this list shows only what will guarantee sufficient description.

The requirement of listing the land owner finds no support in the UCC, as far as a security interest in crops is concerned. The Kansas version of section 9-402,[52] as well as the Official Text, contain no hint of such a requirement. Under Official Text section 9-402(5), the name of the land owner only has to be included if the financing statement covers timber to be cut, minerals, accounts arising from the sale of minerals at the wellhead or minehead, or fixtures (for a "fixture filing"), and the debtor does not have an interest of record in the real estate. If the drafters had intended to subject a description of crops to the land owner requirement, the word "crops" would have been included.[53]

47. *Collingwood Grain*, 792 F.2d at 973.
48. *Id.*
49. *Id.*
50. *Id.* at 974.
51. *In re* McMannis, 39 Bankr. 98 (Bankr. D. Kan. 1983); *In re* Roberts, 38 Bankr. 128, (Bankr. D. Kan. 1984). Kansas law in this area is in accord with the majority rule; *see* text accompanying note 40.
52. KAN. STAT. ANN. § 84-9-402 (1983).
53. The Kansas version is even less supportive of this requirement where the security interest is in crops. KAN. STAT. ANN. § 84-9-402(5) is similar to the U.C.C. Official Text except that the name of the land owner is always required when the financing statement covers timber, minerals, accounts arising from the sale of minerals, or fixtures. Crops are noticeably absent from this list. Additionally, in KAN. STAT. ANN. § 84-9-402(3), part 2 (crops) of the sample form has a space for a real estate description but no space to include the name of the land owner, while part 3 (fixtures, timber, minerals, accounts generated from sale of the minerals) has separate spaces for both a legal description of the real estate and the name of the record owner.

ii. Full legal description not necessary

The second issue addressed by the Tenth Circuit was whether the real estate description was sufficient despite the fact that it did not identify precisely where the land lay within the particular section specified. In upholding the description, the court noted that a full blown legal description is not necessary.[54] Agreement among courts on this point is virtually unamimous, given the UCC's general notice filing concept and Official Comment 5 to section 9-402 which expressly rejects the notion that the description must be by metes and bounds.[55]

It is the general and vague descriptions that frequently give rise to litigation. The court cited *Chanute Production* as an example of what is not sufficient; the creditor there had described the crops as those "produced on land owned or leased by debtor in Cherokee County, Kansas."[56] The court also mentioned the description requirements set forth in *In re McMannis*[57] and noted that those items will guarantee sufficient description.[58]

While the court expressly does not require the name of the land owner in a real estate description, there is still some uncertainty as to how far a creditor can stray from the *McMannis* requirements. The leading case of *United States v. Big Z Warehouse*[59] seems to represent the limit. There, the financing statement, covering all crops to be grown on the farm of "Oscar R. Chancey" of approximately ninety acres located "1 Mi. North of Offerman, Ga. All in the County of Pierce, State of Georgia,"[60] was held sufficient.[61] This decision finds support, since under the UCC's notice filing system, the financing statement indicates merely that the secured party *may* have a security interest in the described collateral, and that further inquiry will be necessary to disclose the complete state of affairs.[62] The conclusion to be drawn is that a description

54. *Collingwood Grain*, 792 F.2d at 974.

55. *See* Annotation, *Sufficiency of Description of Crops*, 67 A.L.R.3d 308 (1975). Creditors should be aware, however, that U.C.C. § 9-402(5) (1978) requires a real estate description sufficient for a mortgage (usually a legal description) where the collateral is timber, minerals, accounts arising from the sale of minerals, or fixtures (for a "fixture filing"). *See also* Official Comment 1 and the important distinction drawn between the function of the description of land in reference to crops and its function in the other cases mentioned. The comment states that:

> [f]or crops it is merely part of the description of the crops concerned, and the security interest in crops is a Code security interest . . . . In contrast, in the other cases mentioned the function of the description of land is to have the financing statement filed in the county where the land is situated and in the realty records, as distinguished from the chattel records.

Id.

56. 210 Kan. 181, 182, 499 P.2d 517, 518. *See also* Piggott State Bank v. Pollard Gin Co., 243 Ark. 159, 419 S.W.2d 120 (1967).

57. 39 Bankr. 98 (Bankr. D. Kan. 1983). *See supra* text accompanying note 51.

58. *Id.* at 100.

59. 311 F. Supp. 283 (1970).

60. *Id.* at 285.

61. *Id.* at 286.

62. U.C.C. § 9-402 Official Comment 2 (1978). *See also* Bank of Danville v. Farmers Nat. Bank, 602 S.W.2d 160, 162-63 (Ky. 1980) ("farm of Dale Wilson on Lancaster Road, 4 miles from Danville, Boyle County, Kentucky" was sufficient). Compare United States v.

is sufficient if it is more precise than a county-wide description.[63]

The Tenth Circuit's holding in *Collingwood Grain* is consistent with *Big Z Warehouse*. The court found it irrelevant that the description failed to identify precisely where the 160 acres of land lay within the single 640-acre section. A reasonable investigation would have disclosed which particular land was involved, without a general search of the record or a general inquiry in the county.

Collingwood Grain is representative of the majority view that if the financing statement provides enough information to enable third persons through the use of reasonable care and diligence to identify the property covered, sections 9-110 and 9-402(1) are satisfied, at least with respect to the real estate description.[64]

d. *Implications of Holding*

Because of the UCC's notice filing concept, most courts have become lenient in judging the sufficiency of crop descriptions in the financing statement. The Tenth Circuit's decision follows this trend, and gives no indication of a more restrictive decision in the future. Yet, creditors should not feel entirely comfortable in relying on any trend when attempting to perfect a security interest in crops—or any other collateral for that matter. The safest approach is to comply with the requirements set forth in *McMannis*.[65]

C. *Maintaining a Perfected Security Interest in Proceeds in the Event of Insolvency Proceedings*

1. Background

UCC section 9-306(1) defines "proceeds" as "whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds." A security interest attached to original collateral also becomes attached to any identifiable proceeds.[66] When the debtor receives cash proceeds and commingles them with other funds in a general bank account, the question that arises is whether the creditor's security interest continues in the commingled proceeds. Courts have generally allowed creditors to trace cash proceeds through the use of the "lowest intermediate balance" rule.[67]

Newcomb, 682 F.2d 758, 762 (8th Cir. 1982) (financing statement that described the land as being located in "Jasper County, Missouri, approximately 15 miles northwest of Carthage, Missouri" was upheld).

63. *See* KAN. STAT. ANN. § 84-9-402 comment at 472 (1983) (discussing *Chanute Production*).

64. *See* KAN. STAT. ANN. § 84-9-110 comment at 409 (1983).

65. *See supra* text accompanying note 51. A creditor should not get the idea that using a legal description is the best course to follow. If a legal description is used, no inquiry beyond the financing statement is required because of the description's specificity. Thus, the secured creditor bears the burden of ensuring that no seriously misleading clerical errors appear. *See In re* Lions Farms, 54 Bankr. 241 (D. Kan. 1985).

66. U.C.C. § 9-306(2) (1978).

67. Under this rule, which is borrowed from the law of trusts, the assumption is that a deposit of proceeds into a commingled account remains identifiable where the commin-

As to perfection in proceeds, there are further complications. If no insolvency proceedings have been instituted section 9-306(3) specifies when perfection in proceeds occurs. When insolvency proceedings have been instituted section 9-306(4) becomes applicable.[68] Concerning "identifiable" proceeds under paragraphs (a), (b) and (c) of section 9-306(4), the secured party's rights are not affected by the insolvency proceedings if such proceeds can still be identified or traced as having been received on the disposition of the collateral. However, the right to trace "identifiable cash proceeds" under paragraphs (b) and (c) does not survive a commingling of the proceeds with other money.[69] When commingling occurs, paragraph (d) applies. The provisions of that paragraph are a substitute for the common law tracing rules, like the lowest intermediate balance rule.[70] Thus, the ability of a creditor to identify and trace a greater sum received prior to the ten-day period is irrelevant; the creditor is limited to the amount deposited by the debtor within ten days before the institution of the insolvency proceedings.[71]

Subsection (4)(d) has been a continuing source of difficulty for the courts. One problem is that the UCC does not specify whether the phrase "any cash proceeds" should include proceeds received from any source or only identifiable proceeds. In *Fitzpatrick v. Philco Finance Corp.*,[72] the Seventh Circuit held that the cash proceeds were limited to funds from the sale of collateral in which the creditor retained a per-

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gled account has equaled or exceeded the amount of the deposit at all times since the intermingling. *See* Universal CIT Credit Corp. v. Farmers Bank of Portageville, 358 F. Supp. 317 (E.D. Mo. 1973).

68. Section 9-306(4) is as follows:

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:

(a) in identifiable non-cash proceeds and in separate deposit accounts containing only proceeds;

(b) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and

(d) in all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is

(i) subject to any right to set-off; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subsection (4).

69. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 45.9 at 1338 (1965).

70. WHITE & SUMMERS, UNIFORM COMMERCIAL CODE 1013 (2d ed. 1980).

71. A few courts have disagreed with this analysis and have permitted tracing. For example, in *In re* Intermountain Porta Storage, 59 Bankr. 793, 796 (Bankr. D. Colo. 1986), the court concluded that § 9-306(4)(d) was not applicable because the proceeds were "identifiable" under the lowest intermediate balance rule. *Accord In re* Gibson Products of Arizona, 543 F.2d 652 (9th Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); *In re* Dexter Buick-GMC Truck Co., 28 U.C.C. Rep. Serv. (Callaghan) 243 (D.R.I. Bankr. 1980).

72. 491 F.2d 1288 (7th Cir. 1974).

fected security interest.[73] But, in *In re Gibson Products of Arizona*,[74] the Ninth Circuit held that the phrase referred to all cash proceeds, regardless of whether they arose from the sale of collateral in which the secured creditor held a security interest.[75] Another problem arises from the Bankruptcy Act of 1978. It is at least arguable that a few of the bankruptcy provisions conflict with section 9-306(4)(d).[76]

2. Uniform Commercial Code Section 9-306(4)(d) Provides Exclusive Means for Recovering Commingled Proceeds in the Event of Insolvency Proceedings: *Maxl Sales Co. v. Critiques, Inc.*

a. *Case in Context*

In *Critiques*,[77] the Tenth Circuit viewed the facts as requiring a straight application of section 9-306(4)(d). The court held that the creditor could not reclaim any proceeds since it offered no evidence showing what amounts, if any, were proceeds received by the debtor within ten days before the institution of insolvency proceedings. As a result of this lack of evidence, the court did not reach the issue of what the phrase "any cash proceeds" means. Nor did it discuss the issue of whether the Bankruptcy Act of 1978 created any conflict with section 9-306(4)(d). The dissent concluded that section 9-306(4)(d) was not applicable.[78]

b. *Statement of the Case*

The creditor and debtor entered into two separate transactions. One was a consignment agreement, and the other was a loan represented by a promissory note. For each transaction, a security agreement was executed, and a corresponding financing statement filed. The debtor defaulted on both security agreements.[79] Later, a district court appointed a receiver to operate the debtor's business and hold in trust any net revenue from operations.[80] The receiver liquidated the debtor's existing inventory, plus inventory purchased by the receiver, at a public sale. The debtor then filed for bankruptcy under Chapter VII of the Bankruptcy Code and state court proceedings were stayed. Funds from the sale were transferred to the trustee in bankruptcy and the creditor

73. *Id.* at 1292.

74. 543 F.2d at 656, *cert. denied*, 430 U.S. at 950.

75. *Id.* White and Summers argue that the approach in *Gibson Products* is not defensible and that the phrase "any cash proceeds" limits the creditor to proceeds of his own collateral. WHITE & SUMMERS, UNIFORM COMMERCIAL CODE 1014-17 (2d ed. 1980).

76. *But see* WHITE & SUMMERS, UNIFORM COMMERCIAL CODE 1017 (2d ed. 1980) (finding no conflict between § 9-306(4)(d) and 11 U.S.C. §§ 547 and 545 (Supp. III 1985) or any other section of the Bankruptcy Act).

77. 796 F.2d 1293 (10th Cir. 1986) (applying Kansas law).

78. *Id.* at 1301.

79. *Id.* at 1295.

80. The receiver was appointed after the state of Kansas had filed a consumer protection complaint against the debtor and the state court had issued a writ of attachment against the debtor's property. *Id.*

filed a reclamation claim. The bankruptcy court rejected the claim,[81] and the district court affirmed.[82]

c. *Discussion and Analysis of the Tenth Circuit's Opinion*

The Tenth Circuit affirmed the decision of the lower courts.[83] Before reaching the ultimate task of applying section 9-306(4)(d), the court had to determine whether the creditor had a perfected security interest in proceeds under the two security agreements. The creditor only had trouble with the consigned goods security agreement, which incorporated a consignment agreement covering "certain items of furniture, household goods, etc. . . . ."[84] Although the creditor's failure to specifically include the term "inventory" in the security agreement did not prevent attachment under section 9-203 in the inventory assigned to the receiver, the same omission in the financing statement did prevent perfection.[85] The court interpreted a Kansas non-uniform amendment to section 9-402(1),[86] an amendment that specifically authorizes the use of generic descriptions of collateral, to mean that a creditor cannot comply with this section by identifying collateral any less specifically than by reference to the general categories of personal property used in Article 9.[87]

The security interest with respect to the promissory note was properly perfected. However, in applying section 9-306(4)(d), the court held that since the creditor failed to show what amounts (if any) were proceeds received by the debtor within ten days before the institution of the bankruptcy proceeding, it had no claim to the proceeds generated by the liquidation sale.[88] It was this application of section 9-306(4)(d) that gave rise to a persuasive dissenting opinion by Judge Logan,[89] who highlighted two important issues: (1) the meaning of "insolvency proceedings," and (2) whether section 9-306(4)(d) applies to proceeds commingled *after* insolvency proceedings have been instituted. The majority overlooked the importance of both of these issues.

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81. *In re* Critiques, Inc., 29 Bankr. 941 (Bankr. D. Kan. 1983).

82. *Critiques*, 796 F.2d at 1295.

83. *Id.*

84. *Id.*

85. The financing statement listed "proceeds, accounts receivable and intangibles arising from a certain consignment agreement. . . ." *Id.*

86. KAN. STAT. ANN. § 84-9-402(1) (1983).

87. *Critiques*, 796 F.2d at 1299. The court's ruling on this issue is strict in comparison with its ruling in *In re* Tri-State Equip., 792 F.2d 967, 971-72 (10th Cir. 1986); *see supra* text and accompanying notes 7-37. Nonetheless, without an appropriate reference to inventory by either "item" or "type" under § 9-402(1), the secured party was limited by the description in the financing statement and could not rely on the broader description in the security agreement. This is an application of what Professor Clark calls the "double filter" rule which limits perfection to the narrower of the two descriptions in the security agreement and financing statement; neither document can expand the scope of the other. B. CLARK, *supra* note 12, at ¶ 2.9[5][b] (cum. supp. no. 1 1987).

88. *Critiques*, 796 F.2d at 1301.

89. *Id.*

i. The meaning of "insolvency proceedings" in Uniform Commercial Code Section 9-306(4)

UCC section 1-201(22) defines "insolvency proceedings" as "any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved." Several courts have held that there is an insolvency proceeding even where a Chapter 11 petition in bankruptcy is filed and the debtor is seeking merely to reorganize his estate, rather than liquidate it.[90] Yet, the definition is broad enough to encompass more than bankruptcy situations.[91] It specifically includes an assignment for the benefit of creditors as well as liquidation and reorganization proceedings which may be equity receivership proceedings under state law that continue when not displaced by federal bankruptcy law.[92] The definition of insolvency proceedings is, therefore, broad enough to include a state law receivership.

The majority in *Critiques* treated the bankruptcy proceedings as the "insolvency proceedings" referred to in section 9-306(4), rather than the state law receivership.[93] As discussed in the next section, the result is a misapplication of section 9-306(4) for the purpose of applying the ten day limit in paragraph (d).

ii. Application of Section 9-306(4)(d)

The majority held that it did not matter whether the insolvency proceedings were deemed instituted when the receiver was appointed or when the bankruptcy petition was filed, due to the fact that the creditor offered no proof as to the amount of proceeds received by the debtor within ten days preceding either date.[94] In so holding, the majority assumed that proceeds arising after insolvency proceedings are also controlled by section 9-306(4).

Subsection (4) states that "*[I]n the event* of insolvency proceedings . . . a secured party with a perfected security interest in proceeds has a perfected security interest only in . . . (d) . . . accounts of the debtor in which proceeds *have been commingled* with other funds. . . ." The language indicates that section 9-306(4)(d) applies only to proceeds commingled *prior* to the date of insolvency proceedings.[95] Therefore, section 9-306(4)(d) was simply not applicable to the facts before the court since the proceeds were generated after the appointment of the receiver.

90. *See, e.g.*, Morrison Steel Co. v. Gurtman, 113 N.J. Super. 474, 478, 274 A.2d 306, 310 (1971); *In re* Conklins, Inc., 14 Bankr. 318, (Bankr. D.S.C. 1981).

91. R. HENSON, SECURED TRANSACTIONS at 217-18 (2d ed. 1979).

92. 1 R. ANDERSON, UNIFORM COMMERCIAL CODE, § 1-201:359 (3d ed. 1981). *See also* 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 45.9 at 1337 (1965) (insolvency proceedings may take place either under a state statute or under the liquidation or reorganization provisions of the federal Bankruptcy Act).

93. *Critiques*, 796 F.2d at 1301.

94. *Id.* at 1300 n. 9.

95. *Id. See also In re* Gibson, 6 U.C.C. Rep. Serv. (Callaghan) 1193, 1196 (W.D. Okla. 1969) (holding that the secured party could recover from the trustee in bankruptcy the proceeds received by the debtor within the ten day period prior to bankruptcy, plus the amount collected by the trustee from accounts receivable subsequent to bankruptcy).

What was before the court was basically a straight bankruptcy question.[96]

d. *Implications of Holding*

As the dissent noted, the problem with the majority's assumption that section 9-306(4)(d) applies also to proceeds that were commingled after insolvency proceedings have begun is that there will never be proceeds received within ten days before the institution of insolvency proceedings with regard to items sold after insolvency proceedings. As a result, secured creditors will always lose here, unless they prevent the receiver from commingling the proceeds with other money.[97] Fortunately, other courts are not likely to follow the Tenth Circuit's approach to section 9-306(4)(d). If the same facts were to arise again, the chances are slim that another court would refuse to find that a state law receivership is an insolvency proceeding within the meaning of that section.

II. BANKING

The troubled oil and gas industry was the breeding ground for the two banking cases decided by the Tenth Circuit during the survey period. The issues in both cases were primarily contractual in nature. Not surprisingly, the financial problems of at least one of the parties involved in each case helped to give rise to these issues.

A. *A Participating Bank's Risk Under a Loan Participation Agreement*

1. Background

Under a loan participation agreement, an investing participant advances funds to the originating lender (referred to as the "lead"), either for the purpose of purchasing an undivided interest in the obligation of a third party and in any collateral or as an extension of credit to the lead. Typically, a bank or other financial institution will attempt to participate in a third-party obligation (the "loan") originated by the lead when it has surplus cash to invest.[98]

For an investor contemplating the acquisition of a participation, either by purchase or as security, there are several potential problems, including: (1) insolvency of the lead, in which case the funds entrusted to the lead may be subject to the adverse claims of the lead's creditors or of its trustee in bankruptcy; (2) inability or unwillingness of the lead to perform its contractual undertakings; and (3) insolvency of the third-party obligor. With regard to this last problem, the existence of a future advance clause in the security agreement between the lead and the third-party obligor can have adverse consequences on the participant's security interest in any underlying collateral.

96. *See* 11 U.S.C. § 552(b) (Supp. III 1985).
97. *Critiques*, 796 F.2d at 1302.
98. *See generally* Simpson, *Loan Participations: Pitfalls for Participants*, 31 BUS. LAW. 1977, 1977-85 (1976).

When there is a future advance clause, the lead will want to ensure that the loan is secured not only to the extent of the amount owed on the original advance but also to the extent of the amount owed on the future advance.[99] If the security agreement's future advance clause is effective, the use of the original collateral to secure a future advance may dilute any interest the participant might have in the collateral for the loan if the value and amount of collateral remain the same. The participant's problem in this situation is compounded when the lead drafts the participation agreement[100] and in it disclaims any representations or warranties with respect to the collateral. If the debtor becomes insolvent, the lead may be able to use the collateral to satisfy not only the original advance but the future advance in which the participant may not have an interest, all at the expense of the participant.

Often, the participant's only real chance to avoid such a result is to argue that the future advance clause does not cover the later advance on the ground that it was created for a different purpose than the original advance. In response to this type of argument, several courts hold that unless the future advance clause is ambiguous it encompasses all future advances, and parol evidence is inadmissible to contradict the clear language of the clause.[101] Other courts look at both the security agreement and parol evidence to ensure that the parties intended the future advance clause to cover the particular type of subsequent advance. These courts generally allow parol evidence to show whether the later advance was of the "same class" as the initial obligation. This is an important determination because if the two obligations are not of the same class the original collateral will not secure the later advance.[102]

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99. Achieving attachment to the extent of the future advance requires a security agreement that demonstrates the debtor's intent to give a security interest in the collateral to cover the future advance. *See* T. CRANDALL, R. HAGEDORN & F. SMITH, JR., DEBTOR-CREDITOR LAW MANUAL ¶ 7.04[2][b][vi] (1985). The collateral may be real as well as personal property. For example, a mortgage may secure future advances of value. In fact, many states have enacted statutes validating the use of the mortgage (or trust deed) to secure future advances. *Id.* at ¶ 8.04. As to personal property, *see* U.C.C. § 9-204(3) (1978).

100. This agreement, between the lead and the participant, governs the participation relationship. Hibernia Nat'l Bank v. Federal Deposit Ins. Corp., 733 F.2d 1403, 1408 (10th Cir. 1984).

101. *See, e.g.*, First Nat'l Bank in Dallas v. Rozelle, 493 F.2d 1196 (10th Cir. 1974); Kimbell Foods v. Republic Nat'l Bank of Dallas, 557 F.2d 491 (5th Cir. 1977), *aff'd*, 440 U.S. 715 (1979); State Bank of Albany v. United States, 468 F.2d 1211 (2d Cir. 1972).

102. *See, e.g.*, Kitmitto v. First Pa. Bank, 518 F. Supp. 297 (E.D. Pa. 1981); Marine Nat'l Bank v. Airco, Inc., 389 F. Supp. 231 (W.D. Pa. 1975); *In re* Grizaffi, 23 Bankr. 137 (D. Colo. 1982). *See also* T. CRANDALL, R. HAGEDORN & F. SMITH, JR., DEBTOR-CREDITOR LAW MANUAL ¶ 7.04[2][b][vi] (1985).

2. Existence of Future Advance Clause Results in Dilution of Collateral in the Absence of Protective Provisions: *In re Continental Resources Corp.*

a. *Case in Context*

In *Continental Resources*,[103] the Tenth Circuit disallowed parol evidence with respect to the subjective intent of the parties in executing a future advance but did apply the "same class" test. The court stated that the future advance was of the same class as the initial advance and therefore was secured by the original collateral. As a result, the participating bank's interest in the collateral was diluted.

b. *Statement of the Case*

The debtor entered into a revolving loan agreement with the lead bank, the loan being secured by mortgages (collectively referred to as "mortgage") on certain oil and gas properties. The mortgage contained a future advance clause.[104] Following the execution of the note and mortgage, another bank purchased a participation in the loan from the lead bank. A few months later, the lead bank and the debtor entered into an agreement for a second loan. The note for this second loan, in which the participating bank did not have an interest, listed "oil and gas mortgages" as collateral.[105] After the debtor went bankrupt, the lead bank filed an application with the bankruptcy court to have its claim under the second note classified as secured (by the mortgage). The bankruptcy court held that the second loan was subject to the future advance clause and granted the application.[106] The district court affirmed.[107]

c. *Discussion and Analysis of the Tenth Circuit's Opinion*

The Tenth Circuit also affirmed the bankruptcy court's decision[108] and rejected the participating bank's arguments that: (1) the lead bank breached its duty of good faith by using the mortgage to secure the second loan; (2) parol evidence should have been admissible to show that the lead bank and the debtor did not intend to secure the second loan; and (3) the second loan was not of the same class as the original loan.[109]

103. *In re* Continental Resources Corp., 799 F.2d 622 (10th Cir. 1986) (applying Oklahoma law).

104. This clause contained the following language: "This mortgage is given to secure the following indebtedness, to wit [original loan] . . . [and] all loans and advances which Mortgagee may hereafter make to Mortgagor, and all other and additional debts. . . ." Another section in the mortgage stated: "it being contemplated by Mortgagor and Mortgagee that Mortgagee may from time to time make additional loans and future advances hereunder. . . ." *Id.* at 624-25.

105. *Id.* at 623.

106. 43 Bankr. 658 (Bankr. W.D. Okla. 1984).

107. *Continental Resources*, 799 F.2d at 623.

108. *Id.*

109. *Id.* at 624-27.

i. The duty of good faith

Every contract imposes upon each party a duty of good faith and fair dealing. According to the drafters of the Restatement of Contracts (Second), the concept of good faith emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.[110] Under the UCC, in the case of a merchant, good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[111] A breach of the duty of good faith and fair dealing occurs when one party to a contract seeks to prevent its performance by, or to withhold its benefits from, the other party. Without more, the mere exercise of one's contractual rights cannot constitute a breach.[112]

The participating bank's argument that the lead bank breached this implied duty by using existing collateral to secure a future advance was, not surprisingly, unsuccessful. The participation agreement clearly disclaimed any representations and warranties concerning the sufficiency of the collateral. In addition, as the participating bank was aware, the mortgage contained a future advance clause. In light of these provisions, the participant could not have justifiably expected that the future advance clause would remain dormant. The risk that the collateral might be diluted via the exercise of the clause was apparent.

In a related argument, the participating bank claimed that the lead breached a fiduciary duty. As the court noted, the specific terms of both the participation agreement and mortgage qualified whatever fiduciary relationship may have existed,[113] and therefore precluded a finding of breach.

ii. Application of the parol evidence rule

The parol evidence rule bars evidence of prior or contemporaneous oral or written agreements and understandings which vary or contradict the written contract.[114] The rule only applies if the written contract is an integration, that is, a final expression of the agreement. Moreover, if the written contract is a completely integrated agreement, parol evi-

110. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979). See comments (a) and (d). Comment (d) lists examples of bad faith: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979) Comment (d).

111. U.C.C. § 2-103(1)(b) (1978).

112. Broad v. Rockwell Int'l Corp., 642 F.2d 957 (5th Cir.), *cert. denied*, 454 U.S. 965 (1981).

113. *Continental Resources*, 799 F.2d at 625. The assertion of a fiduciary relationship between the lead and the participant is frequently helpful in the context of the lead's bankruptcy, as opposed to the debtor-obligor's bankruptcy. If a participant can establish a trustee-beneficiary relationship in this situation, it may be entitled to a return of any funds advanced to the lead. *See* Simpson, *Loan Participations: Pitfalls for Participants*, 31 BUS. LAW. 1977, 1992-2003 (1976) and the cases discussed therein; Hibernia Nat'l Bank v. Federal Deposit Ins. Corp., 733 F.2d 1403 (10th Cir. 1984).

114. *See* RESTATEMENT (SECOND) OF CONTRACTS § 213 (1979).

dence is not even admissible to supplement the writing.[115] When a future advance clause is involved, the rule generally followed is that the language of the contract, unless ambiguous, represents the intention of the parties and that testimony concerning the subjective intent of the parties in adopting the clause is inadmissible.[116]

In the present case, the participating bank argued that the parties did not intend to secure the second loan with the existing mortgage but, rather, had agreed to an unsecured negative pledge arrangement.[117] The court held that parol evidence to establish this intent was inadmissible.

The court seems to have been extreme in its application of the parol evidence rule. By definition, the rule should not be applied to evidence of subsequent agreements or modifications.[118] Therefore, if the parties actually did enter into a subsequent agreement that differed from the original, as the participant claimed, then parol evidence should have been admissible. The participating bank, however, could never really prove that there was any kind of subsequent modification.[119] In the cases cited by the court, the issue was whether evidence prior to or contemporaneous with the writing was admissible.[120] In the present case, the issue was whether there was a subsequent modification.

The court also addressed the issue of whether the participant was subject to the parol evidence rule even though it was not a party to the mortgage.[121] In *Fulton v. L & N Consultants, Inc.*,[122] the court noted that in Oklahoma the general rule is "that the parol evidence rule only applies to parties to the agreement and their privies."[123] As Professor Williston notes, such a statement of the rule "has led to misapprehension."[124] Except perhaps for the purpose of showing either fraud against a third person or some invalidating facts which would be available to the parties themselves, the rule should apply with respect to third parties. Furthermore, the parol evidence rule extends to a third

115. *Id.* The exceptions applicable to the parol evidence rule (*e.g.*, when the writing is ambiguous) are found in § 214. *Id.*

116. Kimbell Foods v. Republic Nat'l Bank, 557 F.2d 491, 496 (5th Cir. 1977).

117. *Continental Resources*, 799 F.2d at 625. A negative pledge is merely an agreement to forebear from taking some manner of action. *In re* Continental Resources Corp., 43 Bankr. at 662.

118. The court recognized this facet but called it an "exception" to the parol evidence rule. *Continental Resources*, 799 F.2d at 626.

119. The second note was blank when signed by the debtor's chief financial officer and filled in later by personnel at the lead bank. The court concluded that filling in the blanks of the note was not actually an alteration of the instrument, and that in such cases the issue is whether authority existed to fill in the blanks. *Continental Resources*, 799 F.2d at 626 (citing *In re* Schick Oil & Gas, Inc., 35 Bankr. 282, 286 (Bankr. W.D. Okla. 1983)).

120. Baum v. Great W. Cities, Inc., 703 F.2d 1197 (10th Cir. 1983); Fulton v. L & N Consultants, 715 F.2d 1413 (10th Cir. 1982); Mercury Inv. Co. v. F.W. Woolworth Co., 706 P.2d 523 (Okla. 1985).

121. *Continental Resources*, 799 F.2d at 626.

122. 715 F.2d 1413 (10th Cir. 1982).

123. *Id.* at 1418. *See also In re* Assessment of Alleged Omitted Property, 177 Okla. 74, 77, 58 P.2d 134, 137 (1936).

124. 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 647 (3d ed. 1961).

person who makes a claim through the right of a party to a written contract.[125] In the instant case, the Oklahoma rule created no "misapprehension" because the court did not consider the participant a stranger to the contract for the purpose of applying the parol evidence rule. The court reasoned that the participant was closely affiliated with the lead bank and was a beneficiary of the agreement.[126]

iii. The "same class" test

The "same class" test, also referred to as the "relatedness rule," serves to limit the application of a future advance clause to those advances which are of the same class as the original loan.[127] In reference to Article 9 of the UCC, Grant Gilmore (one of the Article 9 drafters) states that "no matter how the clause is drafted, the future advances to be covered must 'be of the same class as the primary obligation . . . and so related to it that the consent of the debtor to its inclusion may be inferred.' "[128]

Different loans intended to provide a debtor with working capital are of the same class.[129] A loan is classified as working capital if the debtor uses the money to obtain current assets or to satisfy current liabilities. Current assets are those assets which are reasonably expected to be converted into cash, sold, or consumed within the normal operating cycle of the business or one year, whichever is longer.[130] The court rejected the participating bank's argument that the second loan was not within the future advance clause, since both the original and second loan were for working capital. Even though the debtor used the money from the second loan for acreage acquisition, that loan was still for working capital. Because the debtor was in the business of oil and gas exploration and development, the properties acquired could be considered current assets.

d. *Implications of Holding*

Continental Resources illustrates the importance to a participating

125. *Id.* at 1165.

126. *Continental Resources*, 799 F.2d at 626.

127. Security Nat'l Bank & Trust Co. v. Dentsply Professional Plan, 617 P.2d 1340, 1346 (Okla. 1980); Kitmitto v. First Pa. Bank, 518 F. Supp. 297, 300 (E.D. Pa. 1981).

128. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 35.2 (1965) (quoting National Bank of E. Ark. v. Blankenship, 177 F. Supp. 667, 673 (E.D. Ark. 1959), *aff'd sub nom.*, National Bank of E. Ark. v. General Mills, 283 F.2d 574 (8th Cir. 1960)). *But see* Thorp Sales Corp. v. Dolese Bros. Co., 453 F. Supp. 196, 200 (W.D. Okla. 1978) ("it is no longer necessary, as between the original lender and the original debtor, for future advances to be of the same class as the primary obligation").

129. *Continental Resources*, 799 F.2d at 627 (citing *Dentsply*, 617 P.2d at 1345-46). The term "working capital" refers to a firm's investment in current assets.

130. AMERICAN INST. OF CERTIFIED PUB. ACCOUNTANTS, RESTATEMENT AND REVISION OF ACCOUNTING RESEARCH BULLETINS, ACCOUNTING RESEARCH AND TERMINOLOGY BULLETINS, (final ed. 43 1961), ch.3, § A, ¶ 4. An operating cycle is the average amount of time it takes a firm to spend cash for inventory, process and sell the inventory, and collect the receivables, converting them back into cash; thus, it is the time taken to go from "cash to cash."

bank of obtaining at least some representations and warranties from the lead with respect to underlying collateral. Participating banks who do not obtain these assurances face the very real risk of having their share of the collateral seriously diluted if the third-party debtor borrows pursuant to a future advance clause and then becomes insolvent. The participant in *Continental Resources* made the mistake of placing itself at the mercy of the lead, and found that the court was unwilling to come to its rescue. Other participants who fail to obtain warranties and representations can expect similar judicial treatment.

B. *Fraud Counterclaim in Response to a Suit Seeking Recovery on a Promissory Note*

1. Background

Courts have often stated that fraud cannot be grounded on misstatements of opinion because the element of justifiable reliance is absent.[131] The "puffing" rule, for example, allows a seller the privilege to lie at will, so long as he says nothing specific. Not surprisingly, the rule has not been favored, and whenever it can be found that there was some kind of assurance as to specific facts the question of actionable misrepresentation has been left to the jury.[132]

A statement of value is generally regarded by the courts as a matter of opinion.[133] However, transforming such a statement of opinion into one of fact requires very little. Thus, a representation by the seller of the price paid for the property being sold is considered one of fact.[134] When the seller misrepresents the price paid (cost), courts generally give relief if the other elements of fraud are met.[135]

2. Misrepresentation of Loan Value of Property Provides Basis for Fraud Counterclaim: *Federal Deposit Insurance Corp. v. Palermo*

a. *Case in Context*

In *Palermo*,[136] it was not actually the price paid for the property that

131. *See* W. PROSSER & P. KEETON, THE LAW OF TORTS § 109, (5th ed. 1984) (citing cases) [hereinafter PROSSER & KEETON].

132. *Id.* at 757.

133. Byers v. Federal Land Co., 3 F.2d 9, 11-12 (8th Cir. 1924); Reeder v. Guaranteed Foods, 194 Kan. 386, 394, 399 P.2d 822, 830-31 (1965).

134. PROSSER & KEETON, *supra* note 131, at 758. Representations as to the price at which similar property is selling, the amount of an offer made by a third person, the state of the market, or even the lowest price at which a purchase can be made from another, are also considered to be statements of fact. *Id. See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 168-169. "An assertion is one of opinion if it expresses only a belief, without certainty, as to the existence of a fact or expresses only a judgment as to quality, value, authenticity, or similar matters." *Id.* § 168(1) at 455.

135. Fraud consists of: (1) a material, false representation; (2) made with knowledge of falsity, or recklessly, and made as a positive assertion; (3) with intention that it be acted upon by another; (4) actual reliance; and (5) resulting injury. D & H Co. v. Shultz, 579 P.2d 821, 824 (Okla. 1978); Johnson v. Eagle, 355 P.2d 868, 870 (Okla. 1960).

136. 815 F.2d 1329 (10th Cir. 1987) (incorporating the law of Oklahoma as the federal rule of decision).

was misrepresented, but rather the amount owed on the property. The court held this to be a misrepresentation of fact, not opinion, and upheld a jury verdict in the buyer's favor.[137] In reaching its decision, the court, by analogy, relied on cases holding that a buyer of property may maintain an action for fraud against a seller who misrepresents the price he has paid for the property.[138]

b. *Statement of the Case*

Penn Square Bank was arranging the sale of an interest in oil wells with problem loans. A loan officer at the bank phoned Palermo (buyer) and represented, among other things, that the bank could not take less than $130,000 for the interest because "that's what the man owes the bank for it."[139] Evidence indicated that the loan officer knew that the bank had actually loaned the owner only fifty thousand dollars (secured by the oil wells). The buyer of the wells testified that the amount the bank was willing to loan on the property was important to him in determining the value of the wells and that he would not have bought the property had he known the truth.[140]

After production on the wells was lower than expected, the buyer stopped making payments on the note. The Federal Deposit Insurance Corporation, as receiver of the insolvent bank, sued to recover the balance due. The buyer defended the suit on the basis of fraud, and also counterclaimed, seeking both rescission and damages. A jury rendered a verdict in favor of the buyer.[141]

c. *Discussion and Analysis of the Tenth Circuit's Opinion*

The Tenth Circuit upheld the jury's verdict for the buyer on his claim of fraud.[142] He was not allowed, however, to pursue the fraud claim as one for rescission because he had not acted promptly in exercising his right of rescission.[143] The buyer was able to assert the fraud claim only as a set-off or counterclaim in the nature of recoupment to reduce or eliminate his liability on the promissory note; the running of a two-year state statute of limitations precluded any affirmative relief.[144] On the issue of damages, the court set aside the jury's award and or-

137. *Id.* at 1336.

138. *Id.* (citing Withroder v. Elmore, 187 P. 863, 864 (Kan. 1920); Wisconsin Steel Treating & Blasting v. Donlin, 23 Wis. 2d 379, 383, 127 N.W.2d 5, 8 (1964)).

139. *Palermo*, 815 F.2d at 1333.

140. *Id.* at 1336.

141. *Id.* at 1332.

142. *Id.* at 1341.

143. *See* OKLA. STAT. ANN. tit. 15, § 235 (West 1966).

> Rescission, when not effected by consent, can be accomplished only by the use . . . of reasonable diligence to comply with the following rules: 1. He must rescind promptly, upon discovering the facts which entitle him to rescind . . . and 2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same . . . .

Id.; *see also* Harmon v. Phillips Petroleum Co., 196 Okla. 607, 167 P.2d 360 (1946).

144. OKLA. STAT. ANN. tit. 12, § 95 (West 1960).

dered a new trial on this issue alone.[145]

i. The fact-opinion distinction

The Tenth Circuit's opinion illustrates the difference between misrepresentations of "fact" and "opinion". The traditional rule is that, while misstatements of fact may be actionable, misstatements of opinion are usually not actionable when parties bargain at arm's length.[146] This attempted distinction may not be a meaningful one; as noted by one scholar, "it is scientifically impossible to distinguish fact from opinion."[147] Still, the words probably have meanings which correspond roughly to concepts sufficiently distinct from each other to justify some differences in treatment.[148] Nonetheless, it is clear that the scope of immunity for misstatements of opinion is constantly shrinking.[149] Notwithstanding a few older cases to the contrary, when a statement goes beyond mere value to include assertions of the amount paid for property, such assertions may be actionable.[150]

The court's holding in *Palermo* that the bank loan officer's statement of the amount loaned on the property was one of fact rather than opinion and its application of the fact-opinion rule were clearly correct. To say that the loan officer's statement was merely an opinion of value would be to ignore reality. The statement is as much a fact as a statement by a seller that he himself paid a certain amount for the property. Therefore, the court could properly apply, by analogy, the law from cases holding that misstatements of the amount paid (cost) are actionable.

Despite this apparent logic, several early cases hold that a misstatement by the seller of the price paid for the property does not lay the foundation for a fraud action.[151] The rationale used is that this type of misstatement is no more than an indication of the seller's opinion of the property's value—or mere "dealer's talk." The driving force behind the cases seems to have been the doctrine of *caveat emptor* ("buyer beware"), which had a significant influence on the courts' analyses. Consistent with this doctrine, courts were strictly applying the materiality and justifiable reliance elements of fraud.

To reach a different result from these cases, the Tenth Circuit

145. *Palermo*, 815 F.2d at 1341.

146. *See* James & Gray, *Misrepresentation—Part II*, 37 MD. L. REV. 488, 490 (1978).

147. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643, 657 (1937) (citing 7 WIGMORE ON EVIDENCE § 1919 (rev. 1978)). Keeton believed that the important distinction is between assertions of knowledge and those of opinion, rather than assertion of fact and those of opinion. *Id.* at 657. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 168 comment a (1979), which follows this view.

148. James & Gray, *supra* note 146, at 489.

149. *Id.*

150. *See, e.g.*, Wisconsin Steel Treating & Blasting Co. v. Donlin, 23 Wis. 2d 379, 383, 127 N.W.2d 5, 8 (1964).

151. *See, e.g.*, Holbrook v. Conner, 60 Me. 578, 11 Am. Rep. 212 (1872); Annotation, *Fraud — Misrepresentation of Price*, 66 A.L.R. 188, 191-93 (1930). Many of the cases so holding state that there must be a fiduciary relation between the seller and buyer before there can be any kind of recovery. *See, e.g.*, Banta v. Palmer, 47 Ill. 99 (1868).

found it necessary to distinguish *Steiner v. Hughes*.[152] As the Tenth Circuit noted, the Oklahoma court in *Steiner* based its decision on a lack of actual reliance.[153] The seller misrepresented the profit per share it would make by selling stock to the buyer; but the buyer could not have been misled because he had checked for himself the price of the stock on the day in question. The Oklahoma court's statement of the law[154] was a portion of some misguided dicta which almost certainly would not be followed today.[155]

ii. Measure of damages

Courts are divided over two standards for measuring damages in fraud actions. One standard is the "out of pocket" rule, followed by a minority of courts, whereby the injured party receives the difference between the value of what he has parted with and the value of the property he has received.[156] This measure is always adopted as to a defense in the nature of recoupment.[157] The other measure, called the "loss-of-bargain" rule, gives the injured party the difference between the value of the property as represented and its actual value on the date of purchase.[158]

After holding that the buyer could assert his fraud claim only as a set-off or counterclaim in the nature of a recoupment, the Tenth Circuit concluded that the appropriate measure of damages was the loss of bargain rule, although the court did not label the rule as such.[159] Technically, the out of pocket rule should have been applied since the buyer could only seek a set-off or recoupment. Yet, the court in effect did so

152. 172 Okla. 268, 44 P.2d 857 (1935). In *Steiner*, the Oklahoma Supreme Court stated that:

> [W]e have found no case, by this court, in which the contended fraud consisted merely of a statement made by the seller, upon inquiry by the purchaser, that the property was costing, or had cost him, the seller, more than it actually cost, where this court has held that such a statement, unless coupled with other elements of fraud, inequality of the parties, overreaching or confidential relations, has been held to constitute actionable misrepresentation.

Id. at 270, 44 P.2d at 860.

153. *Palermo*, 815 F.2d at 1337.

154. *See supra* note 152.

155. *See, e.g.*, Beavers v. Lamplighters Realty, 556 P.2d 1328, 1331 (Okla. Ct. App. 1976) (statement by seller that a third party had offered a certain sum for property is a "statement of material fact affecting the value and may form the basis for an action of deceit,") (quoting Chisum v. Huggins, 55 Okla. 423, 441, 154 P. 1146, 1152 (1916)); Varn v. Maloney, 516 P.2d 1328, 1332 (Okla. 1973); *Johnson*, 355 P.2d at 871. Even many of the earlier cases are in accord. *See* Annotation, *Fraud — Misrepresentation of Price*, 66 A.L.R. 188 (1930). For a more recent case that is representative of the increasing tendency of courts to find that assertions of the amount which has been paid or offered for the property are actionable, see Kabatchnick v. Hanover-Elm Bldg. Corp., 328 Mass. 341, 103 N.E.2d 692 (1952); Annotation, *Fraud — Misrepresentation by Lessor*, 30 A.L.R.2d 923 (1953). In *Kabatchnick*, the defendant-landlord induced a tenant to agree to a substantially higher rent by falsely stating that a prospective tenant had offered to lease the premises at the higher rent.

156. PROSSER AND KEETON, *supra* note 131, at 767-68.

157. *Id.*

158. *Id.* at 768; A.A. Murphy, Inc. v. Banfield, 363 P.2d 942, 946 (Okla. 1961).

159. *Palermo*, 815 F.2d at 1340-41 (citing *A.A. Murphy, Inc.*, 363 P.2d at 946).

when it stated that under the circumstances "the value of the property as represented is equal to the price paid for the property."[160] Where, as here, the injured party can recover only by way of set-off or recoupment, the final result is that the damages for fraud[161] are subtracted from the amount due on the promissory note. The net result is a reduction in the buyer's liability.

d. *Implications of Holding*

The Tenth Circuit's holding is consistent with the increasing tendency among courts to find that misrepresentations of the price paid for property are actionable. The case is certainly not surprising, but is a warning to banks that they cannot misrepresent the loan value of property when selling property covered by a security agreement and thereafter argue that the representation was a mere "opinion."

III. Liability of Parent Company for Breaching Subsidiary-Employee Contract

A. *Background*

While the board of directors of a corporation is entrusted with the general power of managing the business and affairs of the corporation, the directors may delegate many decisions to corporate officers or agents.[162] In most publicly held corporations, the full time, professional management runs the business—the directors having more of an oversight role. The directors of large corporations find it necessary to hire managers with specific expertise and to delegate to those managers extensive authority. Nonetheless, problems may arise when too much authority is delegated.

One problem in particular arises in the context of a parent-subsidiary relationship where an employment contract exists between the subsidiary and its highest ranking employee (usually called the chief executive officer). Perhaps to the dismay of the employee, the parent company might find it desirable from a managerial standpoint to involve itself significantly in the subsidiary's day-to-day operations. When the parent interferes with the employment contract, the employee may decide to sue for breach. Aside from proving breach, the employee may have to overcome some other obstacles before obtaining a judgment against the parent. One obstacle is the parent's argument that the contract is invalid because it gives the employee so much authority that it strips the subsidiary's board of directors of its essential function. Another obstacle is that of holding the parent liable when it is not a party

160. *Id.* at 1341 n.3.

161. The total damages would include consequential damages if proximately caused by the fraudulent conduct. Barnes v. McKinney, 589 P.2d 698, 701-02 (Okla. Ct. App. 1978).

162. "All corporate powers shall be exercised *by or under the authority of*, and the business and affairs of the corporation managed *under the direction of*, its board of directors, subject to any limitation set forth in the articles of incorporation." Revised Model Business Corporation Act § 8.01 (b) (1984) (emphasis added).

to the contract. In this situation, a court may analyze the issue in terms of whether the corporate veil of the subsidiary should be "pierced" in order to reach through to the parent.

B. *Parent Company as Non-Signatory Party Held Liable:* McKinney v. Gannett Co.

1. Case in Context

In *McKinney*,[163] the court held that the parent company could be liable for breaching the subsidiary-employee contract on the ground that the contract was inseparable from another contract to which the parent was a party. Not content to rely on that ground alone, the court also concluded that it was proper to pierce the subsidiary's corporate veil using the "alter ego" doctrine so as to hold the parent liable.[164] The contract itself was held to be a proper delegation of power, even though the employee was in complete charge of most of the business and operating aspects of the subsidiary.[165]

2. Statement of the Case

Pursuant to an "Agreement and Plan of Reorganization," the plaintiff, McKinney, sold his newspaper company to Gannett (parent company). The agreement included a ten year employment contract between McKinney and the newspaper company (subsidiary). The employment contract, which the parent company did not sign, provided that McKinney would remain in charge of the business, operations, news, and editorial policies of the subsidiary for the first five years of the contract period, and in charge of the news and editorial policies for the second five years.[166]

After the relationship between McKinney and the parent company deteriorated, McKinney sued both the parent and the subsidiary. McKinney won on his breach of contract claim in the district court, which ordered the equitable remedy of "tolling" the running of the employment contract for the period from the date the parent effectively abrogated the plaintiff's contract rights until the final disposition of the lawsuit.[167]

3. Discussion and Analysis of the Tenth Circuit's Opinion

The Tenth Circuit affirmed the district court's decision and agreed that the parent company could be held liable for breach of contract;[168]

163. 817 F.2d 659 (10th Cir. 1987) (applying New Mexico law).
164. *Id.* at 666-67.
165. *Id.* at 667-69.
166. *Id.* at 662.
167. *Id.* at 663.
168. The court held that the parent company breached the employment contract on six different occassions; two of the breaches were material. *Id.* at 669-71. A material, or "total," breach of contract is a non-performance of duty that is so important as to justify the injured party in treating the whole transaction as at an end. 4 A. CORBIN ON CONTRACTS § 946 (1951).

that the employment contract was a valid delegation of power from the subsidiary's directors; and that the remedy of tolling was an appropriate form of relief.

a. *Basis for Parent Company Liability*

In holding the parent liable despite the fact that it was not a signatory to the employment contract, the court first ruled that the parent was liable because it was a party to the "Agreement and Plan of Reorganization" which was inseparable from the employment contract. This result seems to follow from an application of ordinary agency rules, which the court did not recognize. Considering that the parent (as principal) dominated and directed the subsidiary (as agent) in the transaction by drafting the employment contract and negotiating with the employee, the subsidiary's act of contracting with the employee could be deemed the act of the parent.[169] Therefore, it was not actually necessary for the court to also "pierce the corporate veil" of the subsidiary as a way of holding the parent liable.[170]

Aside from the question of whether it should have been used at all, the application of the concept of piercing the corporate veil was proper under the circumstances. To pierce the corporate veil is to disregard the separate existence of a corporation and to deny a shareholder the benefit of limited liability. The test—obviously result oriented—is simply whether recognition of the separate existence of the corporation would produce unjust or undesirable consequences inconsistent with any legitimate corporate purpose.[171] Some courts, like the Tenth Circuit in the present case, have applied the "alter ego" doctrine as the

169. *See* C. Krendl and J. Krendl, *Piercing the Corporate Veil: Focusing The Inquiry*, 55 DEN. L.J. 1, 3 n.9 (1978).

170. Professor Hamilton states:

> [N]o conceptual problems emerge when liability is imposed upon shareholders under conventional theories of agency or tort law. To argue that the corporate veil is 'pierced' in such cases is both unnecessary and confusing. If the shareholder is acting as a principal in his own name, he is clearly liable on the obligation.

The Corporate Entity, 49 TEX. L. REV. 979, 983 (1971).

171. *See* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 146, at 346 (3d ed. 1983); C. Krendl and J. Krendl, *Piercing the Corporate Veil: Focusing The Inquiry*, 55 DEN. L.J. 1, 15 (1978) (three requisites to piercing the corporate veil: instrumentality, improper purpose, and proximate causation). In *In re* Clarke's Will, 204 Minn. 574, 578, 284 N.W. 876, 878 (1939) (cited by H. HENN & J. ALEXANDER, *supra*, at 345), the court said:

> Many cases present avowed disregard of corporate entity. But they all came to just this—courts simply will not let interposition of corporate entity or action prevent a judgment otherwise required. Corporate presence and action no more than those of an individual will bar a remedy demanded by law in application to facts. Hence, the process is not accurately termed one of disregarding corporate entity. It is rather and only a refusal to permit its presence and action to divert the judicial course of applying law to ascertained facts. The method neither pierces any veil nor goes behind any obstruction, save for its refusal to let one fact bar the judgment which the whole sum of facts requires.
>
> For such reasons, we feel that the method of decision known as 'piercing the corporate veil' or 'disregarding the corporate entity' unnecessarily complicates decision. It is dialectally ornate and correctly guides understanding, but over a circuitous and unrealistic trail. The objective is more easily attainable over the direct and unencumbered route followed herein.

basis for piercing the corporate veil.[172] To invoke the doctrine, it must be shown that the corporation was a mere instrumentality for the transaction of the shareholder's own affairs; that there is such a unity of interest and ownership that the separate personalities of the corporation and the shareholder no longer exist; and to recognize the corporation's separate existence would promote unjustice or protect fraud.[173]

In its application of the alter ego doctrine, the court relied on the following facts: (1) the parent had complete stock ownership of the subsidiary and controlled its board of directors;[174] (2) the parent in effect treated the subsidiary as a division of the whole; (3) all of the subsidiary's revenue went to the parent; (4) all of the subsidiary's capital expenditures were approved by the parent; (5) the parent drafted the employment contract and negotiated with the plaintiff; and (6) the parent directly intervened in the personnel matters of the subsidiary.[175] Moreover, the court concluded that the parent company's dominion over the subsidiary was used for a wrongful purpose, which was to frustrate McKinney's contract rights.

b. *Delegation of Managerial Authority*

The board of directors has the ultimate responsibility for managing the corporation. However, it may delegate the power to transact not only ordinary and routine business but also business requiring the highest degree of judgment and discretion.[176] What the board may not do is delegate its entire duties of management to an individual officer.[177] The problem is determining when a particular delegation goes too far. Although one of degree, the test seems to be whether the board of directors has retained at least its basic authority to govern. If it has not, the delegation and any contract involved will be invalid. For example, in *Kennerson v. Burbank Amusement Co.*,[178] the board of directors of a corporation organized to operate a theatre employed a member of the board to be general manager, and by contract attempted to transfer all control over bookings, personnel, admission prices, salaries, contracts, expenses and even fiscal policies to the general manager. The California court

172. E.C.A. Environmetal Management Serv. v. Toenyes, 679 P.2d 213 (Mont. 1984) (parent liable for breach of contract damages where subsidiary was alter ego of parent); Harlow v. Fibron Corp., 100 N.M. 379, 671 P.2d 40 (N.M. Ct. App. 1983), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983); McCulloch Gas Transmission Co. v. Kansas-Nebraska Natural Gas Co., 768 F.2d 1199 (10th Cir. 1985).

173. 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 at 397 (perm. ed. 1983).

174. This fact is never conclusive by itself since such control is no more than a normal consequence of controlling share ownership. *See* H. HENN & J. ALEXANDER, *supra* note 171, § 148, at 355; London v. Bruskas, 64 N.M. 73, 324 P.2d 424, 427 (1958).

175. *McKinney*, 817 F.2d at 667. *See* Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 992-93 (1971).

176. 2 W. FLETCHER, *supra* note 173, § 495 at 498. Many statutes expressly authorize delegation subject to certain limitations; *see, e.g.*, N.M. STAT. ANN. § 53-11-48 (1978).

177. Boston Athletic Ass'n v. International Marathons, Inc., 392 Mass. 356, 467 N.E.2d 58 (1984).

178. 120 Cal. App. 2d 157, 260 P.2d 823, 832-33 (1953).

held that the contract was void and unenforceable. The general manager was under a duty to make periodic reports to the board, but that was held not to constitute a sufficient retention of control by the board.[179]

In the instant case, the Tenth Circuit held that the contract was valid because the subsidiary's board of directors had not totally delegated its authority to run the affairs of the corporation to the plaintiff. Unlike *Kennerson*, the employee was still responsible to the board of directors under the employment contract and the board did set corporate and departmental budget limitations.[180]

c. *The Equitable Remedy of Tolling*

After rejecting the parent company's argument based on election of remedies,[181] the Tenth Circuit upheld the district court's order that the employment contract be tolled from the date of the first breach until the date of final judgment.[182]

Tolling is an equitable remedy that is often used to adjust the rights of the parties under an oil and gas lease. Where a lessor has placed a cloud on the title of the lease by seeking judicial cancellation of the lease, a court may suspend (toll) the running of the lease terms. Out of fairness to the lessee, the obligations of the lessee to the lessor are suspended during the time such a claim is being asserted.[183] The purpose of tolling is not to punish the lessor but to restore the parties to the position they occupied originally.[184]

Tolling is not restricted to the oil and gas lease context. As the Tenth Circuit held, the remedy may be appropriate where the term of a

179. *Id.* Apparently, this duty to report did not mean much since the board did not retain the power to act in response to the reports. *See also* Sherman & Ellis, Inc. v. Indiana Mutual Casualty Co., 41 F.2d 588 (7th Cir. 1930); Long Park v. Trenton-New Brunswick Theatres Co., 297 N.Y. 174, 77 N.E.2d 633, 634-35 (1948) (the powers of the directors over the management of the business were "completely sterilized").

180. *McKinney*, 817 F.2d at 668. The fact that a valid employment contract exists in such a case does not limit the board's authority to remove the officer, with or without cause. But removal without cause in breach of the contract usually subjects the corporation to liability for damages. REVISED MODEL BUSINESS CORPORATION ACT §§ 8.43-44 (1984); N.M. STAT. ANN. § 53-11-49 (1978).

181. If a party has more than one possible remedy, her manifestation of a choice of one of them (by bringing suit or otherwise) is a bar to another remedy if the remedies are inconsistent and the other party materially changes her position in reliance on the manifestation. RESTATEMENT (SECOND) OF CONTRACTS § 378 (1979). *See also* Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 652 P.2d 240, 243 (1982), *overruled on other grounds*, Universal Life Church v. Coxon, 105 N.M. 57, 728 P.2d 467, 469 (1986). The court rejected the parent's argument on the ground that under *Maddoux* it was appropriate to consider the conduct of the party asserting the doctrine of election to determine whether that party should be allowed to benefit from its application, and that the parent's conduct was objectionable enough to preclude an application of the doctrine. *McKinney*, 817 F.2d at 673.

182. *McKinney*, 817 F.2d at 672-74. The court relied on Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1340-42 (10th Cir. 1982), where it tolled the primary term of leases on a reservation during the pendency of the tribe's suit to cancel the leases.

183. Continental Oil Co. v. Osage Oil & Refining Co., 69 F.2d 19, 23-24 (10th Cir. 1934), *cert. denied*, 287 U.S. 616 (1932); Morrison Oil and Gas Co. v. Burger, 423 F.2d 1178, 1182-83 (5th Cir. 1970).

184. *See* 2 E. KUNTZ, OIL AND GAS § 26.14 (1964).

contract has been interrupted by the conduct of one of the parties.[185]

4. Implications of Holding

The importance of *McKinney* is its clear indication that a parent company should not expect to be able to dominate a subsidiary to the extent of interfering with the rights of those who have contracted with the subsidiary and still obtain the benefit of limited liability.[186] If the interference is deemed wrongful, courts are generally willing to find some way of holding the parent liable even though it is not a party to the contract. *McKinney* shows that the Tenth Circuit is no exception.

CONCLUSION

In its disposition of the Article 9 issues during the survey period, the Tenth Circuit was faithful for the most part to the Uniform Commercial Code's underlying policy of flexibility and leniency. In *Tri-State Equipment* and *Collingwood Grain*, the court gave the first-to-file creditor in each case the benefit of this policy in holding the description of collateral sufficient to perfect the security interest. In *Critiques*, the creditor was not so fortunate. The court there held a financing statement description of collateral to be insufficient, and erred significantly by applying the insolvency provisions of section 9-306(4), with regard to the secured party's perfected security interest under the second of two security agreements.

Given the present economic environment, it is critically important for creditors to take the proper steps to protect themselves. The participating bank in *Continental Resources* undoubtedly realized this after having its share of the collateral diluted because of the use of a valid future advance clause. In *Palermo*, the bank's attempt to rid itself of a problem loan backfired when the court allowed the buyer of the collateral (real property) to recover for fraud because the loan value of the property was misprepresented.

Finally, in *McKinney v. Gannett* the court held the parent company, Gannett, liable for breaching an employment contract between its subsidiary and the subsidiary's chief executive officer.

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185. *McKinney*, 817 F.2d at 673. The court stressed that the remedy was not specific performance in disguise. *Id.* at n.8 ("we are confronted with a declaration of contract rights and not a coercive order decreeing enforcement of the employment contract.").

186. Of course, nothing is wrong with domination by itself since a majority or sole shareholder always dominates the corporation.

CONSTITUTIONAL LAW

OVERVIEW

During the survey period, the Tenth Circuit Court of Appeals decided several cases involving constitutional issues. Some of the cases cast new light on old problems while others reinforced principles previously enunciated in settled precedent. Overall, the Tenth Circuit displayed a well-balanced approach to upholding the constitutional rights of the individual, while meeting the legitimate concerns of the government and the public. The Tenth Circuit was more protective of substantive due process rights of students in public schools than the United States Supreme Court in its decision regarding corporal punishment. In its decisions in other areas, in particular involving the first, fifth, and fourteenth amendments, the court effectively used precedent to further develop the law.

Although no new concepts were introduced by the Tenth Circuit in these cases, they are of interest as illustrations of this circuit's application of principles previously discussed and accepted by this and other circuits. The article which follows is a sampling of the more significant and interesting cases.

I. THE STANDARD USED TO MAINTAIN SUIT IN FEDERAL COURT

A. *Background*

1. First Amendment

The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] This command has two components: the establishment clause and the free exercise clause.[2] The basic purpose of the establishment clause is, in the words of Thomas Jefferson, to erect "a wall of separation between church and state."[3] The image of a "wall", however, does not help very much in determining what types of state actions violate the establishment

1. U.S. CONST. amend. I, cl. 1. The establishment clause is applied to the state via the fourteenth amendment. Everson v. Board of Educ., 330 U.S. 1 (1974).

2. The establishment clause and free exercise clause were intended to be "mutually supportive," yet each works separately to protect distinct liberties. The free exercise clause seeks to prevent government from acting in a way that intrudes upon the individual's right to exercise religious beliefs, while the establishment clause is meant to restrain the government from passing laws favoring a particular religion, thereby placing indirect pressure upon citizens to adopt a particular belief as their own. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-2 (1978).

3. T. JEFFERSON, THE COMPLETE JEFFERSON 519 (S. PADOVER ed. 1943). *See generally* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645 (1978).

clause.[4]

The courts presently employ a three-fold test to determine if the command of neutrality imposed by the establishment clause is violated.[5] In order to pass constitutional muster, state action must have a valid secular purpose, have a primary effect that neither advances nor inhibits religion, and must avoid fostering an excessive entanglement between government and religion.[6] When an action is challenged under the establishment clause it must pass all three prongs of this test to be valid.[7] The establishment clause is not merely a command of equal treatment among religions; the government cannot pass laws which aid one religion or prefer one religion over another.[8]

Despite criticism from commentators[9] and members of the Court,[10] the *Lemon* test remains the yardstick by which state endorsement of religion is measured. Although the Court has repeated its reluctance to confine establishment clause analysis to the *Lemon* test,[11] it officially remains the standard in establishment clause cases.

2. Self-imposed Limitations on Judicial Review

a. *Standing*

Standing is a threshold inquiry concerned primarily with whether a litigant's stake or interest in a suit is sufficient for judicial redress.[12] Litigants generally have standing to challenge government action that

4. Comment, *Hiding Behind the Wall: Friedman v. Board of County Comm'rs*, 64 DEN. U.L. REV. 81, 82 (1987).

5. Lemon v. Kurtzman, 403 U.S. 602 (1971).

6. *Id.* at 612-13. What has become known as the *Lemon* test is really an amalgamation of the holdings of three cases. The requirement that state action be motivated by a valid secular purpose was first articulated in McGowan v. Maryland, 366 U.S. 420, 445 (1961). In that case, the Court upheld a mandatory Sunday closing law, finding that the state was acting to further the nonreligious goal of assuring a uniform day of rest. In Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963), the Court added the requirement that the effect of state action must neither advance nor inhibit religion. The Court held that a Pennsylvania statute requiring daily bible readings in public schools had the effect of advancing religion, and therefore violated the establishment clause. Finally, the rule that otherwise permissible state action will be invalidated if it fosters excessive entanglement between government and religion was incorporated into establishment clause analysis in Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970). There the Court upheld a grant of tax-exempt status to religious institutions. The Court justified its decision by finding that denial of the exemption would entangle the government in the affairs of religion more than granting of the exemption.

7. Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam).

8. *See generally* Everson v. Board of Education, 330 U.S. 1 (1947).

9. *See* Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1, 15-19; Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094, 1122-26 (1985); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1473 (1981).

10. *See generally* Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting); Committee for Pub. Educ. v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

11. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

12. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) ("Whether a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue."). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-17 (1980).

would create a judicially cognizable right of action if committed by a private party.[13] If, however, the plaintiff challenges a government action that results in an indirect harm unprotected by a particular legal interest, such as a government expenditure, standing becomes less certain.[14]

Until 1968, the only Supreme Court decision on whether federal taxpayers have standing to contest violations of constitutional limits on Congress' taxing and spending power was *Frothingham v. Mellon*.[15] In *Frothingham* the Supreme Court squarely addressed the question of whether federal taxpayers have standing to challenge government expenditures. The taxpayer in *Frothingham* attacked the maternity Act of 1921,[16] which provided grants to states engaged in programs to reduce mother and infant mortality, as an unconstitutional infringement of the states' tenth amendment rights.[17] Mrs. Frothingham alleged that she was a taxpayer and in that capacity she was injured because "the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law."[18] The Court held that she lacked standing because her interest in the moneys of the Treasury is shared with millions of others and "is comparatively minute and indeterminable; and the effect upon future taxation . . . remote . . . ."[19]

Frothingham barred federal taxpayer suits for forty five years until it was questioned and partially overcome in *Flast v. Cohen*.[20] The plaintiff taxpayers in *Flast* challenged federal expenditures to aid religious secondary schools.[21] Their complaint alleged that the expenditures violated the establishment clause of the first amendment.[22] The *Flast* majority first held that the rule of *Frothingham* was one of judicial self-restraint and not required by the Constitution, for "we find no absolute bar in article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs."[23] The Court, however, did not overrule *Frothingham*; rather it introduced a two-part standing test, which examined the issues, "to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[24] Applying this test to the federal taxpayers before it, the Court

13. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951).
14. *See generally* C. WRIGHT, THE LAW OF FEDERAL COURTS § 13 (4th ed. 1983).
15. 262 U.S. 447 (1923).
16. Maternity and Infancy Hygiene Act, ch. 135, 42 Stat. 224 (1921).
17. 262 U.S. at 479-80.
18. *Id.* at 486.
19. *Id.* at 487-88.
20. 392 U.S. 83 (1968).
21. *Id.* at 85. The disbursements, made under Titles I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241a (Supp. II 1984), were used to subsidize instruction in basic studies, such as reading and arithmetic, and to purchase textbooks. *Id.* at 85-86.
22. *Id.* at 86. The establishment clause prohibits Congress from passing any "law respecting an establishment of religion. . . ." U.S. CONST. amend. I, cl. 1.
23. 392 U.S. at 101.
24. *Id.* at 102.

articulated two conditions that must be met as a requisite for standing. First, plaintiffs must establish a connection between their status as taxpayers and the legislation attacked.[25] Taxpayers would thus have standing to challenge the constitutionality only of "exercises of congressional power under the taxing and spending clause of art. I sec. 8," and would consequently lack standing to challenge expenditures incidental to an essentially regulatory scheme.[26] Second, taxpayer-plaintiffs must establish a further nexus between their status and the substantive issues they seek to litigate. This prong requires that a taxpayer show that the challenged enactment exceeds "specific constitutional limitations" on the congressional taxing and spending power, and not that it was simply "beyond the powers delegated to Congress."[27] When both prongs are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.[28]

The major change in the direction of standing came in the 1974 companion decisions of *United States v. Richardson*[29] and *Schlesinger v. Reservist to Stop the War*.[30] These cases emphasized separation of powers principles in holding that a direct injury, not merely a general public interest, is required for standing. Neither as a citizen nor as a taxpayer may one invoke judicial review simply to vindicate a belief in the need for lawful conduct by Congress or public officials.[31]

In *Richardson*, the plaintiff alleged that the Central Intelligence Act,[32] which provided for the nondisclosure of the CIA's expenditures, violated the accounts clause of the Constitution.[33] The Court held that the plaintiff lacked standing under the *Flast* double-nexus test on two grounds: first, because he challenged a statute regulating executive agency action, not an exercise of Congress' taxing and spending power; second, because he made no allegation that funds were spent "in violation of a 'specific constitutional limitation.' "[34] The Court therefore concluded that there was no "logical nexus" between the plaintiff's status "of taxpayer and the claimed failure of the Congress to require the

25. *Id.*

26. *Id.*

27. *Id.* at 102-03. The Court distinguished *Frothingham* on this basis. *Id.* at 104-05. Mrs. Frothingham alleged that Congress' action, by infringing the state's tenth amendment rights, caused an increase in her tax bill. *Id.* at 105. She failed, however, to allege any right that specifically protected her from the increased tax liability, and she therefore lacked standing under the second nexus of the *Flast* test. *Id.*

28. *Id.* at 102-03. The Court stated that the plaintiffs satisfied the first nexus because they challenged an exercise of Congress' taxing and spending power, and satisfied the second nexus because the Court found the first amendment to be a "specific constitutional limitation" on congressional taxing and spending power. *Id.* at 103.

29. 418 U.S. 166 (1974).

30. 418 U.S. 208 (1974).

31. *See* C. WRIGHT, *supra* note 14, at 67.

32. 50 U.S.C. § 403 (1970).

33. U.S. CONST. art. I, § 9, cl. 7, (the accounts clause requires that a "regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time")

34. 418 U.S. at 175.

Executive to supply a more detailed report of the [CIA's] expenditures."[35]

The plaintiffs in *Schlesinger* sought to enjoin the membership of congressmen in the military reserves, alleging that such membership violated the incompatibility clause.[36] On the issue of citizen standing,[37] the Court found only "injury in the abstract."[38] The Court found that taxpayer standing did not exist because the plaintiffs below "did not challenge an enactment under art. I, sec. 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status."[39]

Since *Richardson* and *Schlesinger* the Court has continued to restrict taxpayer standing, even in establishment clause cases. In *Valley Forge Christian College v. Americans United for Separation of Church and State*,[40] the plaintiff organization alleged that the grant of federal property to a religious college violated the establishment clause.[41] In holding that plaintiffs failed to satisfy the first nexus of the *Flast* test[42] and therefore lacked standing, the Court delineated a more precise definition. First, the action challenged the decision of an executive agency to transfer property, not an exercise of congressional power.[43] Second, the legislation that authorized the transfer was passed under the property clause of article IV, not the taxing and spending clause of article I.[44]

b. *Political Question*

The doctrine of standing is often confused with other aspects of justiciability which focus on the issues in a suit and their amenability to

35. *Id.*

36. U.S. CONST. art. I, § 6, cl. 2 (the incompatibility clause states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office")

37. *Schlesinger*, 418 U.S. 208. The Court held that plaintiffs had no standing as citizens because they had not suffered a judicially cognizable injury. 418 U.S. at 216-17.

38. *Id.* at 217. The Supreme Court has consistently rejected claims of standing predicated on a citizen's right to require that the government behave in accordance with the Constitution. *See generally* Allen v. Wright, 468 U.S. 737 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 482-83 (1982).

39. *Schlesinger*, 418 U.S. at 228.

40. 454 U.S. 464 (1982).

41. *Id.* at 469. According to the Court, the plaintiffs lacked standing as citizens because they failed to allege a judicially cognizable injury, although the Court implied that this result might be different had the plaintiffs resided near the transferred federal property. *Id.* at 487 n.23.

42. 454 U.S. at 479-80.

43. *Id.* at 479. "The plaintiffs in *Flast* satisfied this test because '[t]heir constitutional challenge [was] made to an exercise by Congress of its power under art. I, sec. 8, to spend for the general welfare,'. . . and because the Establishment Clause, on which plaintiffs' complaint rested, 'operated as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by art. I, sec. 8. . . .'" *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 103-04 (1968)).

44. *Id.* at 480. The authorizing legislation, the Federal Property and Administrative Service Act of 1949, ch. 288, 63 Stat. 377 (1949) was an evident exercise of Congress' power under the property clause, art. IV, § 3, cl. 2. *Id.*

judicial resolution.[45] However, because other justiciability inquiries are concerned with the nature of the issues, they necessarily involve a more extensive inquiry into the merits of the case.[46]

Most discussions of the political question doctrine speak in terms of justiciability.[47] This concept reflects judicial concern that goes beyond the limits of article III of the Constitution: a concern for the "proper — and properly limited — role of the courts in a democratic society."[48] This concern manifests itself in the judicially created prudential limitations on the exercise of federal court jurisdiction which, while "closely related"[49] to the case or controversy requirement of article III of the

45. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 99-101 (1968) (standing does not involve a determination of whether substantive issues in a case are suitable for judicial resolution, i.e., justiciable). Those justiciability inquiries that focus on the substantive issues include the political question doctrine, mootness, ripeness, and the prohibition against advisory opinion. *See generally* L. TRIBE, *supra* note 12, §§ 3-10 to 3-17.

In Baker v. Carr, 369 U.S. 186 (1962), the Court provided a comprehensive list of factors that indicate when an issue is a nonjusticiable political question. *Id.* at 217. These factors range from those that constitutionally commit the issue to a separate branch, to those that compel a court to avoid the issue because of policy concerns. *Id.* For a thorough treatment of the possible constitutional, prudential, and functional sources of the factors in *Baker*, see L. TRIBE, *supra* note 12, § 3-16, note 1.

The doctrines of standing and political question are often confused and used interchangeably, in part because of the Supreme Court's own imprecise characterization of the two. For example, in *Flast*, the Court defined standing as an "aspect of justiciability" and then cited Lewis, *Constitutional Rights and the Mis-use of "Standing"*, 14 STAN. L. REV. 433, 453 (1962), for the proposition that many of the problems with standing arise because it is used as a shorthand for the "elements of justiciability," without defining precisely what element of justiciability was represented by standing. 392 U.S. at 98-99. Moreover, the *Flast* Court developed a standing test that required an examination of the substantive issues, *id.* at 102, despite its declaration that standing questions are decided without reference to the justiciability of the substantive issues involved, *id.* at 100. *See also* L. TRIBE, *supra* note 12, § 3-20 at 90 (in Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), the Court unnecessarily used standing to dismiss the suit, although a variety of pre-existing justiciability inquiries were already designed to handle the question adequately).

46. *E.g.*, United States v. Richardson, 418 U.S. 166, 206-07 (1974) (Stewart, J., dissenting). Justice Stewart argued that the case, though appealed on standing grounds, in reality was dismissed on the issue of justiciability and that the case should therefore be remanded, because a proper justiciability inquiry requires a more extensive analysis of the merits than standing requires. *Id.*

Courts often dismiss cases on standing grounds to avoid more difficult and involved justiciability inquiries. *See* Schlesinger v. Reservist Comm. to Stop the War, 418 U.S. 208, 215 (1974) (the Court commented that "[t]he more sensitive and complex task of determining whether a particular issue presents a political question causes courts . . . to turn initially . . . to the question of standing to sue") For the proposition that Frothingham v. Mellon, 262 U.S. 447 (1923), was decided on standing grounds to avoid an inquiry into the justiciability of the issues involved, *see* Finklestein, *Judicial Self-Limitation*, 37 HARV. L. REV., 338, 359-64 (1923).

47. For discussion on the nature of a political question see Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Jackson, *The Political Question Doctrine: Where Does it Stand After Powell v. McCormack, O'Brien v. Brown and Gilligan v. Morgan?*, 44 U. COLO. L. REV. 477 (1973); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925); *See also* Bickel, *The Supreme Court 1960 Term—Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 72 HARV. L. REV. 1 (1959).

48. Warth v. Seldin, 422 U.S. 490, 498 (1975).

49. *Id.* at 500.

Constitution, are "essentially matters of judicial self-governance."[50] The "political question" doctrine postulates that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution.[51]

The political question doctrine has existed in some form since the earliest days of the republic. In *Marbury v. Madison*, Chief Justice Marshall recognized that "[q]uestions in their nature political, or which are, by the [C]onstitution and laws, submitted to the executive, can never be made in this court."[52] In 1962, the Supreme Court gave its fullest treatment of the doctrine to date. In *Baker v. Carr*,[53] voters in Tennessee alleged that the apportionment of the state legislature produced inequality of representation in violation of the equal protection clause. In a detailed opinion, the Court held that the political question doctrine did not bar the federal courts from considering an equal protection challenge to a state voting apportionment structure.[54] The Supreme Court identified a list of general criteria to determine whether cases can properly be deemed political questions:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate

50. *Id. See also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). As professor Tribe aptly stated:

> There is, thus, a political question doctrine. It does not mark certain provisions of the Constitution as off-limits to judicial interpretation. But it does require federal courts to determine whether constitutional provisions which litigants would have judges enforce do in fact lend themselves to interpretation as guarantees of enforceable rights. To make such a determination, a court must first of all construe the relevant constitutional text, and seek to identify the purposes the particular provision serves within the constitutional scheme as a whole. At this stage of the analysis, the court would find particularly relevant the fact that the constitutional provision by its terms grants authority to another branch of government, if the provision recognizes such authority, the court will have to consider the possibility of conflicting conclusions, and the actual necessity for parallel judicial and political remedies. But ultimately, the political question inquiry turns as much on the court's conception of judicial competence as on the constitutional text. Thus the political question doctrine, like other justiciability doctrines, at bottom reflects the mixture of constitutional interpretation and judicial discretion which is an inevitable byproduct of the efforts of federal courts to define their own limitations.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 79 (1978).

51. The Supreme Court has held that the political question doctrine is inapplicable to constitutional challenges to actions of state governments. Baker v. Carr, 369 U.S. 186, 226 (1962). However, one leading commentator has argued that the doctrine has not historically been limited in this manner. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 538-39 (1966).

52. 5 U.S. (1 Cranch) 137, 170 (1803). *See also* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (the lawlessness of a state government is a political question committed to Congress).

53. 369 U.S. 186 (1962).

54. *Id.* at 209.

> political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging.[55]

Several categories of cases have helped mold the political question doctrine. One category contains cases arising under the guarantee clause of article IV of the Constitution.[56] In *Luther v. Borden*,[57] the Supreme Court refused to determine which of two competing bodies was the legitimate government of Rhode Island. Referring to article IV, the Court concluded that it is Congress' job to decide which government was the proper one, and whether that government was republican. Once this decision was made it could not be questioned by the judiciary.[58]

Another category of political question cases concerns the foreign relations of the United States. One commentator argues that the constitutionally granted power to administer foreign affairs is divided between the executive and legislative departments, completely excluding the judiciary.[59] In *Baker*, the Court agreed that foreign relations cases often required standards for resolution beyond judicial competence, and that there was often a need for a "single-voiced statement of the government's views."[60] The Court concluded, however, that before acting in

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55. *Id.* at 217.

56. U.S. CONST., Art. IV., section 4 states in part, "The United States shall guarantee to every state in this Union a Republican Form of Government. . . ." The Supreme Court has generally held that only Congress and the President, and not the judiciary, can enforce the guarantee clause on the ground that all issues under the guarantee clause raise nonjusticiable "political questions." *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937); Ohio v. Akron Park Dist., 281 U.S. 74 (1930); Davis v. Ohio, 241 U.S. 565 (1916); Pacific Telephone v. Oregon, 223 U.S. 118 (1912); Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900).

57. 48 U.S. (7 How.) 1 (1849).

58. *Id.* at 42, 47.

59. *See* Weston, *supra* note 47, at 318-29. *See generally*, Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

60. 369 U.S. at 211-12. In a footnote, Justice Brennan cited an example of such "sweeping statements:" " 'The conduct of the foreign relations of our Government is

some cases it needed to assess the handling of a question by the political branches and the possible consequences of judicial action.[61]

The Court's role in deciding whether an issue is committed to another branch, in the context of whether Congress can control its own membership, is well illustrated by *Powell v. McCormack*.[62] The area of impeachment is often considered a political question. Article I, section 2 of the Constitution gives the House sole power of impeachment, and section 3 gives the Senate sole power to try impeachments. No statute defines impeachable offenses; thus it would be difficult for the Court to apply any judicial criteria for review of a legislative decision to impeach.[63] Nonetheless, when presented with the issue, the Court did not dismiss the question of the exclusion of a member of Congress from the House of Representatives.[64]

Congressman Adam Clayton Powell was re-elected to Congress in November 1966, but the Congress voted to exclude him. Powell sought a declaratory judgment that his exclusion was unconstitutional. The respondents argued that, pursuant to article I, section 5,[65] upon a two-thirds vote of the House a member could be expelled for any reason. Without deciding the question of the justiciability of the right of the House to expel a member, the Court determined that exclusion was a justiciable issue. The Court stated that section 5 did not give the House judicially unreviewable power to set and judge qualifications for membership,[66] and concluded "that the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[67]

An important consequence of the political question doctrine is that holding it applicable to a cause of action theory renders the government's conduct immune from judicial review.[68] Unlike other restrictions on judicial review — such as case or controversy requirements, standing, and ripeness, all of which may be cured by different factual circumstances — a holding of nonjusticiability is absolute in its foreclo-

committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.' " *Id.* at 211 n.31 (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)).

61. 369 U.S. at 211-12.

62. 395 U.S. 486 (1969).

63. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 109-10 (1978).

64. *Powell*, 395 U.S. 486 (1969). Adam Clayton Powell was re-elected to Congress while under heavy suspicion of wrongdoing. The House of Representatives refused to seat him on the grounds of improprieties committed as a congressman.

65. U.S. CONST., art. I, § 5, cl. 2, states, "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."

66. 395 U.S. at 520-22.

67. *Id.* at 522. (Emphasis in original.) The Court in *Powell* concluded that Congress' discretion in seating members is limited to expulsion for failure to meet the age, citizenship, or residence requirements of art. I, sec. 2. *Id.* at 548.

68. *Baker*, 369 U.S. 186, 209.

sure of judicial scrutiny.[69]

B. *Specific Doctrines Limiting Judicial Review: Phelps v. Reagan*

1. Case in Context

In *Phelps v. Reagan*,[70] the Tenth Circuit Court of Appeals reviewed the United States District Court for the District of Kansas' dismissal of an action requesting declaratory and injunctive relief. Fred W. Phelps, an attorney and Baptist minister, filed an action challenging President Ronald Reagan's appointment of William A. Wilson as United States Ambassador to the Vatican, or Holy See. Phelps sought a declaratory judgment and injunctive relief, claiming that the institution of such relations, and particularly the appointment of an ambassador to the Holy See, violated the first amendment of the Constitution.

The district court granted the government's motion to dismiss holding that Phelps lacked standing to maintain the action and that the case presented a nonjusticiable political question. Phelps appealed but the Tenth Circuit affirmed the district court's decision. The court held that a taxpayer and minister did not have standing to challenge the appropriations involved and that the question of whether to appoint an ambassador was vested solely in the executive branch, and could not be reviewed by a court.[71]

2. Statement of the Case

As a citizen, taxpayer, and minister of the Old School Baptist Order, Phelps filed a complaint in district court. Phelps claimed that the appointment of an ambassador to the Holy See, and the formalization of diplomatic relations with the Holy See, violated the first amendment. He charged that the Holy See is not a foreign government with which the United States has a legitimate need to establish foreign relations, but is instead the headquarters of the Roman Catholic Church. Phelps alleged that the government's conduct was patently violative of the establishment clause of the first amendment, in that it purposely accomplished a predominantly religious purpose, had the effect of favoring one religion over another, and involved the entanglement of the United States in the religious affairs of a church. Phelps claimed standing to bring suit as a taxpayer and citizen, and as a Baptist minister with a vested religious interest in the separation of church and state. Phelps requested a declaration that the government's conduct violated the first amendment and an injunction restraining the government from establishing full diplomatic relations with the Holy See or sending an ambassador to the Holy See.

The government sought dismissal of the suit. They argued that the court was without subject matter jurisdiction, since Phelps lacked stand-

69. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 102 (1986).
70. 812 F.2d 1293 (10th Cir. 1987).
71. *Id.* at 1294.

ing and presented nonjusticiable questions.[72]

3. Discussion and Analysis of the Tenth Circuit's Opinion

The Tenth Circuit affirmed the district court's rejection of Phelps' claim that he had standing to sue as a taxpayer under the doctrine set forth in Flast.[73] He alleged that tax funds were being used to fund the diplomatic mission to the Holy See and the expenses of the United States Ambassador to the Holy See. Phelps clearly did not meet the two-part test to establish taxpayer standing set forth in *Flast*.

To invoke the power of a federal court, a party must show that "he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[74] In light of the Supreme Court's decisions in the area of taxpayer standing, and the decision in *Valley Forge* in particular, two points are well established. First, the extremely narrow taxpayer standing doctrine of *Flast v. Cohen* may not be invoked to challenge an action arising exclusively in the executive branch. Second, to the extent that congressional action may be challenged under *Flast*, the challenge must be directed at a federal spending program enacted pursuant to the taxing and spending power of art. I, sec. 8, cl. 1.

Phelps, like the plaintiffs in *Valley Forge*[75] and *Schlesinger*[76] failed to satisfy the *Flast* test. As in those cases, Phelps' real challenge was to the actions of executive branch officials, and not to a congressional spending program enacted under the taxing and spending power of art. I, sec. 8, cl. 1. The appropriation of money by Congress for support of our embassies cannot be considered an exercise of Congress' taxing and spending power for the general welfare. Rather, it is spending pursuant to Congress' power in the area of foreign relations.[77]

While Phelps rested his assertion of standing primarily on his status as a taxpayer, he also seemed to claim standing as a non-taxpayer/citizen. He appeared to claim that he had standing to enforce the values which underlie the establishment clause of the first amendment. The Tenth Circuit also discounted this argument by affirming the district court's holding that he failed to establish non-taxpayer standing. Phelps' alleged injuries were simply a recasting of the policies which underlie the establishment clause — i.e., not preferring one religion over another and prohibiting entanglement in church affairs. Therefore, Phelps was simply attempting to claim standing to enforce establishment clause values. But as the Supreme Court's decision in *Valley Forge*[78] squarely holds, it is not enough to simply allege a belief that governmen-

72. *Id.*
73. *Flast*, 392 U.S. 83, 101-02 (1968).
74. *Frothingham*, 262 U.S. 447, 488 (1923).
75. *Valley Forge*, 454 U.S. at 479-80.
76. *Schlesinger*, 418 U.S. at 228 n.17.
77. *See*, TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17 (1978).
78. 454 U.S. at 482-486. *See supra* notes 40-44 and accompanying text.

tal action violates the Constitution, or a desire to protect the policies which underlie the establishment clause. Phelps alleged that the formalization of diplomatic relations between the United States and the Holy See placed the nation's official imprimatur of recognition and approval upon a selected religion, in aid of that religion, and in preference of that religion over all other religions, thereby entangling this government in the affairs of that religion in violation of the establishment clause of the first amendment.[79]

What Phelps described are theories supporting his claim of a constitutional violation, and not "distinct and palpable" injuries that he had personally sustained or was in immediate danger of sustaining. Like Phelps, the plaintiffs in *Valley Forge* claimed standing on the basis that they had a spiritual stake in the case to enforce establishment clause values.[80] The reasoning of *Valley Forge* is controlling here because standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy; nor are his strong beliefs or commitment to a constitutional principle a permissible substitute for the showing of injury itself.[81] Even assuming that some plaintiff had met the requisite standing, questions of diplomatic relations are committed by the Constitution to final decision by the Executive Branch and thus present nonjusticiable political questions.[82]

The Tenth Circuit also rejected Phelps' argument that the court could review the President's decision to enter into formal diplomatic relations with the Holy See. It has long been settled that the President's resolution of such questions constitutes a judicially unreviewable political decision.[83] Application of the political question doctrine calls upon the court to determine whether the Constitution itself prohibits judicial intrusion because the matter in dispute has been committed to a coequal branch of government, and whether prudential considerations make a judicial resolution inappropriate.[84] In this case, the factors discussed in *Baker* clearly indicate that the matter presented a nonjusticiable political question.[85] Judicial reluctance to become involved in the running of foreign affairs, and to second-guess the judgments of the political branches which make foreign policy decisions, is further compelled by the standards discussed in *Baker*.[86] These factors have special application to this case since there is a constitutional commitment to recognize governments and appoint and receive ambassadors in art. II, sec. 2, cl. 2, sec. 3. Resolution of Phelps' claims would be impossible without an initial policy determination, which would clearly amount to nonjudicial

79. *Phelps*, 812 F.2d at 1294.
80. *Valley Forge*, 454 U.S. at 482-83.
81. *Id.* at 486.
82. Americans United for Separation of Church and State v. Reagan, 786 F.2d 194, 201-02 (3d Cir. 1986) (citing Baker v. Carr, 369 U.S. 186 (1962)). *Baker v. Carr* is the case most frequently cited in discussions of the nonjusticiability of certain issues.
83. *Id.* at 201.
84. Baker v. Carr, 369 U.S. at 211.
85. *Id.* at 217.
86. *Id.* *See supra* text accompanying note 55.

discretion.[87] Moreover, to undertake the review requested by Phelps would be impossible as expressing lack of respect due coordinate branches of government.[88] To adjudicate this claim would have required the court to second-guess the decision of the President to appoint an ambassador and establish formal relations with the Holy See. Plainly, adjudication of Phelps' claim would have permitted the court to enter an order severing our relations with the Holy See and directing the removal of Ambassador Wilson, involving the "potentiality of embarrassment from multifarious pronouncements by various departments on one question."[89] In short, it is difficult to think of a case where the concerns discussed in *Baker v. Carr* are more applicable.

4. Implications of Holding

The precedential weight of this holding within the Tenth Circuit demonstrates that although the *Flast* exception represents a significant departure from the *Frothingham* rule, there are clear limits to that exception. The court's follow of the Third Circuit's lead in this area is an acknowledgment by the Tenth Circuit that there has been no change in the law of standing to require a departure from the *Frothingham*, *Flast*, or *Valley Forge* line of cases. Even though the court spent a lot of time addressing standing, the effect of this holding illustrates that once the issues in a particular case are found to rest on the political question doctrine, there is no need to address the issue of standing because a court could not adjudicate such a case absent the requisite subject matter jurisdiction. Although the Tenth Circuit did not directly address the issues presented in this case, it is likely that other courts will follow suit in the areas of the standing and political question doctrines.

II. STANDARD APPLIED IN DETERMINING WHAT CONSTITUTES A LEGITIMATE GOVERNMENT INTEREST

A. *Background*

1. First Amendment

The first amendment prohibits the government from infringing upon the people's right to free speech.[90] Where first amendment protections begin and end is unclear; Supreme Court Justices and legal scholars have heatedly debated the contours of the first amendment for many years.[91] Generally, a court that reviews an ordinance or statute abridging speech will make an initial analysis in the following manner. If

87. *Id. See also* Powell v. McCormack, 395 U.S. 486, 521 n.43 (1969).

88. *Baker*, 369 U.S. at 217.

89. *Id.*

90. The first amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The first amendment is extended to the states through the fourteenth amendment. For cases applying the first amendment to the states, see Stromberg v. California, 283 U.S. 359 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

91. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36 (1961) (majority adopted a balancing approach recognizing that speech may be restricted to favor a "subordinating" govern-

the law prohibits only a category of speech unprotected by the first amendment, the law will stand because there has been no constitutionally relevant abridgment of free speech.[92] If the regulation as written is wholly contradictory to the freedom of speech guarantee, the court will strike it down as unconstitutional "on its face."[93]

In *West Virginia State Board of Education v. Barnette*,[94] the Court struck down a West Virginia statute which compelled all students to participate in a daily flag salute ceremony, on the grounds that the law violated the first amendment by forcing students to declare a particular belief. The crucial question was "whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution."[95] Thus, for the Court, the issue was not whether the children should be allowed an exemption from a required ceremony, but whether governmental officials had the legitimate authority to compel such participation in the first instance.[96] The Court upheld the right of the students, for whom saluting the flag was a serious violation of religious duty, to be exempt from a school procedure which forced them to express support for values which directly conflicted with those espoused by their subcommunity. The Court, rather than evaluating the wisdom of the governmental policy, focused on the freedom of speech clause of the first amendment and found that it contained a core

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mental interest). Justice Harlan delivered the majority opinion in *Konigsberg*, specifically rejecting the "absolutist" approach of Justice Black. *Id.* at 49-50.

As does Justice Black, Alexander Meiklejohn, a noted advocate of free speech, views the first amendment as an absolute—a specific reservation of sovereign power by the people to themselves. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 253-54. Meiklejohn suggested that the first amendment necessarily must protect all communication that insures that the people will acquire and maintain the experience and knowledge to effectively govern themselves. According to Meiklejohn, protected speech therefore includes, among other things, education and any speech promoting an understanding of philosophy, the sciences, literature, the arts, and public issues. *Id.* at 256-57.

For other theories regarding first amendment protection, see Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (proposing protection of only political speech); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) (arguing for "definitional balancing").

For a general discussion of the first amendment, see BeVier, *"The First Amendment and Political Speech: An Inquiry into the Substance and Limits of the Principle*, 30 STAN. L. REV. 299 (1978) (overview of the scope of the first amendment protections); DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161 (1972) (general discussion of approaches to first amendment protections).

92. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The *Chaplinsky* Court concluded that the Constitution does not prohibit a state from punishing "fighting words" or speech which is "lewd or obscene." *Id.* at 571-72.

93. *See, e.g.*, Lovell v. Griffin, 303 U.S. 444 (1938). The *Lovell* Court found an ordinance requiring a license to distribute religious pamphlets invalid on its face. The Court stated that the regulation struck "at the very foundation of the freedom of the press." *Id.* at 451. For Justice Stone's now famous statement that legislation which directly encroaches upon the domain of one of the first ten amendments must fall within a "narrower scope" to receive the Court's "presumption of constitutionality," see United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

94. 319 U.S. 624 (1943).

95. *Id.* at 636.

96. *Id.* at 634-36.

of absolute protection which the government could not infringe constitutionally, regardless of any perceived wisdom in so doing. Underscoring the pivotal position of free expression within the American constitutional framework and the necessity for school authorities to honor first amendment guarantees within their classrooms, Justice Jackson wrote for the Court majority: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[97]

In *Tinker v. Des Moines Independent Community School District*,[98] the Supreme Court recognized that neither student nor teacher "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[99] The dispute in *Tinker* arose when three students decided to publicize their opposition to the Vietnam War by wearing black armbands to school. The principals of the schools became aware of the plan and adopted a policy that students wearing armbands to school would be asked to remove them; students refusing would be suspended until they returned to school without the armbands. The students were aware of the regulation, but they ignored it and were suspended.[100] The Court held that the students' suspensions violated the first amendment because the school administrators failed to show that the students' "silent, passive"[101] expression of opinion materially and substantially interfered with school discipline and operation or collided with the rights of the other students.[102]

In reaching its conclusion, the Court balanced the schools' concern with discipline against the students' right to freedom of expression.[103] The Court rejected the district court's conclusion that school administrators acted reasonably in suspending the students because of the fear that the students wearing the armbands might cause a disturbance. This form of expression, "symbolic speech," the Court stated, is protected by the first amendment and cannot be prohibited merely because of school officials' fears of disruption.[104] The first amendment protects certain

97. *Id.* at 642.

98. 393 U.S. 503 (1969).

99. *Id.* at 506.

100. *Id.* at 504. The students sought an injunction restraining the school district from disciplining them. Tinker v. Des Moines Indep. Community School Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966). The district court dismissed the complaint on the ground that the school principals' actions were constitutionally permissible because they prevented the students from disturbing school discipline. *Id.* The Eighth Circuit considered the case en banc and, by an equally divided court, affirmed the district court's decision without opinion. Tinker v. Des Moines Indep. Community School Dist., 383 F.2d 988 (8th Cir. 1967) (en banc).

101. *Tinker*, 393 U.S. at 541.

102. *Id.* at 513.

103. *See Tinker*, 393 U.S. at 506-08; *see also supra* note 93 and accompanying text.

104. *Tinker*, 393 U.S. at 508. The school administrators attempted to justify the regulation on the grounds that some friends of a former classmate who was killed in Vietnam might confront the students and cause a disturbance. *Id.* at 509 n.3.

types of conduct as a symbolic form of speech.[105] When the government attempts to regulate the conduct aspect of that speech, however, it necessarily effects an incidental restriction on the speech. The Supreme Court developed analysis for incidental restrictions on speech in *United States v. O'Brien*.[106] In *O'Brien*, a draft resister challenged his conviction under a federal statute that prohibited the destruction of draft cards; O'Brien contended that the statute infringed upon his freedom of speech.[107] The Court upheld the federal statute and O'Brien's conviction. In doing so, it established a four-part test for evaluating a regulation that governs conduct, but incidentally restricts speech.[108] Governmental regulation of expressive conduct should be sustained

> . . . if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[109]

2. Equal Protection

Each of the guarantees of the first amendment has been held to be a fundamental right and made applicable to the states through the due process clause of the fourteenth amendment. Thus, when a state burdens the freedom of speech, the law must be analyzed under the strict scrutiny required by the first amendment as well as the general guarantees of the due process and equal protection provisions.[110] Whenever a statute allows some persons to speak, but not others, the statute at issue may be analyzed under equal protection as well as first amendment principles.[111] Pursuant to such a statute, a state or local government has the power to treat different classes of persons in different ways in the area of public health, safety and morality,[112] unless the classification is based on "criteria wholly unrelated to the objective of [the] statute."[113] Governmental bodies cannot, however, legislate persons into different classifications when the classifications are unrelated to the objective of the legislation.[114] If the classification is reasonable, the remedial scheme

105. *See* Stromberg v. California, 283 U.S. 359 (1931) (striking statute prohibiting display of red flag); *see also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (rejecting requirement that children salute flag in violation of their religious beliefs).

106. 391 U.S. 367 (1968).

107. *Id.* at 376. The Court noted that a "sufficiently important government interest in regulating the non-speech element can justify incidental limitations on first amendment freedoms." *Id.*

108. *Id.* at 377.

109. *Id. See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (discussion of the implications of the symbolic speech cases); Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1 (discussion of the *O'Brien* case).

110. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 783 (3d ed. 1986).

111. *Id.* at 852.

112. Reed v. Reed, 404 U.S. 71, 75 (1971).

113. *Id.* at 76. (The ends must of course be legitimate.)

114. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969).

does not violate the equal protection clause "simply because it fail[s] . . . to cover every evil that might conceivably have been attacked."[115]

3. Vagueness and Overbreadth

The Court will strike down a regulation for vagueness if the wording of the law is unclear and leaves speakers uncertain as to whether their speech will fall within the rule's prohibition. A statute violates due process if it is so vague that a person of common intelligence cannot discern what conduct is prohibited, required, or tolerated.[116] Reviewing courts will also strike down a regulation that chills speech if the regulation is overbroad, that is, if it reaches speech that is protected by the first amendment as well as unprotected speech.[117]

In recent years the Supreme Court has narrowed the scope of the overbreadth doctrine,[118] so that only when a reviewing court determines that a statute or ordinance is substantially overbroad may the court strike it down under the overbreadth doctrine.[119]

B. *Freedom of Expression:* Mini Spas v. South Salt Lake City Corp.

1. Case in Context

Mini Spas v. South Salt Lake City Corp.,[120] involved the Tenth Circuit Court of Appeal's review of the District Court for the District of Utah's grant of summary judgment in favor of the City of South Salt Lake. This was an action seeking to have an ordinance of the City of Salt Lake, Utah[121] declared invalid as in conflict with the Constitution of the

115. *Id.*

116. *See* Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

117. The overbreadth rule allows a court to strike down a statute that, while designed to prohibit activities not protected by the constitution, also prohibits activities which are constitutionally protected. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 868 (2d ed. 1983).

118. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973). The *Broadrick* court rejected an overbreadth challenge to Oklahoma's limitation on permissible political activity by civil servants. The majority concluded that: "particularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well. . . ." *Id.* at 615; *See also* New York v. Ferber, 458 U.S. 747 (1982). The *Ferber* court concluded that New York's statute prohibiting the sale of any material depicting a child engaged in sexual activity was not unconstitutionally overbroad. The court determined that "the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." *Id.* at 772. The *Ferber* court extended the substantiality requirement from cases involving conduct combined with speech to traditional forms of speech—books and films. *Id.* at 771.

119. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

120. 810 F.2d 939 (10th Cir. 1987).

121. The Ordinance, in pertinent parts, reads:

> (4) Each establishment shall provide to all patrons clean, sanitary and opaque coverings capable of covering the patron's specified anatomical areas. No common use of such covering shall be permitted, and reuse is prohibited unless having been adequately cleaned. In addition, no owner, operator, responsible managing employee, manager, or licensee in charge of or in control of the massage establishment shall permit nor shall any employee of masseur administer a massage unless the patron is covered by the covering provided by the establishment.
>
> (5) With the exception of bathrooms, dressing rooms, or any room utilized for

United States. The provisions of the ordinance mandated a dress code for massage parlor employees. Mini Spas, Inc. and the Society of Licensed Masseurs ("Mini Spas"), massage establishments doing business in South Salt Lake, contended that the dress code was unconstitutional because it proscribed expressive conduct in the form of nudity.[122] The city countered that the ordinance was enacted to control prostitution.[123] Cross motions for summary judgment were filed by both parties. The district court granted the city's motion, upholding the ordinance.

In its affirmance of the district court's grant of summary judgment, the Tenth Circuit held that: the city had a legitimate interest in regulating prostitution; the purpose of the ordinance was unrelated to inhibiting freedom of expression; the ordinance was not overly restrictive, overbroad, or unconstitutionally vague; and it did not violate equal protection.

The importance of this holding is that where a city adopts an ordinance regulating conduct which it seeks to restrict, the ordinance must be only restrictive enough to further the city's interest, that interest must be a substantial one, and the city must draft the ordinance so that it is a valid exercise of the police power. Regulation of prostitution falls within this category.

2. Statement of the Case

On October 13, 1982, South Salt Lake adopted an ordinance enti-

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dressing purposes, no owner, operator, responsible managing employee, manager, or licensee in charge of or in control of any massage establishment shall permit any person in any area within the massage establishment which is used in common by the patrons or which can be viewed by patrons from such an area, unless the person's specified anatomical areas are fully covered. In addition, no owner, operator, responsible managing employee, manager or licensee in charge of or in control of a massage establishment shall permit any person to be in any room with another person unless all persons' specified anatomical areas are fully covered.

(6) No owner, operator, responsible managing employee, manager, or licensee in charge of or in control of a massage establishment shall permit any masseur or employee to be on the premises of a massage establishment during its hours of operation while performing or available to perform any task or service associated with the operation of a massage business, unless the masseur or employee is fully covered from a point not to exceed four (4) inches above the center of the knee cap to the back of the neck. The covering will be of an opaque material and will be maintained in a clean and sanitary condition.

(7) No masseur or employee, while performing any task or service associated with the massage business, shall be present in any room with another person unless the person's specified anatomical areas are fully covered.

(8) No masseur or employee shall be on the premise of a massage establishment during its hours of operation while performing or available to perform any task or service associated with the operation of a massage business, unless the masseur or employee is fully covered from a point not to exceed four (4) inches above the center of the knee cap to the base of the neck. For purposes of this subsection, the covering will be of an opaque material and will be maintained in a clean and sanitary condition.

SOUTH SALT LAKE, UTAH, REV. ORDINANCES tit. 38, ch. 8, § 3B-8-5 (1974) (as amended).

122. *Mini Spas*, 810 F.2d 939, 940.

123. *Id.*

tled "Massage Parlors and Masseurs."[124] The purpose of the ordinance was to regulate the licensing, dress, and operation requirements of massage parlors. Mini Spas attacked the constitutionality of the ordinance, contending that the dress code (1) was unreasonable, arbitrary, overbroad, and violated Mini Spa's first amendment right of freedom of expression; (2) denied equal protection of the law in violation of the fourteenth amendment; and (3) was unconstitutionally vague in violation of due process.[125]

3. Discussion and Analysis of the Tenth Circuit's Opinion

The Tenth Circuit recognized that non-verbal, expressive conduct has often been accorded first amendment protection,[126] but that not all conduct is necessarily "speech" under that amendment.[127] In *O'Brien*, the Court stated "[w]e can not accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[128] Nudity *per se* is not accorded protection under the first amendment.[129] What is protected as "speech" is expressive conduct. An example of protected conduct would be nude dancing.[130] The dress code ordinance of South Salt Lake does not regulate nude dancing nor modeling, rather the dress code regulates the manner in which massage practitioners should be dressed while practicing their profession.

The Supreme Court also noted that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[131] Using the above cited cases, it is clear that the dress code passed the *O'Brien* test, therefore, constitutional muster as well. According to the mayor of Salt Lake, the ordinance was enacted to both ensure that the massage parlors within the city be run in a clean, professional manner and that the massage parlors not be allowed to degenerate into houses of prostitution.[132] These non-speech elements of the ordinance justify whatever small limitation there might be on any speech because the government of Salt Lake has a substantial interest in the health and moral welfare of the citizenry which it has addressed through its massage parlor ordinance.

The Tenth Circuit, in reaching its conclusion, adopted the initial requirements for an overbreadth challenge outlined in *Broadrick v.*

124. *See supra* note 121 and accompanying text.
125. *Mini Spas*, 810 F.2d at 940
126. *Id.* at 941 (citing as examples West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) and Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969)).
127. *Mini Spas*, 810 F.2d at 941 (citing U.S. v. O'Brien, 391 U.S. 367 (1968)).
128. *O'Brien*, 391 U.S. at 376.
129. *Mini Spas*, 810 F.2d at 941.
130. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975).
131. *O'Brien*, 391 U.S. at 376.
132. *Mini Spas*, 810 F.2d at 941-42.

Oklahoma.[133] The court recognized that the overbreadth doctrine reflects a concern that a broadly written "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[134] "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it [the statute] to be facially challenged on overbreadth grounds."[135] Even if the manner in which massage practitioners should be dressed while practicing their profession somehow is accorded first amendment protection as a form of expression, the regulation did not affect the constitutional rights of any third parties not before the court. Therefore, the overbreadth challenge failed.

The court recognized that the fourteenth amendment, through its equal protection clause, does not deny to states the power to treat different persons in different ways.[136] However, the equal protection clause does deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.[137] The dress code ordinance's distinction of singling out massage parlors is equally applicable to every massage practitioner within the South Salt Lake city limits. South Salt Lake also has a legitimate interest in prohibiting prostitution and there is sufficient connection between the dress code provision and the prohibition of prostitution for the ordinance to be rationally related to this interest and withstand constitutional attack.

The Tenth Circuit accepted the district court's assumption that the city would enforce the dress code ordinance in a reasonable manner.[138] By doing so, the court did not have to address the issue of the statute being subject to more than one interpretation. A statute violates due process if it is so vague that a person of common intelligence cannot discern what conduct is prohibited, required, or tolerated.[139] By accepting the city's assertion that the restrictions in the ordinance did not apply to arms and hands of masseurs, the district court was able to construe the ordinance in a way to avoid the problem of unconstitutional vagueness.[140]

4. Implications of Holding

This decision sends a signal to cities within the Tenth Circuit not to be too concerned about the vagueness of their ordinances restricting speech. The Tenth Circuit seems to be saying that if a city can somehow

133. 413 U.S. 601 (1973). *See supra* notes 118 and 119 and accompanying text.

134. Member of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984) (quoting *Broadrick*, 413 U.S. at 612). Also, the *O'Brien* test is applied to states and municipal regulations. *Vincent*, 466 U.S. at 804-05.

135. *Vincent*, 466 U.S. at 801.

136. *Reed*, 404 U.S. at 75.

137. *McDonald*, 394 U.S. at 809.

138. *Mini Spas*, 810 F.2d at 942, 943.

139. *Id.* at 943. *See Connally*, 269 U.S. at 391.

140. *Mini Spas*, 810 F.2d at 943.

show that the ordinance in question is a valid exercise of their police power, or otherwise meets the *O'Brien* test, that in the face of vagueness, it would find a way to avoid an unconstitutional interpretation. It is unclear whether other circuits will follow this holding, for ordinances like statutes, should be drafted to avoid being susceptible to two different readings.

III. STANDARD APPLIED IN THE TERMINATION OF GOVERNMENT EMPLOYEES

A. *Background*

1. Procedural Due Process

Procedural due process is derived from the fifth[141] and fourteenth[142] amendments, which only provide protection to individuals faced with governmental actions that may deprive them of life, liberty or property.[143] The threshold question facing courts in procedural due process cases is whether the private interest affected by government action can be considered a liberty or property interest. A litigant must show that he has been deprived of a protected liberty or property interest before he can claim the protection of procedural due process.[144]

a. *Liberty*

Federal courts have recognized a protected liberty interest in one's reputation[145] and freedom to take advantage of alternative means of employment.[146] The Supreme Court furnished a broad definition of liberty that was afforded procedural protection against arbitrary deprivation in *Meyer v. Nebraska*.[147] In *Miller v. City of Mission*,[148] the Tenth Circuit explained the circumstances in which a public employee's liberty

141. U.S. CONST. amend. V, provides in part: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

142. U.S. CONST. amend. XIV, § 1 states, in part: "[n]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

143. *See generally* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 452 (1977).

144. Board of Regents v. Roth, 408 U.S. 564 (1972) (no property interest in non-tenured teaching position). *But see* Perry v. Sinderman, 408 U.S. 593 (1972) (implied property interest in non-tenured teaching system).

145. *Roth*, 408 U.S. 564; Wisconsin v. Constantineau, 400 U.S. 433 (1971) (reputation interest affected by posting notice forbidding sale of liquor to claimant). *But see* Paul v. Davis, 424 U.S. 693 (1976) (no reputation interest affected by distribution of photo identifying claimant as shoplifter).

146. *Roth*, 408 U.S. 564; Miller v. City of Mission, 705 F.2d 368 (10th Cir. 1983) (assistant police chief stigmatized by public dissemination of reasons for firing).

147. 262 U.S. 390 (1923). In attempting to describe the liberty interest, the Court stated that liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally *to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.*" *Id.* at 399. (emphasis added).

148. 705 F.2d 368 (10th Cir. 1983).

interest may be violated by the manner of termination.[149] *Miller* required that notice of charges must be given to an employee a reasonable time before a hearing in order to provide the individual a meaningful opportunity to be heard.[150] *Miller* further required that, except in extremely unusual situations, the individual must be given a pretermination hearing in order to be afforded a meaningful time within which to be heard.[151]

In *Paul v. Davis*,[152] however, a sharply divided Court held that state defamation of a private individual "standing alone and apart from any other governmental action" did not implicate any liberty protected by the due process clause.[153] The five-person majority argued that "reputation alone, apart from some more tangible interest such as employment," lay outside the range of liberties protected by the fourteenth amendment.[154] The Court stated that interests other than judicially declared fundamental rights acquire the status of liberty or property protected by due process only if they "have been initially recognized and protected by state law."[155]

149. *See* Sullivan v. Stark, 808 F.2d 737 (10th Cir. 1987).

150. *Miller*, 705 F.2d at 372.

151. *Id.* The court stated: " 'The concept of liberty recognizes two particular interests of a public employee: (1) the protection of his good name, reputation, honor and integrity, and (2) his freedom to take advantage of other employment opportunities. The manner in which a public employee is terminated may deprive him of either or both of these liberty interests. When the termination is accompanied by public dissemination of the reasons for dismissal, and those reasons would stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may test the validity of the profferred grounds for dismissal." *Id.* at 373 (quoting Lipp v. Board of Educ., 470 F.2d 802, 805 (7th Cir. 1972)).

152. 424 U.S. 693 (1976). The activity challenged in *Paul* was the distribution by police of a flyer containing photographs of persons identified as active shoplifters to local merchants. A picture of Davis was included because he had been arrested on a shoplifting charge though he was never convicted. Davis brought an action under 42 U.S.C. § 1983 against the chief of police claiming that he had been deprived of liberty without due process because the police had damaged his reputation without providing him with a prior hearing to determine whether he was an active shoplifter.

153. *Id.* at 694.

154. *Id.* at 701. Although earlier cases had indicated that the personal interest in reputation was included within the constitutional protection of liberty, the Court fabricated tenuous ways to distinguish these cases. For example, Justice Rehnquist interpreted (or rather reinterpreted) the recognition in Wisconsin v. Constantineau, 400 U.S. 433 (1971), of a liberty interest in not having one's name posted by the sheriff in a liquor store as an alcoholic, as having been based on the fact that the " '[p]osting' . . . significantly altered [Constantineau's] status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." *Id.* at 708-09.

On Rehnquist's performance in *Paul*, one commentator noted: "The Court's re-rationalization of the earlier cases is wholly startling to anyone familiar with those precedents. In many ways . . . this [is] *Paul's* most disturbing aspect. Fair treatment by the court of its own precedents is an indispensable condition of judicial legitimacy." Monaghan, *supra* note 14, at 424. For additional criticism of the Court's opinion in *Paul*, see Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist*, 64 6 KY. L.J. 753, 754-57 (1976).

155. 424 U.S. at 710. The opinion further seemed to suggest that only in these areas of incorporation is the state's power to regulate conduct limited. *Id.* at 712-13.

b. *Property*

The definition of property since the 1972 decision in *Board of Regents v. Roth*[156] has centered on the concept of "entitlement." In *Roth*, the plaintiff was a Wisconsin State University teacher whose one-year contract had not been renewed. He challenged the nonrenewal partly on the ground that the University's failure to provide a statement of reasons and a hearing violated his right to procedural due process.[157] Roth was untenured, and the relevant Wisconsin statute provided that all state university teachers would be on probation until they had served continuously for four years. Because Roth was hired for one year only, without any promise that his employment would continue beyond that period, his expectation of reemployment was not "property" and was therefore not within the protection of the due process clause. Accordingly, Roth was not entitled to any procedural protections over and above those provided by state law. Roth's substantive interest was "created and defined by the terms of his appointment,"[158] and the Court looked to those state-law terms to determine whether or not Roth's expectation was "property."[159]

In *Perry v. Sindermann*,[160] a companion case to *Roth*, the Court exemplified the implied contractual approach. In *Sindermann*, the Court held that a property interest may arise from "such rules or mutually explicit understandings that support [an individual's] claim of entitlement to the benefit and that he may invoke at a hearing."[161] Like Roth, Sindermann was a teacher at a state college; unlike Roth, he alleged that his institution had a *de facto* tenure system.[162] Furthermore, he alleged that he had legitimately relied on statements in the college's official faculty guide that purportedly instituted an informal tenure system.[163] The Court accepted Sindermann's argument, advancing two theories to support its finding that the *de facto* tenure system created a protected interest — an implied contract theory and an industrial common law theory.[164] If

156. 408 U.S. 564 (1972).

157. Roth also alleged that his termination was invalid because it transgressed a substantive limitation. He charged that he had been fired because of first amendment activity. This charge, however, was not before the Supreme Court; the district court had stayed proceedings on that issue pending Supreme Court review of the summary judgment. *Id.* at 574.

158. *Id.* at 578.

159. *Id.* at 577. In a frequently cited passage, the Court explained: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Id.* *See also* Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982); Kendall v. Board of Educ., 627 F.2d 1 (6th Cir. 1980).

160. 408 U.S. 593 (1972).

161. *Id.* at 601.

162. *Id.* at 599-600. Like Roth, Sindermann also claimed he had been terminated for exercising his free speech right to criticize the school administration. *Id.* at 594-95.

163. *Id.* at 600.

164. *Id.* at 601-02. The court announced that property interests "are not limited by a few rigid, technical forms," *id.* at 601, noting that the absence of a written contract does

Sindermann, on remand, could prove "the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution,' " the Court held, he would be entitled not to reinstatement but to procedural due process — that is, to a hearing on the grounds for his termination.[165]

An enlightening example of the statutory entitlement approach is *Bishop v. Wood*.[166] There, the Court closely examined the language of the relevant state statutes and ordinances to determine whether Bishop, a probationary employee of the police department, had an enforceable expectation of continued employment and therefore could be discharged only for cause.[167] Finding that, under those statutes and ordinances, Bishop's employment was terminable at will,[168] the Court held that Bishop had no property interest. Consequently, he had no right to procedural protection against arbitrary dismissal.[169]

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not foreclose a claim of entitlement supported by principles of implied contract. *Id.* at 601-02 (citing 3A CORBIN, ON CONTRACTS, §§ 561-72A (1960)). As for the industrial common law theory, the court stated that Sindermann "might be able to show from the circumstances of [his] service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure." *Id.* at 602. The basic principle was that a school may create an entitlement by creating a system of tenure "in practice," much as the common law of a particular industry may supplement a collective bargaining agreement. *Id.* at 602 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579-80 (1960) (gaps in a labor agreement were "to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement"—such practices described as the "common law of the shop")).

It now appears unlikely that a practice alone, with no explicit promise attached, would be found to create a property entitlement. Subsequent case law has stressed the need for a "rule or mutually explicit understanding." For example, in Leis v. Flynt, 439 U.S. 438, 441-43 (1979) (per curiam), the Court held that a consistent state practice of admitting attorneys to practice *pro hac vice* did not give rise to property interest because the interest involved was not derived from a statute or rule, and because any understanding that existed, even if reasonable, was neither mutual nor explicit. The court expressly rejected the theory, put forth in Justice Stevens' dissent that an implicit promise could create an entitlement "as if by estoppel." *Id.* at 444 n. 5, thereby limiting the reach of *Sinderman*. *See* Terrell, *supra* note 54, at 912-18. *See generally* Comment, *Leis v. Flynt: Retaining a Nonresident Attorney for Litigation*, 79 COLUM. L. REV. 572 (1979).

165. 408 U.S. at 603 (citation omitted). *See also, e.g.*, Orloff v. Cleland, 708 F.2d 372, 377 (9th Cir. 1983) (postponement of termination of Veterans Administration employee after initial expiration date of appointment may have given rise to property interest in continued employment); Ashton v. Civiletti, 613 F.2d 923, 928-30 (D.C. Cir. 1979) (representations in FBI's employee's handbook amounted to "clearly implied promise of continued employment"). *Id.* at 930 (quoting Board of Regents v. Roth, 408 U.S. at 577). *Cf.* Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980).

166. 426 U.S. 341 (1976).

167. *Id.* at 345.

168. *Id.* The relevant ordinance provided:

> *Dismissal.* A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, . . . he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.

Id. at 344 n.5 (quoting MARION, N.C. PERSONNEL ORDINANCE, Art. II, § 6).

169. *Id.* at 347. Nor, moreover, did Bishop have a liberty interest at stake, according to the Court, because he had not been stigmatized or foreclosed from future employment prospects. *Id.* at 347-49; *see also* Board of Regents v. Roth, 408 U.S. 564, 572-75 (1972).

Once it has been determined that a specific private interest is a liberty or property interest, within the meaning of the due process clause, judicial due process analysis must address a second question: whether minimal procedural safeguards were followed before deprivation of the private interest. *Mathews v. Eldridge* adopted a balancing of private-versus-governmental interest approach.[170] In the last decade the Court has consistently applied the *Mathews* three-pronged balancing test[171] which maximizes judicial discretion.[172]

B. Entitlement to Government Employment : Sullivan v. Stark

1. Case in Context

In *Sullivan v. Stark*,[173] the Tenth Circuit Court of Appeals dealt with the dismissal of a complaint filed by Sullivan, a park ranger, against the National Park Service for terminating his employment prior to the expiration of the period specified in his employment agreement.[174] Sullivan's complaint alleged a violation of his constitutional rights because of a refusal to give him an opportunity to answer and refute his termination, stating a deprivation of liberty and property without due process of law. The district court granted defendants' motion to dismiss, holding that Sullivan was an "excepted service"[175] employee who could be discharged at any time, with or without cause.

The Tenth Circuit held that (1) the termination of Sullivan by the Park Service did not violate his liberty interest because the termination neither damaged his reputation nor barred him from seeking other employment; (2) a public employee with a valid contract of employment for a definite term has a property interest in employment for the duration of the term; and (3) a government agency making an excepted service appointment has power to enter into employment contracts that confer property rights on an employee for the duration of the contract period. In so holding, the court reversed and remanded the case to the district court for a determination as to whether there existed a contract for a

170. 424 U.S. 319 (1976).

171. *See* Parham v. J.R., 442 U.S. 584, 599-600 (1979); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17 (1978); Dixon v. Love, 431 U.S. 105, 112 (1977); Ingraham v. Wright, 430 U.S. 651, 675 (1977).

172. In Matthews v. Eldridge, 424 U.S. at 334-35, the Court indicated the following factors should be considered in determining the "specific dictates" of due process: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens which the additional or substitute procedural requirement would entail.

173. 808 F.2d 737 (10th Cir. 1987).

174. *Id.* at 739. (The United States District Court for the District of Wyoming dismissed the action).

175. " 'Excepted Service' employees are ordinarily considered to be 'at will' employees, and are not entitled to the statutory procedural protections against discharge accorded federal employees in the competitive service." *Sullivan*, 808 F.2d at 740 (citing 5 U.S.C. §§ 7511(a)(1), 7513(b)); Fowler v. United States, 633 F.2d 1258, 1260 (8th Cir. 1980).

definite term of employment.[176]

The Tenth Circuit's reversal of the district court's decision to dismiss Sullivan's complaint, based on the fact that he was an "excepted service" employee, is an example of the Circuit's imposition of a high standard of care on the government. Where the government contracts, it will be held to the terms of the contract where the breach of that contract would be a deprivation of a property interest in violation of the due process clause of the fifth amendment.

2. Statement of the Case

Sullivan was hired as a seasonal employee in the excepted service. On May 5, 1982, he signed a "Letter of Acceptance and Employment Agreement" with the Park Service to work as a park ranger. This agreement provided that Sullivan work approximately four months, from June 8, 1982 through September 30, 1982. The employment agreement contained an express provision for early termination.[177] On August 8, 1982, Sullivan was advised that his employment at Grand Teton National Park had been terminated for unsatisfactory performance. Sullivan immediately demanded, but was told that he had no right to, a hearing.

Sullivan exhausted all administrative remedies in attempting to contest his termination and then filed suit in the United States District Court for the District of Wyoming. Sullivan contended that the employment agreement created a legitimate expectation of continued employment; that his constitutional rights were violated when the Park Service refused to give him an opportunity to answer, refute, and contest the alleged grounds for the termination; and that the agreement further created the expectation that the employment would continue throughout the term of the contract and would be terminated only for cause. The district court dismissed the complaint and the Tenth Circuit reversed. The case was remanded back to the district court for a determination of whether there existed a contract based on the agreement that only bore Sullivan's signature. A finding of a valid contract for a term would require the district court to decide what type of hearing due process requires.[178]

3. Discussion and Analysis of the Tenth Circuit's Opinion

The Tenth Circuit rejected the Eighth Circuit's approach to the excepted service employee,[179] and recognized the right of the individual to contract.[180] Relying on *Board of Regents v. Roth*[181] the court stated

176. *Sullivan*, 808 F.2d at 741.

177. "I understand that due to extenuating circumstances, such as lack of funds or other management changes, this offer of employment may be withdrawn or I may be terminated before my stated ending date." *Sullivan*, 808 F.2d at 738.

178. *Id.* at 741.

179. *Id.* at 740.

180. *See supra* note 164.

181. 408 U.S. 564 (1972).

that if Sullivan had a valid contract of employment for a definite term he had a property interest, protected by procedural due process, in employment for the duration of that term.[182] The Tenth Circuit saw nothing prohibiting the Interior Department from contracting for a definite term under its summer employment program but didn't know whether it had done so.[183] When the court looked at the document in the record, it noted that it was only signed by Sullivan with no expressed reciprocal promise of term employment by the Park Service.[184] The Tenth Circuit, by its reference to other information furnished in a letter of employment and a Seasonal Employee Handbook, by implication suggested that on remand the district court should apply the standards established in *Perry v. Sindermann*.[185] In that case the Supreme Court stated that a written contract with an explicit tenure provision is clear evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient cause is shown.

As previously stated, the agreement provided that Sullivan's employment was to be effective from June 8, 1982, through September 30, 1982. When Sullivan entered into the employment agreement, he relied on the past practice, custom and procedures of the National Park Service in thinking that his tenure of employment would not be interrupted except upon the showing of sufficient cause. Even in the absence of an express reciprocal promise by the Park Service, the district court on remand could have found that there was an explicit understanding between the parties that the agreement was for a fixed term, and that Sullivan had a reasonable expectation of continued employment through the end of that term by the provision in the agreement.

Relying on *Miller v. City of Mission*,[186] the Tenth Circuit had no problem disposing of Sullivan's liberty interest claim.[187] The court found that Sullivan's reputation was not damaged because the termination was not disseminated to the public nor was he barred from seeking other employment.[188]

4. Implications of Holding

The precedential weight of this holding within the Tenth Circuit will make it likely that where the government breaches a contract of employment for a definite term, plaintiff's property interest in employment for the duration of the term has been offended and a hearing will be required. This holding could have an adverse effect on the government's reliance on employee categories when dealing with the termination of an employee, because of the weight given to an individual's right

182. *See supra* notes 156-165 and accompanying text.
183. *Sullivan*, 808 F.2d at 741.
184. *Id.*
185. 408 U.S. 593 (1972). *See supra* notes 160-165 and accompanying text.
186. 705 F.2d 368 (10th Cir. 1983). *See* Paul v. Davis, 424 U.S. 693 (1976); *see also supra* notes 151-155 and accompanying text.
187. *Sullivan*, 808 F.2d at 739.
188. *Id.* at 739.

to contract. By implication, this holding also stands for the proposition that a public employee's liberty interests are implicated when the reasons for his discharge impugn his reputation or good name, or hinder his freedom to seek other employment.

IV. STANDARD APPLIED TO DETERMINE THE CONSTITUTIONALITY OF CORPORAL PUNISHMENT

A. *Background*

1. Substantive Due Process

The Constitution prohibits the federal government and the states from depriving a person of "life, liberty or property without due process of law."[189] The due process clauses traditionally have been held to provide a foundation for analyzing the adequacy of government procedures.[190] In addition, apart from the procedural limitations inhering in the concept of due process,[191] the clauses have been construed to provide "substantive constitutional protection of liberty and property."[192] This due process limit on the substance of government regulation has come to be known as the doctrine of substantive due process.[193]

2. Corporal Punishment as a Violation of Substantive Due Process

The protection of substantive due process has been used to challenge the constitutionality of statutes and regulations authorizing corporal punishment and of the discipline as administered in individual cases.[194] The use of corporal punishment as a means of disciplining school children has deep roots in this country.[195] It was used extensively during the colonial period when the practice was justified as a Biblical exhortation.[196] Corporal punishment is defined as "[p]hysical punishment as distinguished from pecuniary punishment or a fine; any kind of punishment of or inflicted on the body."[197] Although there is a sharp division of opinion among both educators and the general public regarding its use,[198] corporal punishment remains an authorized

189. U.S. CONST. amends. V and XIV. *See also supra* notes 141-142 and accompanying text.

190. *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1166 (1980) [hereinafter *Developments*].

191. W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 420 (5th ed. 1980).

192. *Developments*, *supra* note 189, at 1166; *see also* E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948).

193. *Developments*, *supra* note 189, at 1166.

194. Note, *Corporal Punishment in Public Schools: Constitutional Challenge After Ingraham v. Wright?*, 31 VAND. L. REV. 1449, 1451 (1978).

195. R. MNOOKIN, CHILDREN AND THE LAW (1978).

196. H. FALK, CORPORAL PUNISHMENT 11-48 (1941).

197. BLACK'S LAW DICTIONARY 306 (5th ed. 1979).

198. *See, e.g.*, E. BELMEIER, LEGALITY OF STUDENT DISCIPLINARY PRACTICES (1976); H. FALK, CORPORAL PUNISHMENT (1941); J. HYMAN & J. WISE, CORPORAL PUNISHMENT IN AMERICAN EDUCATION (1979); K. JAMES, CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS (1963); S. LEVINE & E. CARY, THE RIGHTS OF STUDENTS 84-86 (rev. ed. 1972); National Education Association, Report of the Task Force on Corporal Punishment (1972); B. SKIN-

method of discipline in most public school systems.[199]

In *Ingraham v. Wright*,[200] the Supreme Court addressed the rights of students in the context of public school corporal punishment. Pupils in a Florida junior high school sought damages and injunctive relief, alleging that school officials had violated their constitutional rights by subjecting them to disciplinary corporal punishment. The plaintiffs initially based their claims on three grounds: first, corporal punishment of schoolchildren amounts to cruel and unusual punishment; second, severe corporal punishment of public school students violates fourteenth amendment substantive due process because it is "arbitrary, capricious and unrelated to achieving any legitimate educational goal"; and third, the school system's policies for corporal punishment violate fourteenth amendment due process standards by failing to provide the pupils with any procedural safeguards before administering punishment.[201]

Although the Court acknowledged that the punishment complained of in *Ingraham* was "exceptionally harsh"[202] it denied or avoided the various constitutional claims. In a 5-4 decision written by Justice Powell,[203] the Court decided that the eighth amendment was designed to protect persons convicted of crimes and did not apply to paddling of schoolchildren.[204] All members of the Court agreed that the students had a four-

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NER, SCIENCE AND HUMAN BEHAVIOR 192-93 (1953); Reitman, Follman, & Ladd, *Corporal Punishment in Public Schools*, ACLU REPORT (1972).

199. *Ingraham*, 430 U.S. 651, 660-61 (1977).

200. 430 U.S. 651 (1977).

201. 525 F.2d 909, 911-12 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651 (1977). The Supreme Court, however, denied certiorari on the substantive due process question. *See infra* notes 260-262 and accompanying text.

202. 430 U.S. at 657. The testimony before the district court revealed the experiences of students at the junior high school. For example, on one occasion a teacher asked some students, including James Ingraham, to leave the stage of the school auditorium. The students left, but were slow in doing so. Taken to the office to be paddled, James protested his innocence and refused to be hit. Aided by two other school officials who held James, the principal hit him at least twenty times with a wooden paddle. The punishment produced a hematoma on the buttocks; a doctor who examined James advised him to stay home from school for at least one week.

Roosevelt Andrews, the other named plaintiff in the case, stated that one year he was paddled at least ten times, often for being late for physical education class or for wearing an improper gym uniform. On one occasion, paddling by the principal caused severe swelling of his wrist and he was unable to use his arm for a week.

Another student's hand was fractured and apparently disfigured as a result of a paddling. Yet another pupil accused of making an obscene telephone call to a teacher was paddled approximately fifty times, a different child later confessed to the offense. Two boys were struck about fifty times each for "playing hooky." One boy who had asthma and heart trouble was hit on the back with a paddle because he wanted to clean his chair in the auditorium before sitting down. The child had to have an operation to remove a lump that developed where he had been struck. On two other occasions this same child vomited blood after being paddled. Many students testified that they had been subjected to paddlings for a variety of offenses, including chewing gum and not keeping their shirttails tucked in, and also testified that administrators carried paddles and brass knuckles around the school. Ingraham v. Wright, 498 F.2d 248, 255-59 (5th Cir. 1974), *rev'd on rehearing*, 525 F.2d 909 (5th Cir. 1976) (en banc).

203. Justice Powell's opinion was joined by Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist. The dissenting opinion by Justice White was joined by Justices Brennan, Marshall and Stevens. Justice Stevens also wrote a brief dissenting opinion.

204. 430 U.S. at 664.

teenth amendment liberty interest and that the students were deliberately punished by restraint and the infliction of "appreciable physical pain" by school officials acting under color of state law.[205] The majority held, however, that the availability of common law restraints and remedies adequately satisfied the requirements of procedural due process in protecting those liberty interests.[206]

The *Ingraham* Court denied certiorari on the substantive due process question,[207] which was posed broadly: "Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?"[208] *Ingraham* thus left unanswered "the substantive due process issue of the child's own right to physical integrity."[209]

In *Hall v. Tawney*,[210] the United States Court of Appeals for the Fourth Circuit became the first federal court to recognize that public school children have a substantive due process right to ultimate bodily security.[211] The court held that to vindicate this right, a school child may claim federal relief under 42 U.S.C. § 1983[212] when specific corporal punishment exceeds in severity that which is reasonably related to the state interest in maintaining order in the schools.[213] In this case a school administrator, purportedly without provocation, struck a minor plaintiff with a paddle made of hard rubber and about five inches in width, across her left hip and thigh. When the plaintiff resisted, she was shoved against a large stationary desk and was again "stricken repeatedly and violently" by the administrator. As a result of this application of force the plaintiff was taken to the emergency room of a nearby hospital where she was admitted and kept for a period of ten days for treatment of traumatic injury to the soft tissue of the left thigh, and trauma to the soft tissue with ecchyniosis of the left buttock. In addition, the plaintiff was "receiving the treatment of specialists for possible permanent

205. *Id.* at 674.

206. *Id.* at 672, 683. For an excellent commentary on *Ingraham*, see Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978) [hereinafter Rosenberg].

207. 430 U.S. at 659 n.12, 679 n.47.

208. *Id.* at 659 n.12.

209. Rosenberg, *supra* note 206, at 107. Professor Rosenberg stated that "[a] principled resolution thereof . . . would have required a finding that severe corporal punishment is unconstitutional." *Id.* at 100.

210. 621 F.2d 607 (4th Cir. 1980).

211. *Id.* at 613. The substantive due process analysis has been engaged in within a variety of contexts by lower federal courts, but has never been applied in the context of school corporal punishment. *See generally*, Sewell, *Conclusive Presumptions and/or Substantive Due Process of Law*, 27 OKLA. L. REV. 151, 165-71 (1974).

212. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), specifically provides:

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

213. *Hall*, 621 F.2d at 611.

injuries to her lower back and spine."[214]

In its review of this case, the *Hall* panel upheld the United States District Court's dismissal of the cruel and unusual punishment claim and the procedural due process allegation; however, it overruled that court's dismissal of the substantive due process complaint.[215] Although recognizing that the *Ingraham* Court had refused to review a claim that excessive corporal punishment violated a right to substantive due process, the Fourth Circuit determined that the availability of state civil and criminal remedies did not preclude a federal cause of action under section 1983 when rights to substantive due process might be implicated.[216] The Fourth Circuit concluded that school children have a right to ultimate bodily security based on substantive due process and set forth the following test to determine whether the right has been violated:

> . . . the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.[217]

In *Rochin v. California*,[218] the Supreme Court held that the forced pumping of a suspect's stomach was a clear violation of fourteenth amendment due process because it "shocks the conscience,"[219] although it was the only means of obtaining the criminal evidence that the police sought.[220] The Court indicated that an individual's interest in freedom from bodily intrusion is a fundamental interest. In finding that the treatment violated the due process clause, Justice Frankfurter recognized that the clause protected "personal immunities" that are "fundamental" or "implicit in the concept of ordered liberty."[221]

3. Section 1983 and Qualified Immunity

Most corporal punishment cases are litigated in state courts under charges of battery,[222] or assault and battery;[223] however, an increasing

214. *Id.* at 614.

215. *Id.* at 615.

216. *Id.* at 611. The Court had held the allegations sufficient to state a claim for relief under 42 U.S.C. § 1983 and further held that the episodic nature of the punishment did not preclude the federal action. *Id.* at 614-15.

217. *Id.* at 613. The *Hall* panel acknowledged that the Supreme Court, in *Ingraham*, had ruled that school paddlings violated neither procedural due process nor eighth amendment rights, and that since neither of these two rights were violated it might be possible to imply a holding that neither could there be a violation of any substantive due process right. *Id.* at 611. However, the *Hall* panel reasoned that the implication was not compelled due to the Supreme Court's express reservation of the issue.

218. 342 U.S. 165 (1952).

219. *Id.* at 172. Irvine v. California, 347 U.S. 128, 133 (1954), limited *Rochin* to situations involving coercion, violence, or brutality to the person.

220. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-9 (1978).

221. 342 U.S. at 169 (quoting Cardozo, J., Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

222. People v. Ball, 58 Ill.2d 36, 317 N.E.2d 54 (1974).

number of litigants are bringing actions in federal court under 42 U.S.C. § 1983.[224] This federal law allows a plaintiff whose civil rights have been violated by state officials, to bring a constitutional tort or equity action in federal court against such officials[225] or the governmental agency that employs the individuals accused of committing the civil wrong.

Many individuals who claim that their civil rights have been violated prefer to seek damages in federal court under section 1983 primarily because federal law prevents school districts and other municipal agencies from claiming immunity under existing state law for the civil rights violations committed by employees.[226] However, qualified immunity, also known as the good faith defense, generally protects a public official from liability if he can prove he acted in "good faith."[227]

In *Harlow v. Fitzgerald*,[228] the Supreme Court significantly changed the basis for establishing the defense of qualified immunity in section 1983 actions. Under the *Harlow* test, government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[229] The decision eliminated the subjective considerations that were enunciated in *Wood v. Strickland*.[230] Determination of qualified immunity is now to be based "on the objective reasonableness of an official's conduct, as measured by reference to clearly established law."[231]

B. *Constitutional Implications of Corporal Punishment in Public Schools*: Garcia v. Miera

1. Case in Context

Garcia v. Miera[232] involved the Tenth Circuit Court of Appeals' re-

223. Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954).

224. *See supra* note 212 and accompanying text.

225. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Traditionally, defendants had their conduct tested against both an "objective" and a "subjective" standard. *See* Wood v. Strickland, 420 U.S. 308 (1975). However, *Harlow* dispensed with the subjective element and held that the defendant is not liable under § 1983, so long as his official actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

226. Owen v. City of Independence, 445 U.S. 622 (1980). In this case, the Supreme Court held that when a public body is subject to liability, it cannot assert an immunity based on the good faith of its officers as a defense even though the officials themselves might assert such a defense when they are sued individually.

227. *See generally*, Note, *Eleventh Annual Tenth Circuit Survey: Civil Rights*, 61 DEN. U.L. REV. 163, 165-66 (1984) (discussing the distinction between the subjective and objective test, as applied by the Tenth Circuit).

The defendant must prove by a preponderance of the evidence that he acted in good faith. S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 8.01 (1979).

228. 457 U.S. 800 (1982).

229. *Id.* at 818.

230. Wood v. Strickland, 420 U.S. 308 (1975). *See supra* notes 235 and 237 and accompanying text.

231. *Harlow*, 457 U.S. at 818.

232. 817 F.2d 650 (10th Cir. 1987).

view of the United States District Court for the District of New Mexico's grant of summary judgment. The district court found that the school officials involved in the two incidents of corporal punishment were insulated from liability under 42 U.S.C. § 1983[233] by qualified immunity.

Teresa Garcia, an elementary school pupil at the Penasco Elementary School in New Mexico, by her parents and best friends Max and Sandra Garcia, sued the school officials in their individual capacities for denying her substantive due process in violation of section 1983 arising from two beatings suffered at their hands.[234] The district court granted summary judgment to the school district, concluding that it was shielded from liability by the defense of good faith immunity[235] because "the law governing whether excess corporal punishment can give rise to a substantive due process claim [was] not clearly established."[236] Garcia appealed the district court's grant of summary judgment contending that at the time of the beatings excessive corporal punishment by school officials did violate her clearly established substantive due process rights.

In reversing the district court's decision, the Tenth Circuit referred to the United States Supreme Court's ruling in *Ingraham v. Wright*,[237] where the Court declared that "corporal punishment in public schools implicates a constitutionally protected liberty interest."[238]

2. Statement of the Case

Teresa Garcia was a grammar school student at the Penasco Elementary School, Penasco, New Mexico in 1982 and 1983. On February 10, 1982, Theresa Miera, the school principal, summoned Garcia, then in the third grade, to her office to punish her for hitting a boy who had kicked her. Miera attempted to paddle Garcia, but she refused to cooperate, resulting in Miera's calling J.D. Sanchez, a teacher at the school, for assistance. Sanchez grabbed Garcia's ankles and held her upside down while Miera hit her leg with the paddle.[239] The beating made a two inch cut on Garcia's leg that left a permanent scar. Shortly after this incident, Garcia's parents voiced their concerns to Miera and requested that they be notified in the event their daughter was to be subjected to corporal punishment again.

Garcia received a second beating about one and one-half years later when she was summoned to Miera's office for saying she had seen a teacher, Judy Mestas, kissing a student's father, Denny Mersereas, during a field trip. Garcia also said that Mestas had sent love letters to Mersereas through his son.[240] After suffering two blows with the paddle,

233. *See* § 1983, *supra* note 212 and accompanying text.
234. *Garcia*, 817 F.2d at 652.
235. *Id.*
236. *Id.*
237. 430 U.S. 651 (1977).
238. *Id.* at 672.
239. The paddle "was split right down the middle, so it was two pieces, and when it hit, it clapped [and] grabbed." *Garcia*, 817 F.2d at 653.
240. *Id.* at 653, *see also* n.3.

Garcia refused to receive the remaining three and asked permission to telephone her parents. Miera refused to allow Garcia to phone her parents until the paddling was completed. Miera then called Edward Leyba, an administrative associate at the school, to assist her in delivery of the remaining three blows. Leyba assisted by pushing Garcia towards a chair over which she was to bend and receive the last three blows. Garcia and Leyba struggled and Garcia hit her back on Miera's desk. She then submitted to the last three blows. Garcia suffered back pains for several weeks as a result thereof.

Garcia received medical treatment for multiple and severe bruises to her buttocks she sustained from the second paddling. Dr. Albrecht, M.D., the attending physician, stated, "I've done hundreds of physicals of children who have had spankings . . . and I have not seen bruises on the buttocks as Teresita had, from routine spankings . . . [T]hey were more extensive, deeper bruises . . . ."[241] The examining nurse, Betsy Martinez, testified that if a child received such injuries by a parent's hand, she would be obligated to notify protective services.[242]

Garcia alleged that the severity of the paddlings violated her substantive due process rights. Miera, defendant-appellee, based her motion for summary judgment on the fact that the law concerning substantive due process rights of school children subjected to corporal punishment was not clearly established, entitling them to good faith immunity.

3. Discussion and Analysis of the Tenth Circuit's Opinion

The Tenth Circuit rejected the Fifth Circuit's approach to substantive due process in *Ingraham*, aligning itself with the Fourth Circuit on this crucial issue. In *Hall v. Tawney*,[243] the Fourth Circuit indicated that the infliction of corporal punishment by a public school official may violate a schoolchild's constitutional rights. The court determined that "there may be circumstances under which specific corporal punishment administered by state school officials gives rise to an independent federal cause of action to vindicate substantive due process rights under 42 U.S.C. § 1983."[244] Although the test *Hall* proposed for determining a due process violation is extremely stringent, the decision provides a framework for the analysis of the substantive due process rights of students subjected to excessive physical punishment. In coming to its conclusion, the *Hall* court went beyond the scope of *Ingraham*, in which the Supreme Court expressly reserved the issue of substantive due process.[245]

Ingraham made clear that reasonable corporal punishment violated

241. *Garcia*, 817 F.2d at 653.
242. *Id.*
243. 621 F.2d 607 (4th Cir. 1980). *See also* Milonas v. William, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) (the use of excessive physical force may violate schoolchildrens' constitutional rights).
244. 621 F.2d at 611.
245. *Ingraham*, 430 U.S. 651, 659 n.12.

no substantive due process rights of school children.[246] The Tenth Circuit held that by acknowledging that "corporal punishment implicates a fundamental liberty interest protected by the Due Process Clause," *Ingraham* clearly signaled that, at some degree of excessiveness or cruelty, the meting out of such punishment violates the substantive due process rights of the pupils.[247]

Because the Tenth Circuit had addressed the issue of excessive corporal punishment of a student in *Milonas v. Williams*,[248] it decided that the law was clearly established at the time of the second beating. By relying on *Harlow*'s objective test of what a reasonable person would have known, the Tenth Circuit acknowledged the split between the Fifth and the Fourth Circuits, but stated that the Supreme Court when it addressed the Fifth Circuit's decision in *Ingraham*, indicated that corporal punishment in public schools is a constitutionally protected right.

4. Implications of Holding

Although the Supreme Court in *Ingraham* foreclosed section 1983 actions based on the eighth amendment or procedural due process, the Tenth Circuit concluded that corporal punishment could violate substantive due process and hence serve as a basis for federal relief under section 1983. The *Garcia* court's recognition of the right to ultimate bodily security as a matter of substantive due process provides review in federal courts of the conduct of public school officials. The Tenth Circuit has helped clear the way for the Supreme Court to declare severe corporal punishment of schoolchildren a violation of substantive due process.

CONCLUSION

During the survey period, the Tenth Circuit balanced the right of the individual with that of the governmental interest. In *Phelps v. Reagan*, the Tenth Circuit had to decide if the first amendment was a limitation on the President's power to appoint ambassadors. The court decided that the case was foreclosed by the political question doctrine but not before it addressed the standing issue, determining that *Flast* and *Valley Forge* were still the precedent in the area of the first amendment establishment clause cases. In *Mini Spas v. Salt Lake City Corp.*, the court was also faced with a first amendment claim, freedom of expression. Here the court determined that massage parlor's interest in freedom of expression was outweighed by the city's interest in regulating their dress so as to prevent the parlors from degenerating into houses of prostitution. In *Sullivan v. Stark*, the Tenth Circuit required the government to comply with due process requirements. The court stated that it saw no reason why the government could not enter into employment contracts

246. *Id.* at 676.
247. *Garcia*, 817 F.2d at 654.
248. 691 F.2d 931 (10th Cir. 1982).

— having so contracted — it was bound to the terms of such contract because there is a property interest in employment. In *Garcia v. Miera*, the Tenth Circuit found a substantive due process right of students in public schools in the area of corporal punishment. In an area of confusion among the circuits and faced with silence from the Supreme Court, the Tenth Circuit pioneered the field for the Supreme Court to adopt a substantive due process standard in the area of corporal punishment. Although the Tenth Circuit swung back and forth between the individual's rights and the governmental interest in the areas of procedural and substantive due process, its overall approach was well-balanced.

Boston H. Stanton, Jr.

CRIMINAL PROCEDURE

OVERVIEW

This article will summarize and discuss five criminal procedure cases decided by the Court of Appeals for the Tenth Circuit during the survey period. The first two cases involve questions arising under the fourth amendment, and the third case concerns rights under the fifth amendment. The final two cases of the survey involves habeas corpus proceedings.

I. FOURTH AMENDMENT— UNREASONABLE SEARCHES AND SEIZURES: *UNITED STATES V. RUCKMAN*

A. *Overview*

Although the Supreme Court in *Katz v. United States*[1] stated that the fourth amendment was intended to protect privacy interests and not property interests, *United States v. Ruckman*[2] held that reference to property interests may be necessary in specific cases to determine whether the privacy interest is legitimate for fourth amendment protection.

B. *Background*

Since 1967, *Katz v. United States* has been the touchstone of fourth amendment analysis. Prior to this decision, property interests governed search and seizure analysis.[3] However, the Supreme Court in *Katz* enunciated the often quoted statement: "[T]he Fourth Amendment protects people, not places."[4] The property interest analysis was replaced by a two-prong privacy test set forth in Justice Harlan's concurring opinion in *Katz*.[5] This test requires "first that a person have

1. 389 U.S. 347 (1967).

2. 806 F.2d 1471 (10th Cir. 1986).

3. Until 1967, the fourth amendment was viewed by the courts as protecting certain private property, not intangible privacy, interests. This analysis permitted law enforcement agents to search without a warrant so long as they did not trespass on private property in the process. *See* Goldman v. United States, 316 U.S. 129 (1942) (search warrant not required when information can be obtained without trespassing, by placing detectaphone on outer wall of defendant's office); Olmstead v. United States, 277 U.S. 438 (1927) (speech projected beyond confines of home over telephone wires is not protected against warrantless seizure).

4. 389 U.S. at 351. In *Katz*, FBI agents placed an electronic bug on a public telephone booth from which Katz, a bookmaker, conducted his business. Under traditional fourth amendment analysis, the FBI agents did not need a warrant since the telephone booth was a public area. *Id.*

The Supreme Court, however, rejected the notion that the fourth amendment protects only private property. The Court stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment Protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52 (citations omitted).

5. *Id.* at 360-62 (Harlan, J., concurring).

exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.' "[6] In practice, the first part of the test is rarely a matter of contention and, generally, the ultimate issue is whether or not the defendant's subjective expectation of privacy is one which society is prepared to recognize as reasonable.[7]

No single factor is dispositive in determining whether an individual may legitimately claim, under the fourth amendment, that private property should be free of government intrusion not authorized by warrant.[8] Instead, the court looks at several factors in order to assess the degree to which such a warrantless search infringes upon individual privacy.[9] These factors include the intention of the framers of the fourth amendment, the uses to which the individual has put a location,[10] and a societal understanding that certain areas deserve protection from government invasion.[11]

Notwithstanding the above evolution of fourth amendment analysis, the privacy test enunciated in *Katz* has not impaired the vitality of the "open fields doctrine," which permits law enforcement officers to enter and search open fields[12]without a warrant.[13] The Supreme Court in *Oliver v. United States*[14] stated that the "open fields" doctrine was consistent with its holding in *Katz* because first, open fields are not included within "persons, houses, papers, and effects,"[15] and second, there is no societal interest in protecting the activities generally associated with open fields.[16]

C. *Facts*

Without a warrant, state and federal authorities searched a natural cave located on remote government property which defendant Frank Ruckman had been living in and around for eight months. The entrance of the cave had been sealed by Ruckman with a wooden wall and door.[17]

The authorities had gone to the cave to execute a state warrant for

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6. *Id.* at 361 (Harlan, J., concurring).

7. *See* Oliver v. United States, 466 U.S. 170 (1984); Rakas v. Illinois, 439 U.S. 128 (1978).

8. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 177 (1984) (citing Rakas v. Illinois, 439 U.S. 128, 152-53 (1978) (Powell, J., concurring)).

9. *Id.* (citing United States v. Chadwick, 433 U.S. 1, 7-8 (1977)).

10. *Id.* at 178 (citing Jones v. United States, 362 U.S. 257 (1960)).

11. *Id.* (citing Payton v. New York, 445 U.S. 573 (1980)).

12. "Open fields" is land that is beyond the area immediately surrounding the home. Oliver v. United States, 466 U.S. 170 (1970).

13. Hester v. United States, 265 U.S. 57 (1924). Justice Holmes concluded in *Hester* that "the special protection accorded by the Fourth Amendment to the people in their persons, houses, papers, and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Id.* at 59.

14. 466 U.S. 170 (1984).

15. U.S. CONST. amend. IV.

16. 466 U.S. at 177-80. Its decision was consistent with *Katz*, explained the Court, because society is not prepared to recognize privacy expectations in open fields as reasonable. *Id.* at 178.

17. United States v. Ruckman, 806 F.2d 1471, 1472 (10th Cir. 1986). The land is

Ruckman's arrest, which was issued when Ruckman failed to appear in state court to answer a misdemeanor charge. Ruckman could not be found when the authorities first arrived and searched the cave. Shortly after the authorities found certain firearms, Ruckman appeared and was taken into custody.[18]

Eight days later, local authorities, accompanied by Bureau of Land Management ("BLM") agents, returned to clean out the cave and found thirteen illegal anti-personnel booby traps, resulting in charges being brought against Ruckman.[19] At trial, Ruckman moved to suppress the use of the anti-personnel weapons as evidence, but the motion was denied[20] and thereafter the possession of the weapons formed the basis of his conviction.[21] Ruckman appealed the conviction claiming that the cave was his "home" and that the government's search thereof violated his fourth amendment right to be free from warrantless searches.

D. *Majority Opinion*

The Tenth Circuit first rejected Ruckman's contention that the cave was his home by holding that the cave could not be considered a permanent residence.[22] The court concluded that Ruckman was just "camping" for an extended period of time and that the cave was not a "home" within the meaning of the fourth amendment.[23]

The decision, citing *Katz* stated that in order for the cave to come within the ambit of fourth amendment protection, Ruckman must have had a subjective expectation of privacy in the cave which society was prepared to recognize as being reasonable.[24] In its analysis, the majority assumed that Ruckman had such an expectation and then focused exclusively on whether his expectation of privacy was reasonable under the circumstances.[25]

In concluding that Ruckman's expectation of privacy was not reasonable, the majority's opinion revolved around the fact that Ruckman was a trespasser on federal lands. The decision noted that Congress' power over federal lands is without limitation[26] and that Ruckman was

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owned by the federal government and controlled by the Bureau of Land Management (BLM). *Id.* at 1472.

18. *Id.*

19. *Id.*

20. *Id.* at 1471-72. The trial court, by minute order, denied the motion without any comment. *Id.* at 1471.

21. Ruckman was convicted for unlawfully possessing destructive devices, within the meaning of 26 U.S.C. § 5845(f)(3), in violation of 26 U.S.C. § 5861(d). 806 F.2d at 1471.

22. 806 F.2d at 1473. By arguing that the cave was his "home," Ruckman had attempted to bring his claim within the literal language of the fourth amendment which guarantees "[t]he right of the people to be secure in their 'persons, houses, papers and effects,' against unreasonable searches and seizures. . . ." U.S. CONST. amend IV.

23. 806 F.2d at 1473. Counsel for Ruckman conceded that he was just "camping" in the cave. *Id.*

24. 806 F.2d at 1472.

25. *Id.*

26. U.S. Const. art. IV, § 3, cl. 2. This clause provides Congress with the authority to make all necessary rules and regulations respecting property belonging to the United

subject to ejectment at anytime.[27] The fact that Ruckman may have subjectively deemed the cave to be his "castle" was not decisive.[28] The legitimacy of the expectation of privacy, explained the court, is not dependent upon whether a person chooses to conceal private activity, but whether the government's intrusion infringes upon the personal and societal values protected by the fourth amendment.[29]

The majority conceded that *Katz* is often cited for the proposition that the fourth amendment protects people, not places, but further explained that the reasonableness of an individual's expectation of privacy *cannot be determined without reference to a place.*[30] As support, the court cited *Oliver v. United States*[31] in which the Supreme Court noted a distinction between "open fields" and "certain enclaves."[32] The greater accessibility of "open fields" *in general*, stated the Court, has meant that these fields are not protected by the fourth amendment, even when the field is surrounded by fences and "No Trespassing" signs.[33] The fact that the owner of an "open field" has attempted to conceal private activity is not a controlling factor; instead the Supreme Court examines the accessibility of *open fields in general.*[34]

In further support of its decision, the court in *Ruckman* cited a case arising out of the First Circuit which held that squatters on public land have no reasonable expectation of privacy.[35] The First Circuit stated the squatters' claim of a reasonable expectation of privacy was "ludicrous" because the squatters knew they had no colorable claim to occupy the land.[36]

States. Pursuant to this authority, the Bureau of Land Management can control access to public land.

27. 806 F.2d at 1473 (citing United States v. San Francisco, 310 U.S. 16 (1940)).

28. *Id.* In other words, Ruckman's expectation of privacy is meaningless unless society recognizes it as being a reasonable expectation.

29. *Id.* at 1474.

30. *Id.* The location of the property searched is a factor in determining whether legitimate expectations of privacy have been violated.

31. 466 U.S. 170 (1984).

32. *Id.* at 179-80. The Court stated that open fields do not provide the setting for those intimate activities that the fourth amendment was intended to protect against government intrusion or surveillance. The Court did not define "intimate activities," but, presumptively, they are those activities which are expected to be private and not subject to public observation. Certain enclaves are those areas in which we normally expect intimate activities to take place. *Id.* at 179.

33. *Id.* In discussing the general accessibility of open fields, the Court stated that "[i]t is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas." *See also* United States v. Rucinski, 658 F.2d 741 (10th Cir. 1981) (although lumber yard was located in secluded mountain valley and was surrounded by barbed wire and no trespassing signs, no unreasonable intrusion occurred when government agents took pictures of the defendants' mill yard from adjacent property), *cert. denied*, 455 U.S. 939 (1982).

34. *Id.*

35. Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976). The squatters' homes and belongings were bulldozed after they were asked several days earlier to leave voluntarily. *Id.* at 9.

36. *Id.* at 11. Shortly after the squatters set up a community on government land, officials from two commonwealth agencies visited the squatters on two occasions and tried unsuccessfully to persuade them to leave voluntarily. *Id.*

E. *Dissent*

In dissent,[37] Judge McKay contended first, that the majority's inquiry into whether Ruckman's cave constituted a home within fourth amendment protection was unnecessary; and second, that their reliance on Ruckman's status as a trespasser was not in accordance with *Katz*' elimination of property interests in fourth amendment analysis.[38]

McKay stated that the court's inquiry into whether the cave constituted a home presupposed that only homes are protected by the fourth amendment.[39] He held this to be untrue since the Supreme Court had previously acknowledged that a person could have a legally sufficient interest in a place other than his own home, and still fall within fourth amendment protection from unreasonable government intrusion into that place.[40] McKay asserted that the ultimate issue, as in all fourth amendment cases, was whether the defendant had a reasonable expectation of privacy in the area searched.[41] Although the majority addressed this issue, McKay argued that the majority's conclusion that Ruckman's expectation of privacy was not legitimate was incorrect because it focused on property interests, rather than privacy interests.[42]

Without reference to trespassing and other related property interests, McKay concluded that Ruckman's expectation of privacy was both reasonable and legitimate because the cave contained all of his belongings and he had tried to seal off the entrance of the cave by constructing a wall and door.[43]

F. *Analysis*

By following precedent, the majority was correct in concluding that reference to property interests may be necessary in determining whether asserted privacy interests are legitimate. The Supreme Court, in focusing on these reasonable expectations of privacy, has not altogether abandoned the use of property concepts in determining the presence or absence of privacy interests protected by the fourth amendment.[44] The relationship between property interests and society's perception of the reasonableness of asserted privacy interests was discussed by the Court in *Rakas v. Illinois*.[45] The Court explained that "one who owns or law-

37. United States v. Ruckman, 806 F.2d 1471, 1474 (10th Cir. 1986) (McKay, J., dissenting).

38. *Id.* at 1475-78 (McKay, J., dissenting).

39. *Id.* at 1475-76 (McKay, J., dissenting).

40. *Id.* at 1476 (McKay, J., dissenting) (citing Rakas v. Illinois, 439 U.S. 128 (1978)).

41. *Id.* (McKay, J., dissenting).

42. *Id.* at 1478 (McKay, J., dissenting).

43. *Id.* (McKay, J., dissenting).

44. *See* Oliver v. United States, 466 U.S. 170, 183 (1984) ("The existence of a property right is but one element in determining whether expectations of privacy are legitimate."); *see also* Rakas v. Illinois, 439 U.S. 128, 144 n.12 (". . . by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.").

45. 439 U.S. 128 (1978).

fully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude [others]."[46]

The Supreme Court has held that this right to exclude is not dispositive in every case.[47] Even though the person asserting the privacy interest has a property interest, the Court still examines the surrounding circumstances to determine whether the privacy interest is legitimate.[48]

In the instant case, however, the Tenth Circuit found that the Government's property right to exclude was dispositive of Ruckman's privacy interests.[49] This conclusion, without more, was unsupported since the court did not examine factors other than the property rights. Nor did the court explain why a trespasser who is subject to ejectment has no reasonable expectation of privacy. The Supreme Court has stated that property rights and privacy interests are not coterminous.[50] Yet in the instant case, the Tenth Circuit concluded that government officials could disregard Ruckman's makeshift door and search his personal belongings, since the officials had authority to tell Ruckman, a trespasser, to leave.

The court's analogy to "open fields" cases was not supportive of its decision. As Justice Powell stated in *Oliver*, open fields are not protected against unwarranted searches because they do not generally provide the setting for those intimate activities which the fourth amendment was intended to protect.[51] The court's reference to open fields in *Ruckman* was therefore incomplete, since the court did not explain why a cave enclosed with a wall and filled with personal belongings did not provide a setting for protected intimate activities.

Additionally, the majority's reliance on *Amezquita v. Hernandez-Colon*[52] does not strongly support its decision in *Ruckman*. In *Amezquita* the squatters had been asked at least twice by commonwealth officials to voluntarily remove their belongings,[53] and thus the court determined that they had no reasonable expectation of privacy.[54] In the instant case, there was no evidence that Ruckman had been asked to leave. Furthermore, Ruckman had been living in the cave for more than eight months.[55] In light of these facts, the court should have explained why it imputed an absence of privacy rights from the fact that Ruckman had no

46. *Id.* at 143 n.12.

47. *See, e.g., Oliver*, 466 U.S. at 177 (citing Rakas v. Illinois, 439 U.S. 128, 152-53 (1978) (Powell, J., concurring)).

48. *See supra* notes 9-12 and accompanying text.

49. *Ruckman*, 806 F.2d at 1473 ("Ruckman's subjective expectation of privacy is not reasonable in light of the fact that he could be ousted by BLM authorities from the place he was occupying at any time.").

50. *See supra* note 5 and accompanying text.

51. *Oliver*, 466 U.S. at 179.

52. 518 F.2d 8 (1st Cir. 1975), *cert denied*, 424 U.S. 916 (1976).

53. *Id.* at 11.

54. *Id.*

55. *Ruckman*, 806 F.2d at 1472. Ruckman's living in the cave all this time, without being disturbed by the government, is in contrast to the squatters in *Amezquita* who were approached by government officials shortly after moving onto public land.

possessory rights in the cave. In other words, the court failed to explain why society believes that a trespasser has no privacy interests. Moreover, the majority's opinion failed to distinguish Ruckman from campers who camp without permits or overstay their permit. Campers do not own the public land upon which they camp, but would expect to be asked to dismantle their campsites and leave before they would be subjected to a warrantless search. The court's opinion in *Ruckman* leaves one wondering whether campers on government property will have any privacy interests if they remain for a period beyond their camping permits.[56]

II. *UNITED STATES V. MABRY*

A. *Overview*

In *United States v. Mabry*,[57] the court held that when police are involved in undercover drug purchases where the objective is to arrest the seller's suppliers and to confiscate the contraband, a search warrant for the supplier's home does not have to be sought until the identity of the supplier and the location of the contraband is established *to the satisfaction of the police*. This standard is controlling even though exigent circumstances sufficient to excuse the procurement of a search warrant are predictable.

B. *Background*

Typically, police officers must go before a neutral government official[58] and obtain a warrant prior to a search of an individual's premises. The warrant is granted if sufficient facts are presented demonstrating the probability that evidence of a crime can be found in that specific private dwelling.[59] Indeed, the Supreme Court has held that warrantless searches inside a home are presumptively unreasonable.[60] However, there are some "exceptional circumstances" to this presumption that, if met, allow the police to intrude into a private dwelling without a search warrant.[61]

One of the better known exceptions to the warrant requirement is that of *exigent circumstances*.[62] This exception permits police officers to

56. *Id.* at 1474 (McKay, J., dissenting). Judge McKay argued that the majority's decision was a threat to all campers, including senior citizens who live in recreational vehicles. "Under the majority's sweeping language, they could be found at any time to be 'trespassing' on federal lands and be stripped of any legitimate expectation of privacy in their temporary dwellings." *Id.*

57. 809 F.2d 671 (10th Cir.), *cert. denied*, 108 S. Ct. 33 (1987).

58. A neutral government official is a judicial officer or magistrate who is detached from the law enforcement side of government. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971) (state attorney general is not a neutral and detached government official for purposes of issuing search warrants).

59. Zurcher v. Stanford Daily, 436 U.S. 547, 558, *reh'g denied*, 439 U.S. 885 (1928).

60. Payton v. New York, 445 U.S. 573, 586 (1980).

61. *See* United States v. Jeffers, 342 U.S. 48 (1951); United States v. Erb, 596 F.2d 412 (10th Cir. 1979).

62. For other exceptions to the warrant requirement, see Chimel v. California, 395

enter a private dwelling for some limited purpose if the prosecution establishes that the officers have probable cause and exigent circumstances exist.[63]

Probable cause to search a dwelling exists "when circumstances known to a police officer are such as to warrant a person of reasonable caution in the belief that a search would reveal incriminating evidence."[64] Exigent circumstances exist when officers have reason to believe that criminal evidence may be destroyed[65] or removed[66] before a warrant can be obtained. In assessing whether exigent circumstances exist, the court is "guided by the realities of the situation presented by the record."[67] Courts will not attempt to second-guess the police: the circumstances are evaluated as they would appear to a prudent, cautious and trained officer.[68]

In *United States v. Cuaron*,[69] police entered and secured the defendant's home without a search warrant because they feared that he would destroy or attempt to remove drugs. The police theorized that the failure of the defendant's carrier to return from a drug transaction, at which he was arrested by undercover police, might give notice to the defendant that problems had arisen.[70] The Court of Appeals for the Tenth Circuit upheld the warrantless search by holding that exigent circumstances were created by the two or three hour time delay between the arrest of the courier[71] and the procurement of a search warrant.

C. *Facts*

The defendants, John and Debra Mabry, appealed their convictions of drug related offenses claiming that the trial court committed reversible error by refusing to suppress evidence seized by government officials as a result of an unconstitutional entry into their home.[72] The

U.S. 752 (1969) (after making an arrest, police may conduct a warrantless search of the area within the defendant's (arrestee's) immediate control); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (evidence associated with criminal activity may be seized without a search warrant when police are lawfully on the premises and the evidence is in plain view).

63. United States v. Cuaron, 700 F.2d 582, 586 (10th Cir. 1983) (citing United States v. Erb, 596 F.2d 412, 417, 419 (10th Cir.), *cert. denied*, 444 U.S. 848 (1979); *see, e.g.*, United States v. Chavez, 812 F.2d 1295, 1298 (10th Cir. 1987).

64. United States v. McEachin, 670 F.2d 1139, 1142 (D.C. Cir. 1981) (quoting United States v. Hawkins, 595 F.2d 751, 752 n.2 (D.C. Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 910 (1979)).

65. *Cuaron*, 700 F.2d at 586 (citing *Erb*, 596 F.2d at 418-19).

66. *Id.* (citing *McEachin*, 670 F.2d at 1144-45).

67. *Id.* (quoting *McEachin*, 670 F.2d at 1144).

68. *Id.*

69. 700 F.2d 582 (10th Cir. 1983).

70. *Id.* at 585.

71. The police did not obtain a search warrant until after they had completed the drug transaction and arrested the courier. *Id.*

72. United States v. Mabry, 809 F.2d 671, 676 (10th Cir. 1987). The Mabrys were jointly tried along with co-defendant Roger Sanders. The issues raised here relate only to the Mabrys. Sanders presented only one issue on appeal—he contended that the trial court committed reversible error by denying his requested jury instruction on entrapment. *Id.*

Each of the defendants were found guilty on various counts of conspiracy to distribute

Mabrys specifically sought to exclude evidence discovered by the Albuquerque, New Mexico Police Department, after officers entered their home without consent and conducted a protective sweep of the premises before obtaining a search warrant.[73]

The trial court concluded, and the Mabrys agreed, that the investigating officers had probable cause to search the Mabrys' home and that exigent circumstances had made the warrantless entry necessary.[74] The Mabrys argued, however, that the officers involved had sufficient facts to justify the issuance of a search warrant *before any exigent circumstances arose*.[75] On that premise, appellants specifically argued that "police inactivity and disregard of the procedures available to obtain a search warrant could not justify the warrantless entry into and seizure of a private residence under the guise of exigent circumstances."[76]

The facts giving rise to the warrantless entry and protective sweep of the Mabry residence were derived from an undercover narcotics investigation which was conducted by the Albuquerque, New Mexico Police Department. That investigation consisted of several drug purchase and sale transactions over the course of a month between an undercover officer, Gonzales, and Rodger Sanders, co-defendant. During the course of those transactions, Sanders would not reveal the identity of his source, but did intimate to undercover officer Gonzales that his source lived in nearby Tijeras, New Mexico.[77]

On the morning of the defendants' arrests, Officer Gonzales met with Sanders to discuss the purchase of a large quantity of cocaine. After Sanders stated that he needed to call his source, Gonzales observed and recorded the numbers that Sanders dialed.[78] By early afternoon, the police learned that this telephone number belonged to the defendant, John Mabry.

Two detectives went to survey and photograph the Mabry residence that afternoon. By 7:00 p.m., a photograph of the Mabry residence was made available to ten law enforcement detectives[79] when they met to plan their surveillance strategy for Gonzales' drug purchase that same evening.[80]

When Gonzales and another officer met with Sanders, a disagreement over how much money should be paid in advance for the cocaine,

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cocaine in violation of 21 U.S.C. § 846 (possession with intent to distribute cocaine); 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) (distributing cocaine); 18 U.S.C. § 2 (aiding and abetting). *Id.* at 673.

73. *Id.*

74. *Id.* at 679-80.

75. The Mabrys raised a total of seven issues on appeal, and the court ruled in favor of the Government on all seven issues.

76. *Id.* at 678 (quoting Brief for Appellants at 12, United States v. Mabry, 809 F.2d 671 (10th Cir. 1987) (No. 85-2322).

77. *Id.* at 673-75.

78. *Id.*

79. *Id.* The photograph of the Mabry residence was attached to the affidavit in support of a search warrant. *Id.* at 689 (McKay, J., dissenting).

80. *Id.*

and a desire by Gonzales to inspect some of the cocaine, caused Sanders to make two trips to the Mabry residence between 9:00 p.m. and 10:30 p.m. During each trip, Sanders was observed by detectives driving up to the Mabry residence and leaving.[81]

The police did not begin the process of obtaining a search warrant for the Mabry home until after they arrested Sanders at 11:07 p.m. when he returned from the Mabry residence with two ounces of cocaine.[82] At this time, the police also determined that there were exigent circumstances making it necessary for six officers to proceed to the Mabry house in order to secure the home and its contents while awaiting the search warrant.[83]

Detective Gonzales was asked at trial why he did not obtain a search warrant for the Mabry residence after he observed Sanders dialing the telephone of John Mabry. He stated that he did not know who the connection was or where the house was located, and therefore, probable cause was not present.[84]

D. *Majority Opinion*

The majority agreed that Officer Gonzales' observation of Sanders calling the Mabry residence did not create sufficient probable cause to justify the issuance of a search warrant for the Mabry house.[85] Moreover, in determining the reasonableness of police activities, the majority stated that courts must be sensitive to the nature of police investigations and their public interest goals.[86]

The objective of a drug investigation is to effect an undercover transaction with a seller in such a manner that the seller will lead the police to both the supplier and the contraband.[87] In the instant case, the court held it was perfectly proper that the police did not attempt to obtain a search warrant until *the source of the cocaine was established to the satisfaction of the officers*.[88] This did not come to pass until Sanders made his last trip from the parking lot to the Mabry home, after Sanders had been given money to bring back a portion of the one-half pound of cocaine.[89]

After the majority set the standard for obtaining a search warrant,

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81. *Id.*

82. *Id.* at 690 (McKay, J., dissenting). Officers were dispatched to Albuquerque to obtain a search warrant at approximately 11:30 p.m. The officers who secured the home received the search warrant approximately two and one-half hours later, at 2:00 a.m. *Id.*

83. *Id.* at 674-75. The officers, experienced in drug transactions, feared that John Mabry would get suspicious and destroy incriminating evidence when Sanders failed to return.

84. *Id.* at 674.

85. *Id.* at 677. The majority merely stated that they agreed with Officer Gonzales, and did not discuss why probable cause was lacking at this point.

86. *Id.*

87. *Id.*

88. *Id.* (emphasis added). The majority appeared to be referring to the officers' actual knowledge, and not probabilities.

89. *Id.*

they focused on whether the officers' warrantless entry into the Mabry home was supported by exigent circumstances. The court relied on *United States v. Cuaron*[90] by holding that the officers' fear, that Mabry might grow suspicious about Sanders' failure to return, justified a warrantless entry into the Mabrys' home for the purpose of preventing the destruction of evidence while a search warrant was being obtained.[91]

E. *Dissent*

In dissenting, Judge McKay suggested that although the majority correctly quoted the Mabrys' chief contention on appeal,[92] the majority failed to squarely confront this contention.[93] The court's decision focused entirely on the exigent circumstances which arose between the time of the arrest of Sanders and the warrantless entry into Mabry's home, and not the real issue of whether there was sufficient probable cause far enough in advance of Sander's arrest that a warrant should have been pursued prior to that time.[94]

McKay asserted that it was not the function of a police officer to determine whether there was sufficient probable cause to justify the issuance of a warrant, because "the very person whose behavior is meant to be circumscribed by the warrant requirement is the one who determines whether a warrant should issue."[95] This rule is particularly important, McKay noted, when the rise of exigent circumstances is predictable and inexorable.[96]

McKay also argued that the majority's reliance on *United States v. Cuaron* was misplaced because the issue in *Cuaron* was simply whether the warrantless entry was justified by exigent circumstances, and not, as in the present case, whether probable cause was present before the exigent circumstances arose.[97]

F. *Analysis*

Judge McKay, in dissent, was correct in asserting that the majority

90. 700 F.2d 582 (10th Cir. 1983). In *Cuaron*, the officers in a clandestine drug investigation kept a surveillance on the route of a suspected drug seller to his source/supplier's home one and one-half hours prior to the seller's arrest. The agents, as in the present case, began efforts to obtain a search warrant for the home of the source/supplier, Cuaron, after the seller's arrest. After waiting approximately 40 minutes, the officers proceeded to secure Cuaron's home before the search warrant was obtained. *Id.* at 585.

In upholding the officers' warrantless entry into Cuaron's home, the Court of Appeals for the Tenth Circuit held that waiting to search does not necessarily remove the presence of exigent circumstances, even if the officers may have waited long enough to obtain a search warrant. *Id.* at 590 (citing United States v. McEachin, 670 F.2d 1139, 1145 (D.C. Cir. 1981)); *see* United States v. Johnson, 361 F.2d 832, 842, 844 (D.C. Cir.) (en banc), *cert. denied*, 432 U.S. 907 (1977)).

91. *Mabry*, 809 F.2d at 677-79.

92. See text accompanying notes 77-78.

93. 809 F.2d at 688-89 (McKay, J., dissenting).

94. *Id.* (McKay, J., dissenting).

95. *Id.* at 692 (McKay, J., dissenting).

96. *Id.* at 689 (McKay, J., dissenting).

97. *Id.* at 694 (McKay, J., dissenting).

did not address the Mabrys' chief contention, although it was correctly cited by the court.[98] The majority instead examined the presence of exigent circumstances and concluded that its decision in *Cuaron* was dispositive.[99] The court in *Cuaron*, however, addressed the issue of whether exigent circumstances were present,[100] and did not address the issue of whether a warrantless search was excusable because probable cause to obtain a warrant existed prior to the rise of exigent circumstances.

As Judge McKay noted, there was no evidence presented by the state as to why the officers had not made an attempt to obtain a warrant, other than Officer Gonzales' assertion that he did not think he had probable cause earlier in the afternoon.[101] Thus, there was no evidence to rebut the Mabrys' contention that probable cause existed as late as 7:00 that evening. Despite the absence of evidence, the majority concluded that it was perfectly proper that the police did not attempt to obtain a warrant until the source of the cocaine was established to the satisfaction of the police.[102] The majority also failed to explain, as Judge McKay noted in his dissent, why the officers could not have sought a warrant earlier and waited to execute the warrant later in the day.[103] As a result of this case, the determination of whether probable cause exists is taken away from the judiciary and left in the hands of the police. Such a result is particularly disheartening in the instant case because exigent circumstances are almost always sure to arise in undercover drug operations.[104]

98. The Mabrys contended that "the facts in possession of the police at least five hours before the warrantless entry [of the Mabry residence] would have led any prudent and trained officer to believe that there was a 'fair probability that contraband or evidence of crime' would be found in the Mabry residence. Under the totality of the circumstances of this case, the officers involved had probable cause to search the Mabry residence as early as late afternoon on April 4, 1985, and no later than the strategy meeting at 7:00 p.m." *Id.* at 676-77 (quoting Brief for Appellants at 20-21, United States v. Mabry, 809 F.2d 671 (10th Cir. 1987) (No. 85-2322) (citations omitted)); *see also id.* at 688 (McKay, J., dissenting).

99. In addressing the Mabrys' contention that probable cause existed prior to the exigent circumstances, the court stated "[w]e believe that this court, in *United States v. Cuaron*, . . . effectively put this contention to rest." *Id.* at 678. The majority therefore believed that *Cuaron* was controlling even though the Mabrys did not deny that exigent circumstances were present.

100. *Id.* at 586. The chief contention of the defendant in *Cuaron* was that the police had no objective basis to believe that destruction of criminal evidence was imminent; *see also Mabry*, 809 F.2d at 694 (McKay, J., dissenting).

101. 809 F.2d at 691 (McKay, J., dissenting).

102. *Id.* at 677 (McKay, J., dissenting).

103. *Id.* at 693 (McKay J., dissenting).

104. *See, e.g.*, United States v. Cuaron, 700 F.2d 582 (10th Cir. 1983); United States v. Chavez, 812 F.2d 1295 (10th Cir. 1987) (examples of how predictably the police can proceed without warrants due to the fear of the destruction of evidence, i.e. drugs).

III. FIFTH AMENDMENT—MIRANDA WARNINGS AND VOLUNTARINESS OF CONFESSIONS:

UNITED STATES V. CHALAN

A. *Overview*

In *United States v. Chalan*,[105] the Court of Appeals for the Tenth Circuit elaborated on the definitions of custody for purposes of administering Miranda warnings and eliciting involuntary statements.

B. *Background*

1. Custodial Interrogation

In *Miranda v. Arizona*,[106] the Supreme Court held that the prosecution may not use statements derived from custodial interrogation[107] unless it demonstrates the use of procedural safeguards effective to secure the fifth amendment privilege against self-incrimination.[108] The Court in *Miranda* explained the inherent threat of compulsion in custodial surroundings and that statements obtained from suspects cannot truly be the product of the suspect's free choice unless adequate warnings are employed to dispel the compulsion.[109] Furthermore, the Court stated that it would not pause to inquire in individual cases whether the defendant was aware of his fifth amendment rights without a Miranda warning being given.[110] Thus, the Court laid down a blanket rule which excludes all statements obtained from custodial interrogation unless it is shown that the suspect received adequate warnings as to the availability of the privilege prior to the questioning.[111]

Since the compulsion of self-incrimination is derived from the custodial surroundings and not necessarily the interrogation, statements obtained from police interrogation are admissible so long as the suspect was not in custody at the time of the questioning.[112] The Supreme Court in *Miranda* stated that "[b]y custodial interrogation, we mean

105. 812 F.2d 1302 (10th Cir. 1987).

106. 384 U.S. 436 (1966) (Landmark decision whereby the Court set forth procedural safeguards, now more commonly known as Miranda warnings, which must be followed by police when subjecting suspects to "custodial interrogation").

107. See text accompanying note 115.

108. 384 U.S. at 458-65.

109. *Id.* at 457. Prior to *Miranda*, the admissibility of statements obtained from police interrogation was generally determined by reference to the voluntariness of the statement, in light of due process protection provided by the fourteenth amendment. See text accompanying notes 126-28.

110. 384 U.S. at 467-68.

111. *Id.* at 468 ("The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.").

112. California v. Beheler, 463 U.S. 1121 (1983) (suspect who voluntarily accompanied police to station house after reporting a homicide was not in custody for purpose of Miranda warnings when he was told that he was not under arrest and afterward was permitted to leave); Oregon v. Mathiason, 429 U.S. 492 (1977) (burglary suspect who voluntarily came to police station for questioning and then left without being arrested was not in custody for purpose of Miranda warnings).

questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[113] Although the question of whether a person is in custody is not very ambiguous, the latter part of the Court's definition of custody—"otherwise deprived of his freedom"—has been the focus of numerous decisions[114] subsequent to *Miranda*.

The Supreme Court in *Miranda* alluded that an accused who was the focus of an investigation must be given Miranda warnings,[115] but the Court has since rejected such an interpretation of "custodial interrogation."[116] Instead, the Court had stated that the ultimate inquiry in deciding the custody question "is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[117]In making this determination the Court has examined "how a reasonable man in the suspect's position would have understood his situation."[118]

In *Oregon v. Mathiason*,[119] the Court held that a suspect who "voluntarily" came to the police station in response to a police request was not in custody, and was therefore not entitled to Miranda warnings.[120] In reversing the Oregon Supreme Court, the United States Supreme Court stated that a noncustodial situation was not converted to one in which *Miranda* applies simply because the questioning took place in a coercive environment. A formal arrest or "restraint on freedom of movement" of the kind associated with a formal arrest must be present before Miranda warnings are triggered, even though the questioning takes places in a coercive environment.[121]

2. Voluntariness

The fifth amendment's privilege against self-incrimination prohibits the admission of incriminating statements obtained by government acts, threats, or promises which permit the defendant's will to be overborne

113. *Miranda*, 384 U.S. at 444.

114. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420 (1984); Florida v. Royer, 460 U.S. 491 (1983); Dunaway v. New York, 442 U.S. 200 (1979); Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976); Orozco v. Texas, 394 U.S. 324 (1969); Mathis v. United States, 391 U.S. 1 (1968); Osborn v. United States, 385 U.S. 323 (1966); Hoffa v. United States, 385 U.S. 293 (1966).

115. *Miranda*, 384 U.S. at 444 n.4.

116. *See* Beckwith v. United States, 425 U.S. 341 (1976). The Court explicitly rejected the defendant's argument that the mere fact that an investigation had "focused" on him meant that he was entitled to Miranda warnings. *See also* United States v. Ellison, 791 F.2d 821, 823 (10th Cir. 1986).

117. California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curium) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).

118. *McCarty*, 468 U.S. at 442. "[A]n objective, reasonable-man test is appropriate because, unlike a subjective test, 'it is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.' " *Id.* at 442 n.35 (summarizing and quoting People v. P., 21 N.Y.2d 1, 9-10, 233 N.E.2d 255, 260, 286 N.Y.S.2d 225, 233 (1967)).

119. 429 U.S. 492 (1977).

120. *Id.* at 495.

121. *Id.*

and thus rendered involuntary.[122] To determine whether a suspect's statements are made voluntarily, a court examines the "totality of the circumstances" including both the characteristics of the accused and the details of the interrogation.[123]

Prior to *Miranda*, the admissibility of statements obtained from police interrogation was generally determined only by reference to the voluntariness of the statement.[124] The *Miranda* decision did not pre-empt or alter the application of the voluntariness test; instead, the decision merely added another variable into the admissibility of those confessions obtained during custodial interrogation.[125] Statements made involuntarily are still inadmissible, regardless of whether Miranda warnings are given or were not required because the questioning did not constitute "custodial interrogation."[126]

Because the subjective nature of the "voluntariness" test prevents any formulation of clear guidelines, the admissibility of confessions must be determined on a case-by-case basis. The ultimate inquiry, however, is whether the confession was the product of free will.[127] If the confession is not the product of free will, the confession will not be admissible even though it appears to be reliable and not the result of conscious wrong doing by the interrogator.[128] Although no single factor is determinative of the issue of voluntariness, the following factors are important when considering the "totality of the circumstances:" the nature of the questioning, the length of interrogation, the number of interrogators, the suspect's age, education and experience, and the use of physical punishment.[129]

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122. Malloy v. Hogan, 378 U.S. 1 (1969); United States v. Fountain, 776 F.2d 878 (10th Cir. 1985); United States v. Falcon, 766 F.2d 1469 (10th Cir. 1985).

123. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973), where the court stated:

> "Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep."

Id. at 226 (citations omitted). *See also* Culombe v. Connecticut, 367 U.S. 568 (1961); United States v. Fountain, 776 F.2d 878 (10th Cir. 1985); United States v. Falcon, 766 F.2d 1469 (10th Cir. 1985).

124. The aim of this inquiry was to determine whether a suspect's right to due process under the fourteenth amendment had been violated. *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963) (confession not admissible when obtained after suspect was given drug with truth serum qualities); Rogers v. Richmond, 365 U.S. 534 (1961) (confession induced after police pretended to arrest suspect's sick wife held not admissible).

125. *Miranda* directs that statements are to be excluded, regardless of their voluntariness, if the statements were obtained during custodial interrogation and were not preceded by Miranda warnings.

126. Miranda v. Arizona, 384 U.S. 436, 468 (1966).

127. *Bustamonte*, 412 U.S. at 225.

128. *See Sain*, 372 U.S. 293 (confession held involuntary, even though investigators were unaware of truth serum qualities of drug which they gave to the defendant to suppress symptoms of withdrawal from heroin).

129. *Bustamonte*, 412 U.S. at 226; *see supra* note 124 (for the Court's language listing the factors).

C. *Facts*

Defendant Daniel Chalan, an adult Indian who lived on the Cochiti Pueblo in New Mexico, was identified by a witness as being one of four young Indian males seen near a convenience store at the time that it was robbed and its assistant store manager shot and bludgeoned to death.[130] The day after the robbery and murder, federal and local law enforcement officers contacted Chalan through a message conveyed to him by his mother, and asked him to meet them at the Pueblo Governor's office.[131]

Chalan arrived at the Governor's office, accompanied by his mother. At the beginning of the interview he was explicitly informed that he did not have to answer any questions, that he was not a suspect in the case, and that the officers merely wanted him to provide them with information.[132] The questioning, however, was often accusatory, and the investigators,[133] the Governor, and Chalan's mother exhorted him to tell the truth.

At no time during the interview was Chalan arrested or given any Miranda warnings. After approximately one and one-half hours of questioning, the interview ended and Chalan departed *without ever admitting to any participation* in the robbery and murder.[134]

The day after the interview at the Pueblo Governor's office, Chalan spoke with several of his cousins about the murder and robbery and decided to discuss the crimes with the law enforcement officers again. An FBI agent came to the home of Chalan's cousin after Chalan asked his relative to summon the Bureau. When the agent arrived, Chalan confessed to having committed the crimes before the agent had asked Chalan any questions.[135] The agent then informed Chalan of his Miranda rights and Chalan signed a written waiver-of-rights form and then gave a detailed confession, which was later reduced to writing and signed.[136] The confession occurred approximately twenty-two and one-half hours after Chalan was questioned the day before at the Pueblo Governor's office.[137]

At the suppression hearing preceding the trial, Chalan sought to exclude both his confession made to the FBI agent and his statements made the day before at the Pueblo Governor's office. Chalan argued that he was subjected to custodial interrogation at the Pueblo Gover-

130. United States v. Chalan, 812 F.2d 1302, 1305 (10th Cir. 1987).

131. *Id.* at 1305.

132. *Id.* The officers wanted to know whether Chalan knew anything about the crimes at the convenience store.

133. Chalan was questioned by an FBI agent, two investigators from the Bureau of Indian Affairs, and an officer from the local sheriff's department. *Id.*

134. *Id.*

135. *Id.* The court did not state what Chalan said specifically.

136. *Id.*

137. *Id.* The time frame of the confession sheds light on the validity of Chalan's claim that he was still operating under coercion that allegedly was placed on him at the Governor's office. As more time transpires between the questioning and confession, there is less likelihood that the coercive questioning caused the subsequent confession.

nor's office without first being admonished of his constitutional rights in violation of *Miranda*. Specifically, Chalan argued that his attendance at the interview was compelled by tribal custom, which demands he not refuse a request by the Pueblo Governor to come to his office and which requires him to remain until dismissed.[138]

Alternatively, Chalan argued that his statements at the Pueblo Governor's office were made involuntarily because his mother, the investigators, and the Governor exhorted him to tell the truth. Furthermore, he argued that the confession made the following day was also given involuntarily.

D. *Tenth Circuit Opinion*

1. Custody

The Tenth Circuit affirmed the district court's determination that Chalan could not reasonably have believed that he was in custody during the interview at the Pueblo Governor's office.[139] Chalan's argument that his attendance at the interview was compelled by tribal custom was also rejected by the court.[140] The court stated that it was unconvinced that the Governor's influence sufficiently restrained Chalan's freedom so as to necessitate the safeguards required by *Miranda*, although Chalan had presented evidence at the suppression hearing that suggested that obedience to the Governor is expected of all tribal members.[141]

As in *Mathiason v. Oregon*,[142] the court apparently was not influenced by the coercive and accusatory nature of the interview.[143] The determinative factor was that Chalan came to the interview voluntarily and was free to leave at anytime.[144]

2. Voluntariness

The court assessed the "totality of the circumstances" surrounding Chalan's statements at the Governor's office by examining the personal characteristics of Chalan and the details of the investigation, and con-

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138. *Id.* at 1307.

139. *Id.*; *see also* United States v. Ellison, 791 F.2d 821 (10th Cir. 1986) (when reviewing denial of motion to suppress, trial court's findings of fact must be accepted unless clearly erroneous).

140. 812 F.2d at 1307.

141. *Id.* In addition to being in charge of the Pueblo police force, the Governor is the head of the Pueblo and presides over the tribal council.

142. 429 U.S. 492 (1977). The defendant in *Mathiason* had been asked to come to the police station to discuss his involvement in a recent burglary. While at the police station, a detective lied to Mathiason by stating that Mathiason's finger prints had been found at the scene of the burglary, when in fact no finger prints were found. Thereafter, Mathiason confessed to committing the burglary, but he was not arrested, and after further questioning was allowed to leave. *Id.* at 493-94.

The Supreme Court held that Mathiason was not in custody despite the coercive environment in which the questioning took place. The important fact, stated the Court, was simply whether Mathiason was free to leave during the questioning. *Id.* at 495.

143. *Chalan*, 812 F.2d at 1307.

144. *Id.* at 1307-08.

cluded that Chalan's statements were made voluntarily.[145] In regard to the details of the investigation, the court noted that Chalan's consistent denial of any participation in the crimes throughout the interview indicated that his free will was not overburdened by the questioning.[146] In addition, although all those present at the Governor's office exhorted Chalan to tell the truth, he was specifically informed at the beginning of the interview that he was not obligated to answer any questions. Finally, the court interpreted the presence of Chalan's mother throughout the interview as an indication that the interview was not unduly coercive.[147]

With respect to Chalan's personal characteristics, the court noted that he was not uneducated and that he also had experience with law enforcement procedures both as an officer for the Pueblo Police Department and as a prior arrestee.[148]

Chalan's confession was also examined, even though the court had already found that he was not subjected to undue coercion at the Governor's office.[149] The court noted that twenty-two hours had elapsed between his confession and the interview at the Governor's office and that, during this time, Chalan did not have any contact with the police. Moreover, Chalan initiated the contact and spontaneously confessed to the crimes upon seeing the FBI agent.[150] Finally, the court found the signed waiver form as strong proof of the voluntariness of Chalan's waiver to remain silent prior to confessing.[151]

E. *Analysis*

The Tenth Circuit aptly applied Supreme Court precedent in concluding that Chalan was not subjected to "custodial interrogation" at the Pueblo Governor's office. Although Chalan was asked by the police to come to the Governor's office, and the interrogation was often coercive and accusatory, the only relevant inquiry was whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.[152] The coercive nature of the environment in which the questioning took place was irrelevant for purposes of Miranda warnings, so long as Chalan remained free to leave.[153]

It was also correct for the Tenth Circuit to reject Chalan's argument

145. *Id.*
146. *Id.* at 1308.
147. *Id.*
148. *Id.* at 1305. Chalan was 22 years old at the time of the investigation and had attended some college. He also had been arrested twice and had earlier worked approximately one year as a law enforcement officer for the Pueblo.
149. Note that Chalan argued that his confession was involuntary because the coercion used in the interview was still operating when he made his confession the next day. Thus, it appears that the court's further examination of Chalan's confession was unnecessary, since the court had already found that the interview was not coercive.
150. *Id.* at 1308.
151. *Id.* (citing United States v. Fountain, 776 F.2d 878 (10th Cir. 1985)).
152. *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam); Oregon v. Mathiason, 429 U.S. 492, 495 (1977)(per curiam).
153. *See Mathiason*, 429 U.S. at 495 ("[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the

that his attendance at the Governor's office was compelled because, by tribal custom, he could not refuse the invitation. If the court did not reject this argument, then any citizen who is asked to come to the police station could argue that his sense of civic duty compelled his attendance, and that he therefore could be considered "in custody" for the purpose of Miranda warnings. Such a result would be contrary to the Supreme Court's desire to limit *Miranda* to formal arrests or restrictions on freedom of movements of the degree associated with arrests.[154]

In regard to the voluntariness of Chalan's statements, the court was correct in concluding that Chalan was not subjected to undue coercion at the Governor's office. Since the ultimate inquiry in examining "voluntariness" is to determine whether the suspect's will was overburdened, Chalan's consistent denials illustrate that his will was not overburdened, even though all those present exhorted him to tell the truth.

IV. HABEUS CORPUS—THE RIGHT TO A FEDERAL EVIDENTIARY HEARING:

PHILLIPS V. MURPHY

A. *Overview*

In *Phillips v. Murphy*,[155] the Tenth Circuit Court of Appeals held that habeas corpus petitioners are not entitled to evidentiary hearings in federal court, when their applications are supported by allegations that are vague and conclusory, and are wholly incredible in the face of the record.

B. *Background*

Federal courts in habeas corpus proceedings are empowered to provide trial-like proceedings in which the court may receive evidence and try the facts anew.[156] Indeed, in *Townsend v. Sain*[157] the Supreme Court held that this exercise of power by the federal courts is mandatory when the habeas applicant has not received a full and fair evidentiary hearing in state court.[158]

The Supreme Court elaborated in *Blackledge v. Allison*,[159] however,

absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.' ").

154. *See Beheler*, 463 U.S. at 1124.

155. 796 F.2d 1303 (10th Cir. 1986).

156. 28 U.S.C. § 2254 (1985); *see also* Townsend v. Sain, 372 U.S. 293 (1963). "The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." *Id.* at 311.

157. 372 U.S. 293 (1963).

158. *Id.* at 312. The defendant in *Townsend* had been injected with a drug to suppress symptoms of withdrawal from heroin before confessing. The defendant was then denied an opportunity in state court to present evidence that the drug had "truth serum" qualities which caused his confession to be involuntary *Id.* at 321-22.

159. 431 U.S. 63 (1977).

that it would be unwise to allow hearings in all federal post-conviction proceedings,[160] and that finality in the sentencing process should be sought for the good of the prisoner and the court.[161] It was recognized that many collateral attacks may be inspired by " 'a mere desire to be freed temporarily from the confines of the prison.' "[162] Despite the concern, the Court stated that the habeas corpus applicant in *Blackledge* was entitled to an evidentiary hearing because the allegations were not vague and conclusory but were supported by specific facts.[163] The critical question, explained the Court, was whether these allegations, when viewed against the record of the plea hearing, were so "palpably incredible," so "patently frivolous or false," as to warrant summary dismissal.[164]

C. *Facts*

The petitioner pleaded guilty in two separate state cases[165] and, after a pre-sentence investigation, received sentences totaling eighty-five years.[166] In so pleading, the petitioner was subjected to extensive inquiry by the state district court judge to determine whether the guilty pleas were voluntary and informed.[167] After sentencing, petitioner

160. *Id.* at 71.

161. *Id.* The defendant can then focus on rehabilitation, and the courts conserve vital resources, such as court time and the expense of revisiting judgments.

162. *Id.* at 72 (quoting Price v. Johnston, 334 U.S. 266, 284-85 (1948)).

163. *Id.* at 75-76. The petitioner in *Blackledge* sought habeas corpus relief on the ground that his guilty plea was involuntary due to an unkept plea agreement. At the state arraignment, the petitioner had entered a guilty plea by responding to form questions on an "adjudication form." One of the form questions asked petitioner whether he understood that he could be sentenced up to life, while another asked whether anyone had made any promises that would influence his plea of guilty. Petitioner was required to only write no or yes, and there were no other records or transcripts of the arraignment. *Id.* at 66 n.1.

Three days after his guilty plea, petitioner was sentenced to 17 to 21 years imprisonment. Thereafter, petitioner sought habeas corpus relief in federal district court claiming that his guilty plea was induced by his attorney's promise that he would get only a 10 year sentence. The petitioner elaborated on his claim with specific factual allegations, indicating exactly what the terms of the promise were; when, where, and by whom it had been made; and the identity of a witness to its communication. *Id.* at 76-77.

The federal district court dismissed the petition without an evidentiary hearing and held that the printed "form" was conclusive evidence that petitioner's guilty plea was voluntary. The dismissal was reversed by the Fourth Circuit. Blackledge v. Allison, 553 F.2d 894 (4th Cir. 1976).

The Supreme Court affirmed the circuit court's reversal by holding that the district court could not fairly adopt a per se rule excluding all possibility that a defendant's representations on the record at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment. *Blackledge*, 431 U.S. at 76.

The Court stated that a petition can be dismissed without an evidentiary hearing when the allegations are vague or conclusory, but not when the petitioner elaborates on his claim with specific factual allegations. *Id.* at 76-77.

164. *Id.* at 76.

165. Phillips v. Murphy, 796 F.2d 1303, 1303 (1986). The petitioner was charged in C.R.F. 80-346 with lewd molestation of a minor. In C.R.F. 80-653, he was charged with one count of robbery with a firearm, one count of first-degree rape, three counts of sodomy and two counts of kidnapping for extortion.

166. *Id.* Petitioner was sentenced to five years imprisonment in C.R.F. 80-346 and 80 years imprisonment in C.R.F. 80-653 to be served consecutively.

167. *Id.* at 1304-05. The state court asked the petitioner in open court whether he was

sought state relief claiming that his guilty pleas were neither voluntary nor intelligently made because he was operating under the impression that the district attorney had agreed to recommend a forty year sentence in exchange for his guilty pleas.[168]

The state court denied the petitioner's application for state post-conviction relief without conducting an evidentiary hearing. The same state district court judge that had questioned the petitioner before accepting his guilty pleas also ruled on the petitioner's motion for post-conviction relief. The state court judge concluded that, in light of the record and prior proceedings, the matter was a question of law and did not require an evidentiary hearing.[169]

Thereafter, pursuant to 28 U.S.C. § 2254,[170] petitioner brought a petition in federal district court for a writ of habeas corpus. The district court dismissed petitioner's petition by order without an evidentiary hearing and petitioner appealed.[171] In addition to his original claim for post-conviction relief, the petitioner argued on appeal that he should have received an evidentiary hearing because his post-conviction proceeding raised material issues of fact.[172]

D. *Tenth Circuit Opinion*

The Tenth Circuit acknowledged that, if the facts are in dispute and the habeas corpus applicant does not receive a full and fair evidentiary hearing in state court, the applicant is entitled to an evidentiary hearing in federal court.[173] However, the applicant is not entitled to an evidentiary hearing when his assertions are wholly incredible in the face of the record.[174]

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aware of the following: the court was advised that there were no negotiations between the District Attorney's office and his lawyers, whereby there would be any recommended sentence to be presented to the court; that the sentence would be left to the discretion of the court; and that the defendant in the related case who was charged conjointly with the petitioner in C.R.F. 80-653 (alleging robbery with a firearm, first degree rape, sodomy, and kidnapping for extortion) received a 70 year sentence and that the court would probably take that verdict into consideration in determining the petitioner's sentence.

The court also asked whether he was entering his plea of guilty due to any force, or threats or inducements made to him by any officer, attorney, or anyone else. *Id.*

168. *Id.* Since the petitioner stated in court that his guilty plea was not induced by any promises, the assumption must be that petitioner argues he responded negatively in order to receive a lower sentence.

Petitioner also argued that his guilty pleas should be set aside because he was not placed under oath at the time of the plea proceedings. The Fifth Circuit has a supervisory rule which requires that defendants be placed under oath when the court inquiries as to plea agreements. *See* Coody v. United States, 470 F.2d 540 (5th Cir. 1978), *vacated*, 588 F.2d 1089 (5th Cir. 1979) (per curiam).

The Tenth Circuit declined to adopt such a rule and noted that no constitutional basis for the procedural rule was intimated by the Fifth Circuit in *Coody*. Thus, in the Tenth Circuit, statements made in open court during plea proceedings are accepted even when the defendant is not placed under oath.

169. 796 F.2d at 1305.

170. 28 U.S.C. § 2254 (1982).

171. 796 F.2d. at 1305.

172. *Id.* at 1303.

173. *Id.* at 1304 (citing Townsend v. Sain, 372 U.S. 293 (1963)).

174. *Id.* (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)) ("Solemn declarations in

The court reviewed the record and findings from the plea proceedings and concluded that the petitioner's assertion that the district attorney was to recommend a forty year sentence was *wholly incredible*.[175] The court noted that the petitioner was aware of statements in the plea proceedings indicating there were no negotiations on the sentence and that the judge's sentencing decision would be influenced by a seventy-seven year sentence given to another defendant charged conjointly with the petitioner.[176] Thus, since the petitioner's assertion was found to be "wholly incredible," he was not entitled to an evidentiary hearing in federal court, even though he alleged factual disputes and did not receive the hearing in state court.[177]

Furthermore, the Tenth Circuit held that the state district court's finding that the plea was entered without negotiations with the office of the district attorney was a historical fact[178] subject to a habeas corpus presumption of correctness standard. Thus the petitioner was not free to contest this finding in federal court unless he met the requirements of 28 U.S.C. § 2254(d).[179] Although the ultimate question—whether a

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open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). See text accompanying note 166.

175. 796 F.2d at 1305.

176. *Id.* The court also noted that petitioner did not attempt to support his allegations with specifics as to when or how such an understanding between him and the district attorney was made.

177. *Id.*

178. The factual circumstances surrounding a habeas corpus petitioner's claim are determined by the state court. *See, e.g.*, Patton v. Yount, 467 U.S. 1025, 1036-40 (1984).

179. Section D states:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record. . . .

challenged confession was obtained in a manner compatible with the Constitution—is generally a matter for independent federal determination,[180] the court found that here the historical fact was dispositive of petitioner's claim for federal habeas relief.[181]

E. Analysis

The Tenth Circuit's decision in *Phillips* was dictated by *Blackledge v. Allison*,[182] in which the Supreme Court made it clear that summary dismissal is appropriate when habeas corpus petitioners state vague and conclusory allegations.[183] The petitioner in *Phillips* failed to include any factual allegations which would support his claim that the district attorney had agreed to recommend a lower sentence in exchange for his plea. Philips summary dismissal was therefore appropriate, unlike in *Blackledge* where the petitioner alleged exactly what the terms of the alleged unkept promise was, who it had been made by, when and where it had been made, and the identity of a witness to the communication.[184] As a result of *Philips*, it is clear that future habeas corpus petitioners will be subject to summary dismissal unless they include factual allegations in the petition to support their claims.

V. Prosecutor's Duty to Disclose Favorable Evidence: *Bowen v. Maynard*

A. *Overview*

The framework for evaluating the materiality of undisclosed evidence has recently been changed by the Supreme Court's decision in *United States v. Bagley*.[185] The Tenth Circuit, in recently decided *Bowen v. Maynard*,[186] held that the standard set forth in *Bagley* is satisfied if the materiality of the undisclosed information meets both standards of *United States v. Agurs*.[187]

B. *Background*

In *Brady v. Maryland*,[188] the Supreme Court held that "the suppression by the prosecution of requested evidence favorable to an accused violates due process where the evidence is material either to guilt or

180. 796 F.2d at 1305 (citing Mitter v. Fenton, 474 U.S. 104 (1985)). While the habeas corpus court is not free to challenge the facts found by the state court, it can disagree with the state's legal conclusions based on those facts.

181. *Id.* Since the petitioner's claim of involuntariness was based on the assertion that the district attorney agreed to recommend a lower sentence, the claim was disposed of by the state court's finding of fact that there were no negotiations conducted with the district attorney.

182. 431 U.S. 63 (1977).

183. See text accompanying notes 161-66.

184. *See supra* note 165 and accompanying text.

185. 473 U.S 667 (1985).

186. 799 F.2d 593 (10th Cir. 1986).

187. 427 U.S 97 (1976).

188. 373 U.S. 83 (1963).

punishment. . . ."[189] Such evidence is commonly referred to as *Brady* evidence.[190]

The law has recently been changed, however, with respect to the framework for evaluating the materiality of *Brady* evidence. Prior to the Supreme Court's decision in *United States v. Bagley*,[191] the materiality of evidence was judged according to three distinct standards enunciated in *Agurs*.[192] These three *Agurs* standards were replaced with one standard in *Bagley*,[193] but it is yet to be determined whether *Bagley* will be applied retroactively.[194]

The Tenth Circuit did not determine in *Bowen* whether *Bagley* should be applied retroactively; rather, they examined the standards set forth in *Agurs*. The applicability of the *Agurs* standards was dependent upon the factual circumstances of each case. First, where the prosecution knew or should have known that its case included perjured testimony, the conviction would be overturned if there was any *reasonable likelihood* that the false testimony could have affected the judgment of the jury.[195] Second, where defense counsel requests disclosure of specific evidence, the request puts the prosecution on notice of its obligation to disclose, and the verdict therefore has to be set aside if the suppressed evidence *might have* affected the outcome of the trial.[196] This test is commonly referred to as the "lower" *Agurs* standard. Third, where the prosecution received no request or a general request for all *Brady* material,[197] the judgment would be set aside if the omitted evidence created a *reasonable doubt* that would not otherwise have existed.[198] This last test is commonly referred to as the "strict" *Agurs* standard.

In *Bagley* the Court replaced the three Agurs standards of materiality with one single test to be applied in all instances of nondisclosure. The Court held that evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed, the result of the proceeding would have been different.[199] "Reasonable probability" was defined as probability *sufficient to undermine confidence in the outcome*.[200]

189. *Id.* at 87. Impeachment evidence also falls within the protection of the Brady rule, if its suppression would deprive the defendant of a fair trial. *See* Giglio v. United States, 405 U.S. 150 (1972).

190. *See* Moore v. Illinois, 408 U.S. 786, 794-95 (1972).

191. 473 U.S. 667 (1985).

192. *See infra* notes 197-200 and accompanying text.

193. *See infra* notes 201-02 and accompanying text.

194. *Bagley* was decided while *Bowen* was on appeal to the Tenth Circuit. Since the Tenth Circuit found that the withheld material satisfied both of the applicable *Agurs* tests of materiality, it held that there was no need to determine whether the unitary test of *Bagley* should be applied retroactively. *Bowen*, 799 F.2d at 603.

195. *Agurs*, 427 U.S. at 103-04.

196. *Id.* at 104.

197. A general request does not give the prosecution notice of any specific obligation, and therefore is treated as though no request was made. *Id.* at 112.

198. *Id.*

199. 473 U.S. 667, 682 (1985); *see also id.* at 685 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and in judgment).

200. 473 U.S. at 682; *see also* Strickland v. Washington, 466 U.S. 668, 694 (1984).

C. *Facts*

Defendant Clifford Bowen was convicted of three counts of first degree murder,[201] in charges stemming from a notorious triple homicide in Oklahoma City, Oklahoma, known as the "Guest House Murders." The three victims were shot at the Guest House Hotel while sitting around a poolside table late at night.[202] The State's theory of the crime was that Bowen was hired by a local drug dealer, Harold Behrens,[203] to kill one of Behrens' conspirators, Ray Peters, whom Behrens feared would turn informant in light of pending drug charges.[204]

The evidence used to convict Bowen consisted primarily of testimony by two witnesses who testified that they saw Bowen in the pool area before the shooting, and that after gunshots were heard, they saw Bowen run and flee in a waiting vehicle. In defense, Bowen claimed that he was not in Oklahoma when the murders occurred, and offered twelve witnesses who testified that he was at a rodeo in Tyler, Texas until midnight on that night.[205]

After Bowen was convicted, his attorneys learned that earlier in the investigation the police had an initial prime suspect, Lee Crowe, who resembled Bowen in physical appearance.[206] Based on this information, the defense attorneys motioned for a new trial claiming that the prosecution withheld exculpatory evidence from the defense in violation of the *Brady* rule.[207] Furthermore, the defense attorneys stated that prior to trial, they had made a specific oral request to the prosecution to pro-

201. Bowen v. Maynard, 799 F.2d 593, 595 (10th Cir. 1986). At trial, Bowen received death sentences on each count. His convictions were affirmed on appeal and the court set his execution for August 12, 1985. *See* Bowen v. Oklahoma, 715 P.2d 1093 (Okla. Crim. App. 1984), *cert denied*, 473 U.S. 911 (1985).

202. *Bowen*, 799 F.2d at 596-98.

203. *Id.* Behrens was formerly a detective in the organized crime detail of the Oklahoma City Police Department. He became a suspect when his former supervisor, Detective Sergeant David McBride, recognized the circulated description of the gunman as being someone who Behrens had investigated while on the force. The supervisor recalled that toward the later stages of the investigation, Behrens quit the department and shortly thereafter Bowen was no longer seen in Oklahoma City. *Id.* at 597.

204. Shortly before the shooting, Behrens and his lover Herman Borden had been sitting at the poolside table with Peters and the two other murder victims. Upon leaving the table, Behrens put his hand on Peters' shoulder and said he would see him tomorrow. A former lover of Behrens testified at trial that it was not Behrens' custom to make physical contact with people upon parting company. The State contended that Behrens' gesture "fingered" Peters for the hit man. *Id.* at 598-99.

205. *Id.*

206. Lee Crowe was employed as a police officer in Hanahan, South Carolina, at the time of the murders. Both Crowe and Bowen fit the description of the shooter: white, six feet two inches tall, 225 pounds, salt and pepper hair, beer belly, and pale complexion. *Id.* at 600.

Crowe also habitually carried a .45 caliber pistol with unusual and expensive silver-tipped hollow point ammunition; the type found at the scene of the murders. *Id.* at 599, 600 n.2.

Bowen's lawyers became aware of Crowe when they were contacted by South Carolina law enforcement agents who suspected that Crowe was a hit man for organized crime. Not until the first day of the federal hearings (five years after Bowen's convictions) did Bowen's attorneys discover the full extent of information which the state had concerning Lee Crowe. *Id.* at 602. *See infra* note 216.

207. *See supra* note 191 and accompanying text.

duce any information concerning other suspects. As a result of the nondisclosure, the defense attorneys argued that the materiality of the undisclosed information might have affected the outcome of the trial and should be judged by the lower *Agurs* standard.[208]

Following an evidentiary hearing to determine the materiality of the withheld information, the state court concluded that the withheld information did not warrant a reversal of Bowen's convictions.[209] The state court applied the stricter *Agurs* standard[210] and found that the evidence did not undermine the confidence of the guilty verdict.[211] It is not clear from the state court record, however, whether the court found that no oral request was made or whether the court simply held that *Brady* requests must be in writing in order to trigger the stricter *Agurs* standard.[212]

After the motion for post-conviction relief was denied in state court, Bowen sought a writ of habeas corpus in federal court pursuant to 28 U.S.C § 2254.[213] Before the petition was addressed by the federal court, Bowen's attorneys obtained police investigative reports from the prosecution[214] which further implicated the earlier suspect, Lee Crowe. Bowen argued to the federal court that the Lee Crowe material was exculpatory within the meaning of *Brady* because it could have been used to impeach witnesses and because it cast doubt on his guilt.[215]

The federal district court held hearings and determined first that the prosecution had in fact received an oral request from Bowen's attor-

208. *See supra* note 198 and accompanying text.

209. 799 F.2d at 603.

210. *See supra* notes 199-200 and accompanying text.

211. 799 F.2d at 601-02.

212. If the court had found that no oral request had been made, this finding would have been a "historical fact" entitled to a presumption of correctness by the federal court. *See* 28 U.S.C. § 2254(d) (1985); *see also* Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963).

213. 28 U.S.C. § 2254 (1982). For a general discussion of habeas corpus proceedings and the purpose of the writ, see Hutson v. Justices of Wareham Dist. Court, 552 F. Supp. 974 (D. Mass. 1982) (remedy is available only when circumstances are presented which demonstrate fundamental unfairness in trial, or the infringement of important constitutional rights).

214. 799 F.2d at 615-18. These reports revealed that Ray Peters, who was considered by police to be the prime target of the murders, was divorced and that his former wife, Patsy Peters, was engaged to Crowe. Patsy and Crowe lived in Hanahan, South Carolina, along with another woman, Deana Burris. Crowe provided protection in their apartment while Patsy and Deana worked as prostitutes.

Ray Peters' mother, Mae Margraves, recalled that Ray had phoned Patsy a week before his death and had told her not to come out to Oklahoma City because he did not want to see her but only his children. He threatened Patsy by telling her that if she came out to Oklahoma he would tell her parents that she was a prostitute. *Id.*

The reports also revealed that South Carolina authorities suspected Crowe to be a hit man, and that on several occasions Crowe had left South Carolina and, upon his return, it was discovered that a homicide had occurred where he had been. Crowe had also been a suspect in a murder unrelated to organized crime. Crowe's former girlfriend had a boyfriend who persisted in bothering her. The boyfriend was later found dead with five bullet wounds in the head. When Crowe was asked to produce his gun, he said that he lost it. *Id.*

Finally, the reports revealed that Crowe and Patsy were in Oklahoma on the day of the murders and that Crowe's exact whereabouts at the time of the murders were undetermined. *Id.*

215. *Id.* at 610.

neys for prior suspects.[216] The court then applied the lower *Agurs* standard to the withheld evidence, including the police investigative reports which were not before the state court, and held that Bowen's convictions were constitutionally invalid.[217] The State appealed, claiming that the withheld material was not exculpatory within the meaning of *Brady*.

D. *Tenth Circuit Opinion*

The Tenth Circuit held that the prosecution had a federal constitutional duty to reveal the Lee Crowe material either with or without a specific request by the defense. In holding that the withheld material met both applicable *Agurs* tests,[218] the court declined to determine whether the unitary test[219] of *Bagley* should be applied retroactively.[220]

The court first examined the district court's finding of an oral request for other suspects, and concluded that the finding was supported by both federal and state court records and was not clearly erroneous.[221] The decision then stated that a specific oral request which is not on the record is legally equivalent to a formal, written motion for purposes of the prosecution's duty to disclose favorable evidence. The oral request gives the prosecution specific notice of exactly what the defense desires.[222]

The court then noted that the State's case against Bowen was based upon testimony of two identification witnesses, whose testimony may not have been flawless.[223] Lee Crowe's marked resemblance to the description of the suspect could have been used by the defense to impeach the witness' identifications of Bowen.[224] Furthermore, the opinion noted that the police reports documenting the connection between Lee Crowe and one of the victims to organized crime in South Carolina

216. *Id.* at 605-06. During questioning by the court, the prosecution conceded that an oral request had been received from Bowen's attorneys. This concession overcame any presumption of correctness, to the extent that the state record could be interpreted to include a court finding that no oral request had been made, and thus a historical fact entitled to a presumption of correctness. *Id.* at 609.

217. *Id.* at 613.

218. *See supra* notes 198-200 and accompanying text.

219. *See supra* note 201 and accompanying text.

220. 799 F.2d at 603.

221. *Id.* at 607.

222. *Id.* at 603. The standard for judging the materiality of information not disclosed after a specific request is lower than the standard for evaluating the materiality of nonrequested information because the specific denial has a greater affect on strategic decisions. Thus, in the absence of any specific denial by the prosecution that there were no prior suspects, the defense is less likely to pursue that line of inquiry than if they had never requested such information. *See* United States v. Bagley, 473 U.S. 667, 682-83 (1985) ("the more specifically the defense requests certain evidence . . . the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.").

223. 799 F.2d at 611. One witness had only viewed the suspect from a distance of 85 feet, and the other witness had undergone hypnosis to sharpen her memory before trial and had possibly misidentified a police detective in a live line up.

224. *Id.* at 610. *See also* Giglio v. United States, 405 U.S. 150 (1972) (suppression of evidence which could be used to impeach witnesses violates the Constitution if it deprives the defendant of a fair trial).

would have alerted the defense to focus on the motive, opportunity, and ability to kill of Lee Crowe.[225] Therefore, the Crowe material would have been invaluable in undermining the identifications of the witnesses.[226]

The court further held that the Crowe material cast doubt not only upon the testimony of witnesses, but on Bowen's guilt. The court rejected the State's argument that *Moore v. Illinois*[227] was controlling, because unlike the instant case, there was no evidence in *Moore* that the undisclosed prior suspect had any opportunity, motive, or ability to kill the victim.[228] In contrast, Lee Crowe was a suspected hit man living with the ex-wife of one of the victims and was visiting Oklahoma at the time of the murders. In addition, Bowen offered twelve witnesses who said that he was in Tyler, Texas, at the time of the murders. Furthermore, the only supportable motive Bowen could have to commit the murders was money, but the prosecution offered no proof that Bowen received any payment.[229]

While it was admittedly within the province of the jury to weigh the credibility of Bowen's alibi, the court concluded that the jury would have viewed Bowen's alibi differently had it been given the opportunity to learn of Lee Crowe's existence.[230] The court held therefore that the stricter *Agurs* test,[231] in addition to the lower test, had been met because the undisclosed evidence created a reasonable doubt that Bowen committed the murders.[232]

E. *Analysis*

The Tenth Circuit's decision in *Bowen v. Maynard* illustrates the complex application of the *Agurs* standards. These standards require that the court first make factual determinations as to the circumstances giving rise to the nondisclosure before evaluating the materiality of the withheld information.[233] The complexity of applying these standards is compounded by the court's decision in *Bowen*, because it means that reviewing courts cannot rely just on the record for determining what material was or was not requested by the defense. It is clear from the court's decision that the courts must conduct factual inquiries to determine whether or not certain oral requests were received by the prosecution and, if so, what was the nature and scope of the information requested.

The Supreme Court's replacement of the *Agurs* standards with the unitary standard set forth in *Bagley* will probably not reduce the type of

225. 799 F.2d at 611.
226. *Id.*
227. 408 U.S. 786 (1972).
228. 799 F.2d at 611.
229. *Id.* at 612.
230. *Id.*
231. *See supra* notes 199-200 and accompanying text.
232. 799 F.2d at 612.
233. The factual circumstances surrounding discovery requests determine what *Agurs* standard will be applied. *See supra* notes 197-200 and accompanying text.

extensive fact finding illustrated in *Bowen*.[234] Justice Blackmun, joined by Justice O'Connor, stated in *Bagley* that a specific request by the defense for certain evidence should be taken into account in applying the unitary standard.[235] The *Bagley* Court recognized that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist.[236] This in turn may cause the defense to rely on this misleading representation and abandon lines of independent investigations, defenses, or trial strategies that it might otherwise have pursued.[237]

Thus, although the court in *Bowen* applied the *Agurs*standards, the future application of the unitary *Bagley* standard will be affected by the holding in *Bowen* that oral requests for discovery are equivalent to written requests.

Steve Louth

234. *See Bowen*, 799 F.2d at 613 (reviewing the lower court proceedings and record of oral arguments to determine whether an oral request for prior suspects was received by the prosecution); *see also supra* note 214 (for applicability of *Agurs* standards).

235. *Bagley*, 473 U.S. at 683-84.

236. *Id.*

237. *Id.*

LABOR AND EMPLOYMENT LAW

OVERVIEW

In considering a variety of important labor law topics, the Tenth Circuit Court of Appeals issued a number of unanimous opinions. This article will examine the major issues in four of these decisions. In *Harberson v. NLRB*,[1] the court considered the appropriateness of the National Labor Relations Board's (the "Board") deferral to an arbitrator's decision on an unfair labor practice issue. *Derr v. Gulf Oil Corp.*[2] marked a reassessment of the Tenth Circuit's position on the standard for determining when an employee has been constructively discharged. In addressing the issue of hybrid versus non-hybrid actions, the court in *Garcia v. Eidal International Corp.*[3] made an important exception to the *DelCostello v. International Brotherhood of Teamsters*[4] rule in selecting the proper statute of limitations period. Finally, in *Crenshaw v. Quarles Drilling Corp.*,[5] the Tenth Circuit construed the Fair Labor Standards Act focusing on the requirements necessary for a Belo contract, and the questions regarding liquidated damages and statute of limitations.

I. THE STANDARD FOR BOARD DEFERRAL TO ARBITRATION

A. *Background*

It is not uncommon in labor law for an employee to assert that one's "rights," under both section 7 of the National Labor Relations Act[6] (the "Act") and a collective bargaining agreement, have been violated by the employer. An employee's statutory rights under section 7 of the Act include the right to form, join or assist labor unions, bargain collectively, and engage in other concerted activities.[7] Section 10 of the Act empowers the Board to protect such rights by making findings, issuing orders, and petitioning for the enforcement of such orders in a court of law.[8]

In addition to the rights under the Act, employees can obtain rights under a collective bargaining agreement, such as the right to refuse to cross an approved picket line and the right of arbitration. In this situation, the enforcement of such rights is contractual, with both management and labor agreeing to submit to an impartial arbitrator any contractual dispute.

An employer's single act can, in many situations, be a violation of an

1. 810 F.2d 977 (10th Cir. 1987).
2. 796 F.2d 340 (10th Cir. 1986).
3. 808 F.2d 717 (10th Cir. 1986).
4. 462 U.S. 151 (1983).
5. 798 F.2d 1345 (10th Cir. 1986).
6. 29 U.S.C. § 157 (1982).
7. *Id.*
8. 29 U.S.C. § 160(a)-(i) (1982).

employee's statutory, as well as contractual, rights. The question that then arises is: what happens when a union, after submitting a losing dispute to arbitration, files an unfair labor practice action? Can or should the Board defer to the arbitrator and assume that the unfair labor practice issue was also resolved? The Board has determined that in some situations it will defer to an arbitrator's decision on an unfair labor practice. The standard used to determine when this deferral is appropriate has, however, been a volatile one.

In *Spielberg Manufacturing Co.*,[9] the Board determined that if the arbitration proceedings appeared to be fair and regular, if the arbitrator's decision was not "clearly repugnant to the purposes and policies of the Act" and if all parties agreed to be bound, Board deference was proper.[10] Eight years later, in *Raytheon Co.*,[11] the Board added a fourth requirement that an unfair labor practice issue had to be "fully and fairly litigated" before the Board would give effect to an arbitrator's decision.[12] In *Yourga Trucking*,[13] the Board insisted that the party urging deferral bear the burden of proving that the statutory issue was advanced in the arbitration. However, in 1974, the Board, in *Electronic Reproduction Service Corp.*,[14] changed its course radically by holding that if an unfair labor practice issue was not raised in arbitration but could have been, the Board must defer unless there were "unusual circumstances."[15] However, a few years later, in *Suburban Motor Freight, Inc.*,[16] the Board disavowed the *Electronic Reproduction* decision by holding that it would not defer to an arbitration decision which bore "no indication that the arbitrator ruled on the statutory issue."[17] Finally, in 1984, the Board reaffirmed a modified *Spielberg* standard in *Olin Corp.*[18] and reversed *Suburban Motor Freight* by shifting the burden of proof onto the party opposing deferral.[19]

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9. 112 N.L.R.B. 1080 (1955).

10. *Id.* at 1082.

11. 140 N.L.R.B. 883 (1963).

12. *Id.* at 887.

13. 197 N.L.R.B. 928 (1972).

14. 213 N.L.R.B. 758 (1974).

15. *Id.* at 764.

16. 247 N.L.R.B. 146 (1980).

17. *Id.* at 147.

18. 268 N.L.R.B. 573 (1984). The Board held that:

> [A]n arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is 'clearly repugnant' to the Act. And, with regard to the inquiry into the 'clearly repugnant' standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

Id. at 574.

19. *Id.* at 574.

B. *Interpreting the* Olin *Standard*

1. Case in Context

Harberson v. NLRB[20] reviewed the *Olin* standard as applied by the Board in this case. The Tenth Circuit's interpretation was that the *Olin* standard could be interpreted in different ways, depending on the particular factual setting to which it is applied. Because the Board had not adequately explained why it had rejected the administrative law judge's (the "ALJ") interpretation and application of the *Olin* standard, the court remanded the case to the Board. The Tenth Circuit held that merely stating the *Olin* decision, without discussing it in light of the applicable factual circumstances, was not acceptable.

2. Statement of the Case

Two sympathy strikers, Harberson and Talley, refused to cross a lawful picket line organized by one of the three unions representing the Hilton Hotel employees. When the strike was settled, the two strikers returned to work and were told that they had been permanently replaced and put on a preferential hiring list.[21]

As a result of the employer's actions, two issues arose. First, because the collective bargaining agreement stated that employees would not be disciplined or discharged for refusing to cross a legally approved picket line,[22] there was a potential breach of contract. Secondly, there was a potential unfair labor practice under section 8(a)(3) of the Act.[23]

It was determined in arbitration that there was not a violation of the contract when the two employees were permanently replaced. Thereafter, the union filed an unfair labor practice action. The employer urged that the ALJ defer to the arbitrator's decision; however, the ALJ found that deferral was not appropriate because the contractual claims were not relevant in deciding the statutory claims.[24] The Board reversed the ALJ's findings and concluded that, pursuant to *Olin*, deferral was appropriate.[25]

3. Analysis

The ALJ took the position that the contractual issue was not factually parallel to the unfair labor practice issue because the arbitrators did not consider the factual question of whether the employees hired to replace the plaintiffs undertook the same job assignments. Because this issue was essential to the unfair labor practice question,[26] the ALJ held

20. 810 F.2d 977 (10th Cir. 1987).
21. *Id.* at 979-80.
22. *Id.* at 980.
23. 29 U.S.C. § 158(a)(3) (1982) provides in part that an employer cannot discriminate for the purpose of discouraging an employee's right to engage in concerted activities.
24. Denver Hilton Hotel, 272 N.L.R.B. 488, 491 (1984).
25. *Id.* at 488.
26. *Id.* at 491. This issue is important under the Act because economic strikers' right for reinstatement hinges upon whether permanent replacements have actually been ob-

that the *Olin* standard had not been met and, consequently, that the unfair labor practice issue had not been presented in arbitration.

The Tenth Circuit found this interpretation to be reasonable and refused to sanction the Board's rejection of the same.[27] In what can be considered the heart and soul of the *Harberson* opinion, the Tenth Circuit noted that "[w]hen applied to a particular factual situation, the standard for deferral set out in *Olin* may be interpreted in various ways."[28] The ALJ's finding that the facts relating to the unfair labor practice were not adequately presented to the arbitrator were, according to the court, strongly supported in the record. Whereas, the court could not find such support in the Board's decision.[29] Thus, the Board's mere assertion that the ALJ was wrong was rejected because the court had no idea how the Board was interpreting *Olin* in light of the specific factual situation. Consequently, rather than manufacturing an interpretation of the *Olin* standard for the Board, the court remanded the case in hopes that the Board would provide one.

4. Implications of Holding

Absent from the Tenth Circuit's opinion is an analysis of the *Olin* standard. While the court was certainly aware of the debate over the standard,[30] the judges apparently did not wish to state their position until they could review the Board's interpretation of the various elements of the *Olin* standard. Presumably, the court will eventually have to resolve the issue of whether the *Olin* standard, as implemented by the Board, is allowable under the Act. Thus, it will be useful to explore some of the major areas of controversy surrounding *Olin*.

Several problems are raised by those who disagree with the Board's decision in *Olin*. One scholar noted that even though there are two "safety devices" in the *Olin* standard — the contractual issue must be "factually parallel" to the unfair labor practice issue and the arbitrator must be presented with the facts necessary to resolve the unfair labor practice,[31] — they are rendered completely ineffectual by the Board's insistence that the party resisting deferral bear the burden of proof.[32] Professor Ray also noted that the records of many arbitration decisions are far from complete, sometimes stating an award in only a few sentences.[33] Consequently, the Board, without the arbitrator's reason-

tained. If the replacements are not permanent and the employer refuses to reinstate the economic strikers after they have made an unconditional offer to return, there is a potential unfair labor practice under sections 8(a)(1) and 8(a)(3) of the Act. *See* NLRB v. Int'l Van Lines, 409 U.S. 48 (1972), and NLRB v. McKay Radio & Telegraph Co., 304 U.S. 333 (1938).

27. *Harberson*, 810 F.2d at 983.

28. *Id.* at 984.

29. *Id.*

30. *Id.* at 982-83.

31. *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).

32. Ray, *Individual Rights and NLRB Deferral to the Arbitration Process: A Proposal*, 28 B.C.L. REV. 1, 13 (1986).

33. *Id.*

ing and factual basis before it, is not able to make determinations under the established standards.[34] Furthermore, the *Olin* standard provides that the General Counsel, who is never present at an arbitration, bear the burden of proving that relevant facts and evidence were not presented.[35] Given these circumstances, it seems unlikely that the Board will be able to protect the individual rights mandated in section 10(a) of the Act.

Similarly, the Eleventh Circuit has explicitly denounced *Olin* in *Taylor v. NLRB*.[36] Taking note of several factors addressed by the Fifth Circuit,[37] the court communicated its conviction that employees need to have a forum, independent of the arbitration arena, to advance their statutory rights.[38] The factors that the court considered especially important were that many arbitrators are principally educated in the "law of the shop," and thus may lack the sophistication to decide intricate statutory issues, and that fact finding in arbitration is usually not analogous to judicial fact finding.[39] The Eleventh Circuit further condemned the Board's position that deferral is appropriate unless it is affirmatively shown that an unusual situation exists, thus necessitating an independent exploration by the ALJ into the employee's statutory claims.[40] The court stated that this position neglects those situations where contractual and statutory issues factually correspond but entail different levels of proof and issues of factual relevance.[41]

The final problem is raised by the forceful dissent in *Olin*. Board member Zimmerman recognized that the deferral policy adopted by the Board could actually deter arbitration rather than encourage it. Zimmerman suggested that unions might begin demanding that all arbitrations be performed in a very formal, on-the-record manner. Thus, many advantages of arbitration — less expensive, quicker, and less formal — could quickly evaporate.[42]

II. THE STANDARD FOR ASSESSING CONSTRUCTIVE DISCHARGE

A. *Background*

The utilization of constructive discharge in Title VII[43] cases has its

34. *Id.* at 13.
35. *Id.*
36. 786 F.2d 1516 (11th Cir. 1986).
37. McNair v. United States Postal Service, 768 F.2d 730 (5th Cir. 1985).
38. *Taylor*, 786 F.2d at 1521.
39. *Id.*
40. *Id.* at 1522.
41. *Id.*
42. Henkel and Kelly, *Deferral to Arbitration After Olin and United Technologies: Has the NLRB Gone Too Far?*, 43 WASH. & LEE L. REV. 37 (Wntr. 1986).
43. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000(e) (1982) provides that:
(a) It shall be an unlawful employment practice for an employer -
(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's race, color, religion, sex or national origin; or
(2) To limit, segregate, or classify his employees or applicants for employment

roots in the National Labor Relations Act's (the "Act") prohibition on employer discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[44] To establish an unfair labor practice under section 8(a)(3) of the Act, it must be shown that an employee was terminated because of his union activity.[45] The Board has, however, recognized that employers could subject union employees to harsh working conditions, thereby avoiding the literal prohibition of anti-union discrimination.[46]

Applying Title VII of the Civil Rights Act of 1964, it was found that employers could use the same methods to circumvent the prohibition on discrimination under the Civil Rights Act as they had used to avoid the Act's prohibition of anti-union discrimination. As a result, the circuit courts also adopted the doctrine of constructive discharge.[47] The utilization of this doctrine, however, resulted in a controversy among the circuit courts as to what an employee must prove to establish a constructive discharge. The "objective standard" — adopted by the First,[48] Second,[49] Third,[50] Fifth,[51] Sixth,[52] Ninth,[53] Eleventh,[54] and District of Columbia[55] Circuit Courts of Appeals — is met upon an employee's showing that the working conditions "have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."[56] Under the "subjective standard" — adopted by the Fourth,[57] Eighth[58] and, until recently, the Tenth[59] Circuit Courts of Appeals — a constructive discharge "exists when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job."[60] Thus, this two-prong subjective standard requires one to not only consider the unpleasantness of the working conditions, but to consider the employer's subjective mental state or intent.

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in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

44. 29 U.S.C. § 158(a)(3) (1982).

45. 1 THE DEVELOPING LABOR LAW 187 (C. Morris 2d ed. 1983).

46. O'Toole, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587 (1986) [hereinafter "O'Toole"].

47. *Id.* at 591.

48. Rosado v. Santiago, 562 F.2d 114 (1st Cir. 1977).

49. Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983).

50. Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984).

51. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980).

52. Held v. Gulf Oil Co., 684 F.2d 427 (6th Cir. 1982).

53. Heagney v. University of Wash., 652 F.2d 1157 (9th Cir. 1981).

54. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

55. Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981).

56. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980) (quoting Rosado v. Santiago, 562 F.2d 114, 119 (1st Cir. 1977)).

57. EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983).

58. Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981).

59. Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975).

60. *Muller*, 509 F.2d at 929.

B. *The Employment of the Objective Standard:* Derr v. Gulf Oil Corp.

1. Case in Context

The holding in *Derr v. Gulf Oil Corp.*[61] is important in that the Tenth Circuit explicitly changed the requirements for proving a constructive discharge. The decision marks the rejection of the subjective standard established by the Tenth Circuit in *Muller v. U.S. Steel Corp.*[62] and the adoption of the objective standard as developed by the Fifth Circuit in *Bourque v. Powell Electric Manufacturing Co.*[63]

2. Statement of Case

After Gail Derr was demoted, she resigned and filed an action alleging that the demotion was the result of sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The trial court agreed with Ms. Derr's contentions that Gulf had discriminated against her when it transferred her to the lower position and that she had been constructively discharged, and thus ordered that she be reinstated and awarded back pay.[64]

3. Analysis

The Tenth Circuit's "unqualified adoption"[65] of the less stringent objective standard seems to reflect a frustration with the troublesome task of analyzing an employer's state of mind. Indeed, ascertaining what a particular person "intended" is one of the most difficult and elusive problems in the law. Thus, in rejecting the two-prong subjective test, the court simply presumed that an employer "intended those consequences it could reasonably have foreseen,"[66] thereby making an employer's state of mind irrelevant notwithstanding an employer's denial of the existence of any wrongful intent. Consequently, the objective standard simplifies the fact finder's task by redirecting the focus away from the employer's nebulous mental state onto a more manageable "reasonable person" standard.

4. Implications of Holding

The acceptance of the objective standard will be advantageous to workers and their unions. Employees may prevail where they would not have otherwise had the subjective standard been applied. For example, consider the situation where an employer is satisfied with an employee's performance in a particular job classification but refuses to promote the worker because of the employee's sex. Under the subjective standard, a constructive discharge would not be found because the employer did

61. 796 F.2d 340 (10th Cir. 1986).
62. 509 F.2d 923 (10th Cir. 1975).
63. 617 F.2d 61 (5th Cir. 1980).
64. *Derr*, 796 F.2d at 341-42.
65. *Id.* at 344.
66. *Id.* (quoting Clark v. Marsh, 665 F.2d 1168, 1175 n. 8 (D.C. Cir. 1981)).

not have the requisite intent to make working conditions so intolerable that the employee would resign. The employer wants the employee to stay in the position without having to promote. Whereas, under the objective standard, an employee would prevail upon the trier of fact's finding that the employer, by his illegal discrimination, had "made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign."[67] Thus, the employee would be fully compensated regardless of the employer's intent.[68]

It would be a mistake, however, to assume that the utilization of the less burdensome objective standard will necessarily manifest a major increase in the number of employee resignations. The leading circuit in this area, the Fifth Circuit, has stated that "the policies underlying Title VII will best be served if, whenever possible, unlawful discrimination is attacked within the context of existing employment relationships."[69] The objective standard does not allow an employee to resign solely because the employer's discrimination takes the form of unequal pay. An employee has a duty to mitigate damages by remaining on the job and trying to rectify the problems either through internal grievance procedures or by filing a complaint with the Equal Employment Opportunity Commission. Only when there is no reasonable possibility of rescuing the employment relationship — measured by the court's objective standard — will an employee who resigns be considered constructively discharged.

III. Statute of Limitations in Hybrid Actions

A. *Background*

Because Congress remained mute on the issue, a question arose in *Garcia v. Eidal International Corp.*[70] as to what statute of limitations period should apply to suits brought under section 301 of the Labor Management Relations Act of 1947 (the "LMRA").[71] For over one hundred years, the established precedent has been that, when Congress does not supply a statute of limitations for a federal cause of action, the states' statutes of limitations apply.[72] However, in *DelCostello v. International Brotherhood of Teamsters*,[73] the United States Supreme Court made an exception to this general rule. The Court held that when an employee files a "hybrid action" — a suit against the employer for a breach of a collective bargaining agreement and the union for a breach of its duty of fair representation — the six-month statute of limitations period provided for by section 10(b) of the Act[74] controls the claim against both the em-

67. *Id.* at 344.
68. *See* O'Toole, *supra* note 46, at 615.
69. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (5th Cir. 1980).
70. 808 F.2d 717 (10th Cir. 1986).
71. 29 U.S.C. § 185 (1982).
72. UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966); *see also* M'Cluny v. Silliman, 27 U.S. (3 Pet.) 270 (1830).
73. 462 U.S. 151 (1983).
74. NLRA, 29 U.S.C. § 160(b) (1982).

ployer and the union under section 301 actions.[75]

B. *An Exception to* DelCostello: Garcia v. Eidal International Corp.

1. Case in Context

Garcia v. Eidal International Corp.[76] involved a review of the district court's interpretation and application of the *DelCostello* hybrid standard. The Tenth Circuit disagreed with the district court's decision to impose the six month federal statute of limitations, and held that the *DelCostello* standard is not to be applied when an employer has renounced all of its responsibilities under a collective bargaining agreement.[77] Consequently, the court indicated that a worker's section 301 claim under the LMRA should be "analogized to an action on a contract, and the appropriate state limitations period should be applied."[78]

2. Statement of the Case

Eidal International Corporation ("Eidal") terminated all of its bargaining unit employees after it allegedly sold its business to Jencor International Corporation ("Jencor"). Because Eidal did not transfer their collective bargaining agreement with the sale, Jencor's employees — only a few of whom were former Eidal employees — were subject to less favorable working terms.[79]

Eighteen months after being notified of the sale, Eidal's former employees filed an action under section 301 of the LMRA[80] against the union, Eidal, and Jencor.[81] The employees asserted that Jencor was simply Eidal's alter ego and that the actions taken by Eidal were pursued for the sole purpose of avoiding its obligations under the collective bargaining agreement. The employees further contended that, because the union had not informed them of the sale and had signed a pre-hire agreement with the buyer, it had violated its duty of fair representation.[82]

3. Analysis

In hybrid actions, employees assert not only that their employers treated them unfairly, but also that the union treated them unfairly because it represented them in a discriminatory, arbitrary, and perfunctory manner in the arbitration process. Consequently, in order to prevail in this type of action, the employees must prove that the union breached its duty of fair representation. Otherwise, if the union has met its duty of

75. *DelCostello*, 462 U.S. at 166, 172.
76. 808 F.2d 717 (10th Cir. 1986).
77. *Id.* at 719.
78. *Id.* at 721.
79. *Id.* at 719.
80. 29 U.S.C. § 185 (1982).
81. *Garcia*, 808 F.2d at 719.
82. *Id.*

fair representation, the arbitrator's decision will be final and binding.[83]

The question facing the Tenth Circuit in *Garcia* was whether the particular factual situation was a hybrid action as defined in *DelCostello*.[84] Rejecting the lower court's position that it was a hybrid action, the Tenth Circuit carved an exception to the *DelCostello* rule because of factual differences and policy considerations.[85]

On the surface, *Garcia* appears to fit into the *DelCostello* mold in that an employee sued both his employer for breach of contract and his union for breach of the duty of fair representation. The court, however, found a subtle factual difference which took *Garcia* out of the scope of *DelCostello*.

Unlike the *DelCostello* situation,[86] the employees in *Garcia* claimed that the employer unilaterally sold out to its alter ego, Jencor, in order to repudiate the collective bargaining agreement and escape arbitration. Therefore, in order for the employees to prevail against the employer under these circumstances, the employees do not have to prove that the union failed in its duty of fair representation. Instead, if the employees prove their assertion against their employer, the employer will be liable and such liability will be separate from the union's liability.[87] The Tenth Circuit, therefore, refused to allow the employer to label the claim as a hybrid action simply because the union had consented to the breach. Since the claim against the employer is contractual, the court found that the appropriate state statute of limitations must be applied.[88]

Judge Seymour's opinion also noted that the policy considerations which had contributed to the outcome in *DelCostello* are absent in *Garcia*. The Court in *DelCostello* implemented the shorter six month statute of limitations primarily because it recognized that if decisions interpreting a collective bargaining agreement could be challenged years later, the relationship between labor and management could be severely disrupted.[89] Speed and finality are paramount when the issue under consideration is intertwined with the open and ongoing working relationships between management and labor.[90]

In *Garcia*, there was no open and ongoing relationship. Assuming the truth of the employees' allegations, the employer had repudiated the entire contract, thereby leaving those employees covered under the contract "outside and looking in." With all contractual relationships shattered by the company's bad faith and unilateral actions, the employees'

83. United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 62-63 (1981).

84. *See supra* note 75 and accompanying text.

85. *Garcia*, 808 F.2d at 721.

86. In *DelCostello*, a single employee charged that his employer had discharged him in violation of the collective bargaining agreement and that his union had not properly represented him in the grievance procedure. *DelCostello*, 462 U.S. at 155.

87. *Garcia*, 808 F.2d at 721.

88. *Id.* at 723.

89. *DelCostello*, 462 U.S. at 169 (quoting from United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 63-64 (1981)).

90. Adams v. Gould, Inc., 739 F.2d 858, 867 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985).

allegation that the dispute was not subject to arbitration was legitimate.[91] Hence, because there was no longer any resemblance of a day-to-day working relationship, the rationale for swift and uniform resolutions of labor disputes vanished.

4. Implications of Holding

The significance of this opinion is the Tenth Circuit's creation of a limited exception to the *DelCostello* rule — a bad faith dissolution of the day-to-day employment relationship. Therefore, in determining what statute of limitations will be applied in a particular section 301 action, labor attorneys are well advised to carefully scrutinize all cases which at first glance appear to be a hybrid-*DelCostello* variety.

IV. Assessing the Fair Labor Standards Act

A. *Background*

1. The Belo Contract

Section 207(a)(1) of the Fair Labor Standards Act (the "FLSA") specifies that an employer cannot force his employees to work more than forty hours a week unless he pays them time-and-a-half for the time worked over forty hours.[92] This overtime provision was instituted to reduce unemployment by prodding employers to hire more workers who would work fewer hours, and to offset, at least partially, the marginal costs incurred by employees who work additional hours.[93]

An exception to this standard, however, was recognized by the United States Supreme Court in *Walling, DOL v. A.H. Belo Corp.*[94] The so-called "Belo contract" was subsequently codified by the United States Congress.[95] This exception was created in response to the problems which arose when particular job classifications required employees to work hours fluctuating above and below forty hours per week.[96] Rather than subjecting employees to the uncertainty of fluctuating weekly paychecks, the Belo contract permits employers and employ-

91. *Garcia*, 808 F.2d at 722.
92. 29 U.S.C. § 207(a)(1) (1982).
93. Donovan v. Brown Equip. and Service Tools, Inc., 666 F.2d 148 (5th Cir. 1982).
94. 316 U.S. 624 (1942).
95. 29 U.S.C. § 207(f) states that:
No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employees necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.
96. *Donovan*, 666 F.2d at 153.

ees working "irregular hours"[97] to agree upon a fixed weekly salary.[98]

B. *Employer Limitations Under the FLSA:* Crenshaw v. Quarles Drilling Corp.

1. Case in Context

Crenshaw v. Quarles Drilling Corp.[99] provides a useful discussion of several of the important concepts found in the FLSA. After characterizing the elements of the section 207(f) exception,[100] the Tenth Circuit held that the exception did not apply in this case because the "irregular hours" requirement had not been satisfied.[101] After much discussion, the court further found that the three-year — not the two-year — statute of limitations was appropriate because the employer had committed a "willful violation" of the Act.[102] Finally, after analyzing section 216(b) of the FLSA,[103] which provides for liquidated damages equal to the amount of the unpaid overtime, and concluding that the employer did not show that its actions were taken in good faith, Judge Tacha upheld the district court's decision to award plaintiff liquidated damages.[104]

2. Statement of the Case

Crenshaw, a drilling equipment mechanic for Quarles Drilling Corporation ("Quarles"), performed routine maintenance and responded to emergency situations at drilling sites. Crenshaw and Quarles entered into a contract whereby Crenshaw was to be paid a set biweekly wage based on a sixty-hour work week. After working for Quarles for approximately three years, Crenshaw filed this suit alleging that Quarles had violated the overtime requirements of the FLSA. The district court agreed with Crenshaw's assertions, and Quarles appealed.

3. Analysis

a. *The Belo Contract*

Two of the three requisite elements of a Belo contract were disputed in *Crenshaw*. The first element at issue was whether the contract designated a "regular rate" of pay[105] as required by section 207(f).[106]

97. *See infra* notes 110-12 and accompanying text.
98. *Donovan*, 666 F.2d at 153.
99. 798 F.2d 1345 (10th Cir. 1986).
100. *Id.* at 1347. (The elements of the section 207(f) exception are, as described in Donovan v. Brown Equip. and Service Tools, Inc., 666 F.2d 148, 153 (5th Cir. 1982), as follows: "First, the duties of the employee must 'necessitate irregular hours of work.' 29 U.S.C. § 207(f) (1982). Second, the employee must be employed pursuant to a bona fide individual contract or collective bargaining agreement. *Id.* Third, that contract must 'specif[y] a regular rate of pay' for hours up to forty and one and one-half times that rate for hours over forty. Id. at § 207(f)(1). Finally, the contract must provide a weekly pay guarantee for not more than sixty hours, based on the specified rates.").
101. *Id.* at 1349.
102. 29 U.S.C. § 255(a) (1982).
103. 29 U.S.C. § 216(b) (1982).
104. *Crenshaw*, 798 F.2d at 1351.
105. The "regular rate" of pay has been defined as "the hourly rate actually paid for

After the Tenth Circuit concluded that the district court's reliance on an employee's testimony[107] was justified, the court emphasized that it would not tolerate after-the-fact calculations by unscrupulous employers.[108]

The second element disputed was whether Crenshaw worked "irregular hours."[109] The court, acknowledging that fluctuating hours are not necessarily equivalent to "irregular hours,"[110] concurred with a Fifth Circuit decision which held that "[f]or hours to be considered irregular within the meaning of section 7(f), they must, in a significant number of weeks, fluctuate both below forty hours per week as well as above."[111] Therefore, working fifty hours one week and ninety hours the next constitutes fluctuating hours but does not constitute "irregular hours" as contemplated under section 207(f) of the Act. Instead, there must be a "significant" number of weeks worked under forty hours before a court will conclude that an employee has worked "irregular hours."[112]

b. *The Statute of Limitations under the FLSA*

The Tenth Circuit was also faced with determining the applicable statute of limitations period. Section 255(a) establishes a two-year statute of limitations for any cause of action concerning "unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938."[113] However, if there is a "willful violation" of the Act, a three-year statute of limitations is applicable.[114]

In contemplating whether an employer's behavior is "willful," the court adopted the Fifth Circuit's former approach.[115] In *Coleman v. Jiffy June Farms, Inc.*,[116] the Fifth Circuit held that an "employer's decision to change his employees' rate of pay in violation of the FLSA is 'willful' when . . . there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA."[117]

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the normal, non-overtime work-week." Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 40 (1944).

106. 29 U.S.C. § 207(f)(1) (1982).

107. Quarles' testimony that the parties had designated a "regular rate" of pay contradicted Crenshaw's testimony. *Crenshaw*, 798 F.2d at 1348.

108. *Id.* (quoting Triple "AAA" Co. v. Wirtz, 378 F.2d 884 (10th Cir. 1967)).

109. 29 U.S.C. § 207(f) (1982).

110. *Crenshaw*, 798 F.2d at 1348.

111. *Id.* (quoting Donovan v. Brown Equip. and Service Tools, Inc., 666 F.2d 148, 154 (5th Cir. 1982)); *see also* Donovan v. Tierra Vista Inc., 796 F.2d 1259, 1260 (10th Cir. 1986).

112. *Crenshaw*, 798 F.2d at 1348.

113. 29 U.S.C. § 255(a) (1982).

114. *Id.*

115. Donovan v. McKissick Products Co., 719 F.2d 350 (10th Cir. 1983).

116. 458 F.2d 1139 (5th Cir. 1972), *cert. denied*, 409 U.S. 948 (1972).

117. *Id.* at 1142. The Supreme Court in Trans World Airlines v. Thurston, 469 U.S. 111, 127-28 (1985), held that this broad standard is inappropriate for determining liquidated damages, but the Court did not rule on what is the appropriate standard for the statute of limitations. The Fifth Circuit, in Halfertz v. Pulse Drug Co., 826 F.2d 2 (5th Cir.

In *Crenshaw*, the company's tax manager testified that he believed that Crenshaw should have been paid overtime for hours exceeding sixty.[118] This, coupled with Crenshaw's time sheets demonstrating that he continually worked more than sixty hours a week, was substantial evidence for the district and the Tenth Circuit courts to conclude that Quarles should have known that the FLSA was applicable. Accordingly, the court found Quarles' violation to be "willful" and, thus, applied the three-year statute of limitations.[119]

c. *Liquidated Damages*

The Tenth Circuit also reviewed the district court's liquidated damages award to Crenshaw. The FLSA permits the awarding of liquidated damages in an amount equal to the unpaid overtime unless the employer proves that its failure to pay overtime compensation was in good faith and that it reasonably presumed that such action/inaction would not constitute a FLSA violation.[120]The court rejected Quarles' contention that its misbelief that Crenshaw's employment contract fell under the section 207(f) exception constituted "reasonable grounds" since the statute's mandate could be easily evaded by an employer simply claiming that it misunderstood the FLSA's requirements.[121] Consequently, the court held that the district court did not err in awarding liquidated damages.[122]

4. Implication of Holding

a. *The Belo Contract*

There are several important issues which the court addressed in its interpretation of the FLSA provisions enumerated in *Crenshaw*. One of the most significant comes from the discussion on the so-called "Belo" contract. In reaffirming the notion that fluctuating hours are not necessarily equivalent to "irregular hours," the Tenth Circuit clearly stated that an employer cannot work a salaried employee as much as it wants without compensating for overtime. To fall within the Belo exception, a "significant"[123] number of the work weeks must fall below forty hours. However, the court did not define "significant." The only conclusion that can be drawn with any certainty is that if an employee works fewer than forty hours per week, 6.9%[124] of the time, then the Tenth Circuit will deem the same to be insignificant.

1987), and Peters v. City of Shreveport, 818 F.2d 1148, 1168 (5th Cir. 1987), subsequently rejected its *Jiffy June* standard as being too broad in light of *Trans World*. The Tenth Circuit, in *Crenshaw*, rejected this interpretation of *Trans World*. *See infra* note 118 and accompanying text.

118. *Crenshaw*, 798 F.2d at 1350.
119. *Id.*
120. 29 U.S.C. § 260 (1982).
121. *Crenshaw*, 798 F.2d at 1351.
122. *Id.*
123. *Id.* at 1349.
124. *Id.*

b. *The Statute of Limitations and Liquidated Damages*

The court's findings regarding the statute of limitations and liquidated damages place an employer on notice that it must analyze not only the FLSA provisions but also the particular factual setting at issue. The Tenth Circuit has made it clear that it will not condone tenuous justifications by the employer such as "I did not know" or "I did not understand the law."

In the case of liquidated damages, for example, an employer is required to show "reasonable" grounds for believing that it had not violated FLSA. Several circuits, including the Tenth Circuit, have held that an employer's claim of ignorance of the Act's requirements is not a reasonable ground.[125]

Similarly, if a statute of limitations issue arises, it is evident that the court will not tolerate an employer ignoring the particular factual situation when claiming it did not willfully violate FLSA. If an employer should have known that its employees might have been covered by the Act, it will be held that the employer's violation of FLSA was "willful."[126]

CONCLUSION

In a series of well written opinions, several important themes and positions emerged during the 1986-87 survey period. First, the Tenth Circuit insisted upon the need for a careful factual analysis. This was evident in the *Harberson* opinion when the court refused to uphold a Board decision because of the Board's failure to adequately discuss the factual aspects of the case. In the *Garcia* case, the Tenth Circuit again showed its preoccupation with factual detail and careful analysis by distinguishing this case from the closely related *DelCostello* standard in analyzing the statute of limitations in a hybrid action.

Finally, the court in this survey period showed a willingness to provide workers with some protection against unscrupulous employers. In *Crenshaw*, the Tenth Circuit clearly stated that it will not tolerate employers who work employees long hours without paying overtime compensation. The court also noted that an employer will not be able to avoid the FLSA by simply asserting that it did not understand the FLSA. Instead, the court adopted a "should have known" standard which provides working people with a greater degree of protection and carries out the legislative intent of the FLSA. Similarly, in dealing with the issue of constructive discharge, the court in *Derr* rejected the subjective standard and replaced it with the more manageable objective standard. This,

125. Sinclair v. Auto. Club of Okla., Inc., 733 F.2d 726, 730 (10th Cir. 1984); *see also* Marshall v. Brunner, 668 F.2d 748, 753 (3d Cir. 1982) and Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 468-69 (5th Cir. 1979).

126. *Crenshaw*, 798 F.2d at 1349-50.

also, should give employees more protection against those employers with a predisposition towards illegal conduct.

Steven M. Francy

EMINENT DOMAIN: A CASE COMMENT—*MOUNTAIN STATES LEGAL FOUNDATION V. HODEL*

I. INTRODUCTION

The founding fathers of the United States, in their creation of the Constitution, went to great lengths to protect private property from governmental use and invasion. While government has the right to expropriate private property for purposes beneficial to the general public, it cannot require a single property owner to bear the costs of providing property for the general public.[1] This principle, which is the essence of the property clause of the fifth amendment,[2] commands that the cost of public benefits must be borne by the public.[3] The fifth amendment demands just compensation to property owners as a governmental restraint.

The Tenth Circuit Court of Appeals, in *Mountain States Legal Foundation v. Hodel,*[4] has lifted the restraints on governmental power by allowing the use of the Rock Springs Grazing Association's (the "Association") land by wild horses without just compensation. The horses are exclusively and affirmatively under the control of the Secretary of the Interior under the Wild Free-Roaming Horses and Burros Act (the "Act").[5] The Act was promulgated to protect wild horses from "capture, branding, harassment, or death."[6] It places them under the sole dominion of the Secretary of the Interior and prevents any management or control of such horses by private parties.[7] Due to the Secretary's noncompliance with the Act, the unmanaged horses caused thousands of dollars of damage[8] to the Association's property.

This article addresses the different types of takings, the tests used to determine whether a property owner is entitled to compensation, and the case law through which these tests developed. It will also demonstrate how the tests were confused and misapplied by the Tenth Circuit Court of Appeals to the facts in *Hodel.*

II. BACKGROUND

The determination of whether a governmental action constitutes a taking is not a clear-cut task. Although there is no analytical formula in

1. Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981).

2. Clause four of the fifth amendment provides that "private property (shall not) be taken for public use without just compensation." U.S. CONST. amend V, § 2.

3. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).

4. 799 F.2d 1423 (10th Cir. 1986), *vacated sub nom.* Mountain States Legal Found. v. Clark, 740 F.2d 792 (10th Cir. 1984), *cert. denied*, 107 S.Ct. 1616 (1987).

5. 16 U.S.C. §§ 1331-40 (1982).

6. 16 U.S.C. § 1338(a)(3) (1982).

7. 16 U.S.C. § 1331 (1982).

8. Brief for appellant at 19, Mountain States Legal Found. v. Hodel, 779 F.2d 1423 (10th Cir. 1986), indicates the amount of damage.

which to insert the facts and render a solution, guidelines have evolved through case law which facilitate a takings analysis.[9]

The landmark case in takings jurisprudence is *Mugler v. Kansas*,[10] where the Supreme Court in 1887 upheld the shutdown of a brewery under the Kansas prohibition law. The United States Supreme Court closely examined the character of the action and recognized the need for categorization of governmental action.[11] The Court distinguished two types of governmental takings which necessitate compensation: (1) a regulatory taking, which is a restriction on land use outside the authority of the police power, and (2) an actual physical invasion.[12] When government causes the latter, the landowner may recover through an inverse condemnation action. "Inverse condemnation" is the term used to "[describe] the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."[13] Such action is brought by the landowner when government causes a physical invasion to private property.

Thirty-five years after *Mugler*, in *Pennsylvania Coal v. Mahon*, the Supreme Court developed a balancing approach to the takings analysis.[14] In *Pennsylvania Coal*, Justice Holmes placed the government's authority to regulate on a continuum by stating that if a regulation goes too far, it will be recognized as a taking.[15] Like *Mugler*, *Pennsylvania Coal* represents the theory that a regulatory taking may be present without a physical occupation, but it is most noted for the balancing test it established, weighing the private burden against the public benefit.[16]

Though not often cited in recent cases, *Mugler* still influences case law today. The following demonstrates the necessity of characterizing the nature of the government interference as either a regulation or a physical occupation. The standards applied in determining whether a property owner deserves compensation depend on which category the government action belongs. Whether governmental action is a regulation properly exercised under the police power, or a permanent physical occupation warranting inverse condemnation is the issue upon which *Hodel* turns.

A. *Inverse Condemnation Based on "Permanent Physical Occupation"*

In a takings analysis, the court often analogizes property rights to a "bundle of sticks," with each stick representing a property right.[17] Some sticks in that bundle are more valuable than others, the right to

9. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130 (1978). *See infra* notes 11-71 and accompanying text.

10. 123 U.S. 623 (1887).

11. *See* Note, *"Taking" Jurisprudence and its Application to Regulations of Sensitive Ecological Environments*, Graham v. Estuary Properties, Inc., 9 FLA. ST. U.L. REV. 489, 493 (1981).

12. Mugler v. Kansas, 123 U.S. at 666-69.

13. United States v. Clarke, 445 U.S. 253, 257 (1980).

14. 260 U.S. 393 (1922).

15. *Id.* at 415.

16. *Id.* at 413-15.

17. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982);

exclude being the most valuable. The Supreme Court applies a per se rule when the government physically and permanently occupies one's land. The per se rule renders a physical invasion to be a taking regardless of an offsetting public interest and differs from the ad hoc test applied to regulatory takings which balances several competing factors.[18] The regular use of private property by the government is "[t]he one incontestable case for compensation."[19] Indeed, both federal and state governments have been required to compensate property owners for the use of their property in numerous cases.[20] A discussion of the inverse condemnation case law will facilitate the understanding of when compensation is required for government action.

The United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*[21] applied the per se rule and found for the landowner in an inverse condemnation proceeding. In *Loretto*, the Court determined that a New York statute, forcing a landlord to permit installation of cable facilities on private property, constituted a taking.[22] The *Loretto* Court held that the permanent physical occupation by the cables is a taking regardless of offsetting public interests which include the educational and recreational benefits provided by cable television. Justice Marshall stated that "[o]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[23]

Airplane flights in *U.S. v. Causby*[24] infringed on a farmer's property rights to the extent that the Supreme Court found a taking in an inverse condemnation proceeding. The land over which the airplanes flew was held to have been "appropriated as directly and completely as if it [was] used for the runways themselves."[25] The Court compared *Causby's* facts to *Richards v. Washington Terminal Co.*,[26] where a property owner was denied compensation for the nuisance of smoke, noise, and vibrations from a nearby railroad.[27] In *Richards*, the elimination from the property owner's "bundle of sticks," that stick which represented the right to enjoy property free from nuisance, was not a substantial enough loss to constitute a taking. However, in *Causby*, the stick the government took from the "bundle of property rights" was the right to exclude; thus, the

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Andrus v. Allard, 444 U.S. 51, 65-66 (1979); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

18. Tarlock, *Regulatory Takings*, 60 CHI.[-]KENT L. REV. 23, 26 (1984).

19. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967).

20. *See* Nollan v. California Coastal Comm'n, 107 S.Ct. 3141 (1987); *Loretto*, 458 U.S. 419; United States v. Causby, 328 U.S. 256 (1946).

21. 458 U.S. 419 (1982).

22. *Id.* at 426.

23. *Id.* at 434-35.

24. 328 U.S. 256 (1946).

25. *Id.* at 262.

26. 233 U.S. 546 (1910).

27. *Causby*, 328 U.S. at 262.

govenment effectuated a taking.[28] The degree of actual governmental appropriation of the land in *Causby* and *Richards* was crucial in the Court's determination of whether land had actually been physically invaded, necessitating compensation.

The Court again emphasized the right to exclude as being highly protected in *Kaiser Aetna v. United States*.[29] In order to create a marina, a pond owner dug an inlet through a natural barrier. The owner was faced with a government claim that the marina had become part of the navigational waterways, and therefore must be open to the public. The Supreme Court held that the government servitude constituted a taking of the landowner's right to exclude which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[30] The *Kaiser* Court, in order to avoid compensation from the inverse condemnation, however, found the marina did not constitute a navigational waterway.

The Supreme Court reconfirmed the importance of a property owner's right to exclude in *Leo Sheep Co. v. United States*.[31] There, the government's easement over private property to a public recreational area necessitated compensation in an inverse condemnation proceeding. The government argued that the public use of the road was an easement by necessity and therefore no compensation should be paid. However, because the government has the power of eminent domain, the Court found that the easement of necessity doctrine is not available to the sovereign.[32]

The United States government has been required to compensate private property owners for physical occupation of property. This has included compensation for use of water rights,[33] underlying secured materials,[34] and the use of a leasehold.[35]

B. *Regulatory Takings*

Although at one time eminent domain and police power were two different concepts, they have merged to mean practically the same thing: the government's authority to regulate land use is for the common well-being of the public.[36] In short, the police power is the government's authority to regulate private property for public use.[37] When a regula-

28. *Id.* at 262.
29. 444 U.S. 164 (1979).
30. *Id.* at 176.
31. 440 U.S. 668 (1979).
32. *Id.* at 680.
33. Dugan v. Rank, 372 U.S. 609 (1963).
34. Armstrong v. United States, 364 U.S. 40 (1960).
35. United States v. General Motors, 323 U.S. 373 (1945).
36. *See* Comment, *Eminent Domain, the Police Power and the Fifth Amendment: Defining the Domain of the Takings Analysis*, 47 U. PITT. L. REV. 491, 499 (1986).
37. *Id.* at 499. "Public use" means the furtherance of the public interest in health, safety, welfare or morals. The decision of what constitutes public use is left to the legislature. Most courts, although empowered to decide questions of public use, choose not to second-guess the legislature.

tion is outside the boundaries of authority granted by police power, it is a "regulatory taking" which requires compensation.

The government's authority to regulate under the police power was very broad in 1915 when the Supreme Court rendered the opinion of *Hadacheck v. Sebastian*.[38] *Hadacheck* represents the theory that, although a regulation diminishes the value of property, compensation is not due where diminution is the result of the police power.[39] In *Hadacheck*, the City of Los Angeles passed an ordinance prohibiting the manufacture of bricks within city limits. Although the regulation diminished the value of Hadacheck's land from $800,000 to $60,000, diminution of value alone was not enough to constitute a taking. Because the restriction served a substantial public purpose, it was upheld against the takings challenge. The scope of judicial review was thus extremely limited so long as the legislative act supported a public purpose.[40]

In 1922, Justice Holmes did find a regulatory taking in *Pennsylvania Coal Co. v. Mahon*[41] when the Pennsylvania legislature went beyond its constitutional powers by enacting a statute which prohibited the mining of coal in a manner that would cause surface subsidence. Using a balancing test, Justice Holmes weighed the public benefit against the private burden and found the regulation to be an infringement of such magnitude on mine owner's property rights that it could not be allowed.[42] Justice Holmes sustained the coal company's argument that enforcement of the Pennsylvania statute constituted a taking under the fifth and fourteenth amendments.[43]

After *Pennsylvania Coal*, the Court for many years found that regulations did not constitute takings because they fell under the pervasiveness of the police power;[44] however, there were a few exceptions. In *Nectrow v. City of Cambridge*,[45] property suitable for commercial purposes was rezoned to residential. Justice Sutherland found the rezoning to be a taking because the area in question adjoined land used for commercial purposes and the property would have been of little value if limited to residential use.[46]

Until recent years, the Court sustained land use regulations despite claims that the government had taken private property. Courts do not often scrutinize the legislature's decision to regulate property for the common good of the public. Although courts have not commented directly on the issue, because of the nature of land use regulation, they have used a more deferential standard than that used with a physical invasion of land.[47] The Supreme Court has been consistently reluctant

38. 239 U.S. 394 (1915).
39. *See* Comment, *supra* note 19.
40. *Id.*
41. 260 U.S. 393 (1922).
42. *Id.* at 413.
43. *Id.* at 413-15.
44. *See* notes 49-70 and accompanying text.
45. 277 U.S. 183 (1928).
46. *Id.* at 187. *See also Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987).
47. *See* Comment, *supra* note 19.

to require compensation for the loss of property caused by government regulation.[48]

In 1978, the Court in *Penn Central Transportation Co. v. New York City*,[49] one of the most frequently cited takings cases, articulated a test composed of three factors to be considered in compensation or takings analysis: (1) the character of the governmental action,[50] (2) the economic impact of the regulation,[51] and (3) the extent government action interferes with investment-backed expectations.[52] These factors have been interpreted to mean that unless property is one hundred percent diminished by a regulation, there is no taking.[53]

The Supreme Court's analysis of *Agins v. City of Tiburon*[54] demonstrates a combined approach of the *Penn Central* three factor test and the *Pennsylvania Coal* balancing test. Claimants challenged a zoning ordinance which limited the development of their property to one-family dwellings, accessory buildings, and open space uses. The court held that the issue of whether to compensate the landowners required a weighing of private and public interests.[55] In *Agins*, the public interest in preserving open space outweighed the private interest. In support of the holdings that there can be no taking without just compensation, the Court used the *Penn Central* test.[56] Because there was no complete denial of the owner's economically viable use of land, the zoning ordinance did not effectuate a taking.

The *Agins* Court's analysis also set forth an additional test to be used in evaluating a regulatory taking, that which has come to be called the "ends-means" test.[57] A regulation on property is upheld under the state's police power if that regulation promotes a legitimate public purpose and is likely to advance that purpose.[58] "The public interest," courts have found, includes the protection of endangered species and wildlife. The Migratory Bird Treaty Act of 1916,[59] for example, was upheld against the challenges of landowners who claimed its promulgation amounted to a taking in *Bishop v. United States*.[60] Property owners sued the government for the alleged taking of hunting facilities and for crop damage resulting from a prohibition to hunt wild geese. The Court held

48. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

49. 438 U.S. 104 (1978).

50. *Id.* at 130.

51. *Id.* at 128.

52. *Id.* at 136.

53. *See Euclid*, 272 U.S. 365 (1926)(75% diminution of property value, resulting from enactment of a zoning ordinance, was not sufficient to constitute a taking); *Sebastian*, 239 U.S. 394 (1915) (87% diminution of property's value, resulting from prohibition of brick manufacturing within city limits, did not constitute a taking).

54. 447 U.S. 255 (1980).

55. *Id.* at 260.

56. *Id.* at 262-63.

57. Agins v. Tiburon, 447 U.S. 255, 260-61 (1980).

58. *Id.* at 261.

59. 16 U.S.C. §§ 703-711 (1982).

60. 126 F. Supp. 449 (1954), *cert. denied*, 349 U.S. 955 (1955).

the important goal of protection and preservation of game justified the restriction and found that there was no taking under the fifth amendment.[61] In *Sickman v. United States*,[62] a claim similar to that in *Bishop* was brought by property owners. There, the Court held that the government did not own the wild geese, and therefore they were not responsible for their trespass and the resulting damage.[63]

Andrus v. Allard[64] demonstrated that there is unlikely to be a taking of property when an alternative use for property exists. The court also reinforced the substantial public interest in protecting wildlife through regulation. Merchants who sold artifacts containing eagle feathers brought a claim for damages resulting from the enforcement of the Bald and Golden Eagle Protection Act[65] which prohibited destroying or removing their nests and selling or collecting their feathers. The Court held that because the regulation did not compel the surrender of the feathers and there was no physical invasion or restraint on the merchants, there was not a taking.[66] Although the Court banned the most profitable use of the feathers,[67] their value had not been sufficiently reduced since the merchants were allowed to keep them.[68]

As demonstrated by the preceding discussion of case law, regulatory takings analysis requires the *Pennsylvania Coal* balancing approach of weighing the public interest versus the private interest. In evaluating the private interest, courts use the *Penn Central* test to consider the economic hardship on the property owner.[69] The Court has refused to find a taking even in the face of substantial diminution of property.[70]

The inverse condemnation analysis, however, does not require the same balancing and economic hardship test. The rule to be followed, in a situation where there is a permanent physical occupation resulting from government action, is just compensation to the property owner.[71]

C. *The Wild and Free Roaming Horses and Burros Act*

Congress passed The Wild Free-Roaming Horses and Burros Act[72] in order to protect the dwindling population from hunting and commer-

61. 126 F. Supp. at 452-53.
62. 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951).
63. 184 F.2d at 618.
64. 444 U.S. 51 (1979).
65. 16 U.S.C. § 668(a) (1982).
66. 444 U.S. at 64.
67. *Id.*
68. "[W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.*
69. *See* Agins v. Tiburon, 447 U.S. 255, 261-62; *Andrus*, 444 U.S. at 65-66.
70. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). In *Goldblatt*, the owner of a gravel pit was not compensated for a taking when regulation banned excavation from the potentially dangerous pit. No regulatory taking was found because the owner failed to present evidence that the value of the lot on which the pit was located was completely diminished. The court held that diminution of value alone did not establish a taking.
71. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
72. 16 U.S.C. §§ 1331-1340 (1982).

cial exploitation by prohibiting "malicious harassment."[73] This Act placed all wild horses under the sole dominion of the Secretary of the Interior, preventing any management or control of such horses by private parties.[74] *Kleppe v. New Mexico*[75] upheld the Act as a proper exercise of congressional power, thereby confirming the duty and authority of the Bureau of Land Management ("BLM") to manage the horses and burros as part of the public land system.

Under the Act, the Secretary of Interior has exclusive control to manage wild horses and is required to remove horses from private property upon the owners request.[76] This affirmative duty to manage means the Secretary must locate and relocate the horses from time to time "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands."[77] Only the Secretary of Interior may capture, move, or otherwise manage the horses; any other person found to perform these acts could be criminally prosecuted.[78]

III. FACTS

The Mountain States Legal Foundation[79] filed this action because wild horses were destroying the Association's land. They argued that because the Secretary of the Interior failed to perform his duty of removing the horses upon their request, as mandated under section 4 of the Wild Horses Act, the government was liable for resulting damage to their property.[80] The nature of the government's action, they contended, was best characterized as inaction, having resulted in the physical occupation of wild horses on private property.

The Wyoming land in question covers an area about 115 miles long by forty miles wide and is called the "checkerboard." This title was given to land granted by the federal government to the Union Pacific railroad in the Union Pacific Act of 1862.[81] Odd-numbered sections of 640 acres each, running along the original railbed, were granted to the

73. 43 C.F.R. § 4700.0-5(k) (1985). Malicious harassment was defined by the Department of the Interior as:

> an intentional act which demonstrates a deliberate disregard for the well-being of wild and free roaming horses and burros and which creates the likelihood of injury, or is detrimental to normal behavior patterns. . . . Such acts include but are not limited to, authorizing chasing, pursuing, herding, roping, or attempting to gather or catch wild, free-roaming horses and burros.

74. 16 U.S.C. § 1333(a) (1982).

75. 426 U.S. 529 (1976).

76. 16 U.S.C. § 1334 (1982).

77. 16 U.S.C. § 1333(a) (1982).

78. 16 U.S.C. § 1338(a)(3) (1982).

79. Mountain States Legal Foundation is a non-profit public interest law foundation, dedicated to the preservation of individual liberties and private property rights. Many of the Foundation's members are shareholders in the Rock Springs Grazing Association. The Foundation initiated the lawsuit to protect its members' property interests and constitutional rights.

80. 16 U.S.C. § 1334 (1982) ("If wild, free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest federal marshall or agent of the Secretary, who shall arrange to have the animals removed. . . .").

81. For history and discussion of railroad land grants, see J. Laitos, *Natural Resources Law* 251-253 (1985).

Union Pacific, while even numbered lots were retained by the federal government, thus creating a "checkerboard" pattern. Union Pacific has since sold portions of their property to private landowners who mainly use it for grazing. The Association purchased their land from Union Pacific in 1909 and has since used it for winter cattle and sheep grazing. The BLM has issued grazing permits to allow the Association to graze their livestock on federal land.[82] The wild horse herds have continually grazed the Association's unfenced private property, as well as adjoining public lands.

In 1972, there were an estimated 1,116 wild horses on the checkerboard. At the time the Association filed their lawsuit in 1979, the population had more than doubled. As a result of the drastic herd population increase, vast quantities of the Association's forage were consumed. Due to the nature of the sensitive soil and growing conditions, it will be many years before the depleted land will be replenished to its former grazing capacity.[83]

The Association's property is comprised of high desert badlands and sand dunes. Horse trails are frequently found in steep terrain where the soil is particularly sensitive to overuse and erosion, resulting in damage to the forage.[84]

In order to stem the loss of forage and water, the Association, within six months of the passage of the Act, made repeated oral and written requests, pursuant to section 4 of the Act, to the BLM to remove the horses from their property.[85] Despite the requests and offers of aid from the Association, the horses were not removed, and in fact, the numbers greatly increased.[86]

The Association's cause of action for compensation was the result of the BLM's noncompliance with the mandates of the Act which require that the Secretary shall remove the wild horses upon request within a reasonable time.[87] The Association sought a declaratory judgment that the Secretary mismanaged the horses.[88] They also filed a writ of mandamus to compel the Director of the BLM to reduce the herd population on the adjacent public land. Damages of $500,000 were requested by the Association from the Director of the BLM for the alleged uncompen-

82. Brief for appellant at 6, Mountain States Legal Found. v. Hodel, 779 F.2d 1423 (10th Cir. 1986).

83. *Id.* at 7.

84. *Id.* at 5-7.

85. *Id.* at 7 n.1. The ineffectiveness of the program is revealed by the total number of horses rounded up yearly. The wild horse population increases 15% to 25% each year. The BLM was not even able to remove the annual increase, much less reduce the overall population.

86. *See* Opening Brief for appellant at 26, Mountain States Legal Found. v. Hodel, 779 F.2d 1423 (10th Cir. 1986)(Frank Gregg, director of the BLM, and under pressure from various media sources, was alleged to have diverted funds, originally appropriated for wild horse removal and adoption, to an investigation of the treatment of already adopted horses. As a result, the BLM cancelled the wild horse gathering activities for 1979).

87. *See supra* note 77.

88. 799 F.2d at 1424.

sated taking of its property.[89]

The District Court granted the Association's petition for mandamus to remove the horses, dismissed the claim against the Director, and granted the summary judgment. In the Tenth Circuit Court's first hearing, it affirmed the dismissal of the claim against the director but reversed and remanded the grant of summary judgment, holding that an unresolved factual issue precluded a summary determination of the takings claim. The government respondents sought a rehearing en banc in September of 1984. In March of 1985, the Tenth Circuit Court of Appeals granted rehearing of the case as to whether the trial court properly dismissed the Association's claim and whether the Secretary's failure to manage the horses constituted a taking.[90]

A. *Majority Holding*

Judge McKay, writing for the four member majority of the court, affirmed the trial court's decision to grant summary judgment for the government. The court held that the Association was not entitled to compensation because the government action was nothing more than a land use regulation enacted by Congress to ensure the survival of a particular species of wildlife.[91] The court cited a series of cases[92] to show that damage to private property by protecting wildlife did not constitute a taking. Through a discussion of *Andrus v. Allard*,[93] *Sickman v. United States*[94] and *Barrett v. State*,[95] the court demonstrated the Supreme Court's stance on the paramount interest of wildlife protection by regulation. Through these case analyses, the majority likened the Wild Horses Act to the Endangered Species Act, the Migratory Bird Treaty Act, and the Bald and Golden Eagle Protection Act. The degree of governmental control in these acts, the Tenth Circuit stated, was no different in character from the Wild Horses Act.[96]

A second line of reasoning in support of the constitutionality of the Wild Horses Act was addressed by the court through the *Penn Central* test. Government regulation, the majority stated, often necessitates adjustment of private rights for the public good.[97] Although regulation often diminishes the economic use of property, it would be unreasonable to compensate every affected landowner, thus requiring regulation by purchase. Because the court found no taking had occurred, they also dismissed the Association's claim against the Director of the BLM.

89. *Id.*
90. *Id.* at 1425.
91. *Id.* at 1428.
92. *Id.* at 1428-29.
93. 444 U.S. 51 (1979).
94. 184 F.2d 616 (7th Cir. 1950).
95. 220 N.Y. 423, 116 N.E. 99 (1917).
96. 799 F.2d at 1428-29.
97. *Id.* at 1429.

B. *The Dissenting Opinion of Judge Seth*

In his dissent, Judge Seth emphasized that the case primarily involved the BLM's failure to perform specific duties under the Act.[98] Judge Seth argued that the Association was entitled to compensation for the consumption and destruction of its property from the public use.[99]

C. *The Dissenting Opinion of Judge Barrett*

Judge Barrett, in his dissent, disagreed with the majority's characterization of the Act as nothing more than a land use regulation.[100] He reasoned that Congress did not intend the Act to burden private parties because of the duty it imposed on the BLM to remove the horses at the request of the landowners. He therefore believed that a fifth amendment taking violation was possible and summary disposition of the Association's claim was inappropriate.[101]

IV. ANALYSIS

A. *The Court's Mischaracterization of the Governmental Action*

The Tenth Circuit Court of Appeals, in *Hodel*, showed a gross misunderstanding of the Association's claim. This misunderstanding led them to improperly apply the law by sidestepping the takings issue and devoting three pages of discussion to the authority of the federal government to control wildlife. The discussion by the majority on the government's authority over marine animals, waterfowl, and endangered species is irrelevant. The issues presented in *Hodel* have little to do with the government's exclusive authority to control the horses. They primarily involve the consequences of the Director's mismanagement or nonaction. The Association agrees with the majority, that government management is essential for protection of the wild horses and ecological balance; however, it is not the authority to control that is disputed by the Association. It is the failure of the Director to manage the wild horses properly that violates the Act.

The majority cited *Bishop v. United States*[102] and *Sickman v. United States*[103] to illustrate that damage caused by wildlife protected under congressional acts did not constitute a taking.[104] In both *Bishop* and *Sickman*, wild geese damaged crops. The property owners' claims were denied because the importance of the Migratory Bird Treaty Act, which served to protect the geese, outweighed the property owners' rights for compensation. However, these cases cannot be applied to *Hodel* because

98. *Id.* at 1431.
99. *Id.* at 1434.
100. *Id.* at 1435.
101. *Id.* at 1438.
102. 126 F. Supp. 449 (1954).
103. 184 F.2d 616 (7th Cir. 1950).
104. 799 F.2d at 1428-29.

there is no clause mandating government control in the Migratory Bird Treaty Act, as there is in the Wild Horses Act.

Judge McKay, who stated in the majority opinion that the Act "is nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife,"[105] did not address the real issue. As Judge Barrett stated in his dissent, the Association's claim was not for compensation due to the promulgation of a regulation; the case was instead about actual physical invasion of property.[106]

The key to an analysis of the Association's claim is a proper understanding of the character of the governmental action. The government's action or inaction, the Supreme Court has said, must be characterized as either a regulatory taking or inverse condemnation.[107] The Supreme Court cases which have distinguished regulatory takings from inverse condemnation have emphasized the seriousness of the government's action when physical use and occupation occur.[108] The comparison of regulatory takings with inverse condemnation was made in *Penn Central*, where the Court stated that a taking was more likely to be found when the government action was characterized as a physical invasion than when it was characterized as a regulatory action meeting a public purpose.[109] A physical invasion is a government intrusion of unusually serious character, and the remedy is just compensation.[110] In *Loretto v. Teleprompter*, the court held that a physical intrusion by the government was of unusually serious character.[111] When the government physically invades private property, it does not simply take a "single strand" from the "bundle" of property rights; it chops through the bundle taking a slice of every strand.[112]

In *Hodel*, the regulatory takings issue would not have been improperly addressed by the court had the Association contended their damage was the result of the enforcement of the Act. Instead, the Association argued that nonenforcement of the Act caused the actual physical presence of the horses which resulted in the consumption of their forage and deprived them of their right to exclude.

The Tenth Circuit accepted the government's argument that the action was regulatory. The court erred, however, in basing its decision on regulatory takings standards, when the actual damage was not caused by the regulation, but by the noncompliance with the regulation. The court should have based its analysis on the physical invasion aspect of the claim resulting from the BLM's inaction. *Loretto* provided that a perma-

105. *Id.* at 1428.
106. *Id.* at 1435.
107. *See supra* notes 18-72 and accompanying text for comparison between regulatory takings and inverse condemnation.
108. Kaiser Aetna v. United States, 444 U.S. 164 (1979); United States v. Causby, 328 U.S. 256 (1946); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
109. 438 U.S. at 124.
110. Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635, 645 (1986).
111. 458 U.S. at 426.
112. Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

nent physical occupation authorized by the government is a taking without regard to the public interest it may serve.[113]

B. *Government Ownership of a Damaging Instrumentality is not a Prerequisite for Finding a Taking when Government has Assumed Control*

The facts supporting the finding of a taking in *United States v. Causby*[114] are analogous to the situation at hand. In *Causby*, the government owned the military aircraft which was found to have taken an easement by continually flying low over private property. In *Hodel*, the government did not own the horses which grazed continually on the Association's property; however, the Secretary of Interior had assumed complete and exclusive control over the horses. *United States v. Cress*[115] held that the government need not own the instrumentality of the invasion as long as the actual use or invasion is caused by the government action. In *Cress*, construction of a government flood control project caused the private property owner's land to be repeatedly flooded by water. Although the government did not actually own the water that occupied the land, the United States was responsible for the invasion and thus a compensable taking was found.[116] Similarly, in *Hodel*, the inaction of the Secretary of the Interior resulted in the physical invasion of the Association's property. Because the Secretary is mandated by the Act to remove the horses upon request, the government is responsible for the damage.

C. *Takings Case Law Decided After Hodel*

In its 1986-1987 term, the United States Supreme Court decided more takings cases on the merits than in its entire history. The Supreme Court has yet to deal with the *Hodel* issue of whether "nonaction," when the government clearly has a duty to act, constitutes a taking. However, three of the recently decided cases are relevant to the takings analysis set forth above and deserve discussion relative to *Hodel* and the future of takings case law.

In *Nollan v. California Coastal Commission,*[117] the California Coastal Commission conditioned its approval of rebuilding permits for beachfront property on the requirement that owners provide lateral access to the public. The public easement, the commission argued, was in furtherance of the state interest of providing beach access to the public and therefore was not a violation of the fifth amendment under the police power. However, the Supreme Court focused on the Commission's justifications for the condition and found that the easement would not further a public interest. The *Agins* ends-means test was not met: the government's use of property as an easement did not further a legiti-

113. 458 U.S. at 426.
114. 328 U.S. 256 (1946).
115. 243 U.S. 316 (1917).
116. *Id.* at 328.
117. 107 S.Ct. 3141 (1987).

mate public interest.[118]

Along with this ends-means analysis, Justice Scalia reiterated the per se takings rule set forth in *Loretto* and stated that Supreme Court precedent has uniformly held there is a taking to the extent of the occupation. Thus, a taking exists without regard to whether the action achieves an important public benefit or causes only minimal economic impact on the owner.[119]

The *Nollan* ends-means analysis is not directly applicable to *Hodel* because there is no issue as to whether the Act furthers a legitimate public interest. However, application of the per se rule strengthens the Association's argument. The majority in *Nollan* found a permanent physical occupation by the public's continuous right to pass back and forth, even though no individual was permitted to station himself permanently upon the premises.[120] Therefore, it would seem that the same finding of a permanent physical occupation should have been applied in *Hodel* by invoking the per se rule.

In *Keystone Bituminous Coal Association v. Debenedictis,*[121] mineowners attacked the constitutionality of sections of an act prohibiting mining that caused surface subsidence damage to pre-existing buildings.[122] Because it was a facial attack and not an as-applied challenge claiming damages resulting from application of the act to the mineowners, the inquiry was limited to whether the mere enactment of the statute constituted a taking.[123]

Although the facts in *Keystone* were somewhat similar to those of *Pennsylvania Coal,*[124] *Pennsylvania Coal* did not control the *Keystone* holding. Whereas Justice Holmes found the act in *Pennsylvania Coal* to be solely for the benefit of private parties, the act in *Keystone* was found to serve legitimate public interests, that of avoiding further subsidence damage to surrounding surface estate owners.[125]

The second factor on which the Court relied to distinguish *Keystone* from *Pennsylvania Coal* is the degree of diminution of property. In *Keystone*, the court held a regulatory statute is only a taking if it denies owners of *all* economically viable uses of of their land.[126] However, as the Court held in *Andrus v. Allard*, to take one strand from the bundle of rights is not a taking because the aggregate must be viewed as an en-

118. *See supra* notes 57-58 and accompanying text. The Court in *Nollan* believed sufficient public access to the beach existed and that increased access was not in furtherance of a legitimate public interest.

119. *Loretto*, 458 U.S. at 434-35.

120. *Nollan*, 107 S.Ct. at 3145.

121. 107 S.Ct. 1232 (1987).

122. The Act in question is the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, §§ 1406.4, 1406.6 (Purdon 1980).

123. 107 S.Ct. at 1236.

124. *See supra* notes 41-43 and accompanying text.

125. *Keystone*, 107 S.Ct. at 1246.

126. *Id.* at 1248 (emphasis added); Agins v. Tiburon, 447 U.S. 260 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

tirety.[127] Thus, the Court in *Keystone* denied the mineowners' facial challenge of the act because they did not prove it was impracticable for the miners to continue mining all types of coal.[128]

The final relevant case decided by the Court during this term, *Hodel v. Irving*,[129] involved an amendment of the Indian Land Consolidation Act of 1983 which threatened to deprive Indian landowners of the right to pass property to their heirs. Property would only be subject to the amendment, section 217, if it was small, undivided, and if its productivity was low during the year preceding the owner's death. Upon the death of the owner, this small parcel would escheat to the tribe to ameliorate the problem of extreme fractionalization of the land. Justice O'Conner, after making an ad hoc inquiry as to the impact of the regulation, its interference with investment-backed expectations, and the character of the governmental action, found the new amendment to be a taking.[130] The impact of the regulation was determined to be substantial even though the income from the land was *de minimis*. Justice O'Conner stated that, although the value of the land may not be much, the right to convey land to heirs is itself a valuable right.[131] The stick in the bundle of rights involved here, the right to pass property to heirs, could be equated to the right of a property owner to occupy land free from physical invasion, as in *Mountain States Legal Foundation v. Hodel*.[132] Denial of either stick invokes the per se rule, resulting in the finding of a taking.

Through these recently decided cases, the Court has reaffirmed the framework for examining whether a regulation amounts to a taking. By examining the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action, the Court makes an ad hoc factual inquiry and determines which test should be used. If the character of the governmental action is a permanent physical invasion, as in *Nollan*, the inquiry is limited, and the per se rule is applied. The holdings in these recent Supreme Court cases, which are consistent with established precedent, are contrary to the finding of *Mountain States Legal Foundation v. Hodel*.

V. CONCLUSION

The character of the government's action must be identified by the courts in a takings analysis in order to determine what precedent to follow. The nature of the government's interference with private property owners' rights should be distinguished as either a regulation or a physical occupation. Differentiation by the courts is essential because the Supreme Court has developed different standards in their takings analy-

127. 444 U.S. 51 (1979).
128. *Keystone*, 107 S.Ct. at 1250.
129. 107 S.Ct. 2076 (1987).
130. *Id.* at 2084.
131. *Id.* at 2082.
132. 799 F.2d 1423 (10th Cir. 1986).

sis, depending on the character of the action. Although the Court has given deferential treatment to the legislature to regulate as they see fit, because of the serious character of a governmental action which physically uses and occupies private property, government physical invasion has been closely scrutinized. Permanent physical occupation of private property by the government is a taking without regard to the public purpose it may serve, and thus deserves compensation under the fifth and fourteenth amendments.

In *Hodel*, there is no doubt that the wild horses, as a result of the BLM's noncompliance with the Wild Horses Act, physically invaded the Association's property. Therefore, the regulatory takings analysis set forth by the Tenth Circuit was inappropriate. Enforcement of the Wild Horses Act did not cause the damage to the Association's property and, furthermore, compliance with the Wild Horses Act would have prevented the damage. The wild horses are controlled exclusively and affirmatively by the BLM under the Act. Had the BLM complied with the Act, the damage caused by the wild horses would never have occurred.

The majority, in their analysis of *Hodel*, whether inadvertently or intentionally, misconstrued the basis for the cause of action in upholding the government's authority to regulate. As a result, the court's analysis did not address the issues around which *Hodel* centers.

Sarah S. Godfrey

NATURAL RESOURCES AND PUBLIC LANDS

OVERVIEW

Economic exposure and contractual uncertainty have intensified for the oil and gas and mining industries. These negative factors are a direct result of the Tenth Circuit Court's decisions analyzed during this survey period.

In *Park County Resource Council v. Department of Agriculture*,[1] the court concluded that the National Environmental Policy Act (NEPA) does not automically require the preparation of an Environmental Impact Statement (EIS) for issuance of federal onshore oil and gas leases. The court ruled, however, that NEPA challenges may be initiated against holders of federal onshore oil and gas leases *at any time*, so long as exploration or development operations are in progress or contemplated for the leased land. NEPA contains no statute of limitations and the court was unwilling to limit its application with other federal statutes. Thus, the *Park County* court has vested NEPA proponents with new latitude to pursue NEPA challenges free from time restraints. Susceptibility to this continuous right to assert NEPA challenges serves to undermine the value of issued and approved federal oil and gas leases by diminishing the oil and gas industry's incentive to undertake costly and often risk laden exploratory ventures on federal lands.

While the oil and gas industry began to battle with this new dimension of economic uncertainty, the coal industry learned from the companion cases of *Coastal States Energy Co. v. Hodel*[2] and *FMC Wyoming Corp. v. Hodel*[3] that the coal industry's vested, indeterminate-term commercial coal lease contracts are no longer vested contractual rights. Rather, these contracts are actually agreements of a finite term, subject to material alteration by the Federal Coal Lease Amendment Act when such leases celebrate their next anniversary. These changes create substantial economic problems for coal mining companies who have tailored their supply and price committments to the original terms of the coal lease contract.

In *Martin Exploration Management Co. v. FERC*,[4] the Tenth Circuit held that when Congress provides oil and gas producers with the right to elect the highest price for natural gas under the complex regulatory scheme found in the Natural Gas Policy Act, such right shall not be summarily abrogated by the Federal Energy Regulatory Commission in the name of reasonable rulemaking.

The Tenth Circuit held in *Navajo Tribe of Indians v. New Mexico*,[5] that

1. 817 F.2d 609 (10th Cir. 1987).
2. 816 F.2d 502 (10th Cir. 1987).
3. 816 F.2d 496 (10th Cir. 1987).
4. 813 F.2d 1059 (10th Cir. 1987).
5. 809 F.2d 1455 (10th Cir. 1987).

the Indian Claims Commission Act was established to provide the sole forum and remedy for Indian claims arising before 1946. The harsh outcome of this case renders all courts incompetent to entertain any claim arising before 1946 and those not timely submitted to the Indian Claims Commission. By sleeping on its rights, the Navajo Tribe missed the opportunity to avail itself to the only forum empowered to hear its case.

I. NEPA CHALLENGE TO FEDERAL ONSHORE OIL AND GAS LEASING

A. *Park County Resource Council v. Department of Agriculture*

1. Background

This case further defined the relationship between the National Environmental Policy Act of 1969 (NEPA)[6] and onshore federal oil and gas leases by expanding plaintiff's rights under NEPA. The primary issue in *Park County*[7] was whether an EIS was required prior to the issuance of a federal onshore oil and gas lease. The lease at issue covered non-wilderness federal lands and was subject to customized stipulations limiting the scope of exploration activities. These stipulations restricting the lessee's activities, were designed to minimize environmental damage.[8] Before reaching the primary issue, however, the Park County court faced three distinct procedural issues of equal importance: (1) whether Park County Resource Council's (Park) claim was time-barred by the ninety day statute of limitations as found in the Mineral Lands Leasing Act of 1920 (MLLA),[9] (2) whether Park's claim was time-barred by the equitable doctrine of laches,[10] and (3) whether the courts were unavailable to Park due to its failure to exhaust administrative remedies.[11] The district

6. The National Environmental Policy Act, 42 U.S.C. § 4332(2) (1982) provides: all agencies of the Federal Government shall- . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on - (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes.

7. *Park County*, 817 F.2d at 620.

8. *Id.* at 612-13.

9. 30 U.S.C. § 226-2 (1982).

10. *Park County*, 817 F.2d at 617. The district court concluded that the equitable doctrine of laches applied since Park County's delay in filing a known claim prejudiced the intervenor, Marathon Oil Company. Park County v. Department of Agriculture, 613 F. Supp. 1182 (D. Wyo. 1985).

11. *Park County*, 817 F.2d at 619. *See* 43 C.F.R. § 4.411 (1987).

court found that all three procedural points barred Park from pursuing its substantive claim in court. This ruling forced Park to appeal the lower court's decision to the Tenth Circuit Court of Appeals.

2. Facts

Park's case was comprised of three substantive claims. First, Park asserted that the BLM should have prepared an EIS covering the entire lease area prior to issuing the oil and gas lease.[12] It claimed that lease issuance constitutes a major federal action significantly affecting the quality of the human environment, thereby requiring an EIS under NEPA.[13] Second, it claimed that the site specific North Fork well EIS was inadequate because it failed to address the cumulative surface impact that may result from a successful well completion.[14] Third, Park contended that the defendants violated the Endangered Species Act,[15] alleging that they failed to draft appropriate measures protecting nearby grizzly bears.[16]

In June 1983, Marathon Oil Company (successor in interest to May Petroleum, Inc., and representing co-owners Amarada Hess Corp. and Rosewood Resources, Inc.) submitted to the BLM an Application for Permit to Drill (APD) covering the North Fork well location.[17] The APD was approved after the BLM prepared an EIS for the well site.

Thereafter, Park filed a complaint seeking an injunction prohibiting oil and gas exploration and drilling on the lease, alleging that the BLM prepared an inadequate EIS and thus failed to comply with NEPA.[18] Park also sought a declaratory judgement that an EIS should have been prepared *prior to the issuance* of the federal oil and gas lease. Park alleged that the act of issuing the lease constituted a major federal action which significantly affected the quality of the human environment because the lease vested the lessee with the right to drill wells on National Forest Service land.[19]

a. *North Fork Lease and Well Location*

Park's request for a preliminary injunction prohibiting drilling at the North Fork site obligated Park to prove that irreparable harm would

12. *Id.* at 615, 620.
13. *Id.*
14. *Id.* at 614.
15. 16 U.S.C. §§ 1531-43 (1982).
16. *Park County*, 613 F. Supp. at 1185, 1188.
17. *Id.* at 1184.
18. *Id.* at 1184-85.
19. *Id.* at 1185. *Park County*, 817 F.2d at 614. Moreover, Park County prayed for an order "requiring defendants to withdraw their approval on any leases or permits previously given pending their compliance with . . . NEPA." *Id.* Park's motion for a temporary restraining order was denied June, 1985. The parties agreed to consolidate the hearing of Park's motion for preliminary injunction with a trial on the merits. The district court denied Park's motion for preliminary injunction and dismissed the complaint with prejudice. Park unsuccessfully sought a stay pending appeal from the Tenth Circuit. Thereafter, Park petitioned the Chief Justice of the United States Supreme Court for a stay in July 1985. This petition was denied in October 1985. 106 S. Ct. 42 (1985).

occur to the surrounding environment.[20] The North Fork well was staked on an untimbered ridge located 28 miles west of Cody, Wyoming, and 26 miles east of Yellowstone National Park, in the Shoshone National Forest.[21] The district court concluded the area was "not pristine, or primitive, or even very unusual."[22] The North Fork well was completed as a dry hole during the course of this action and reclamation work has been completed and continues to be monitored.[23] Moreover, Congress had had three opportunities to designate the area as a "Wilderness Area," but declined to do so.[24]

Prior to offering the lease, the Forest Service issued a "Finding of No Significant Impact" (FONSI).[25] This means, that with appropriate controls protecting environmental resources, an EIS at the leasing stage would not be necessary.[26] Indeed, when the lease was issued, it was subject to a number of provisions and stipulations protecting the environment from the harmful affects of oil and gas exploration.[27]

The district court ruled that the EIS prepared on the North Fork well site was adequate. It also declared that the BLM was not obligated to prepare an additional EIS prior to lease issuance.[28] Its ruling on this issue, however, was one of accommodation only, since it had ruled that Park County lost the right to attack the issuance of the lease.[29] The district court found that Park's EIS attack was time-barred by the ninety day statute of limitations in the MLLA; furthermore, Park's claim was barred by the equitable doctrine of laches; and finally it was prohibited from pursuing its claim because it failed to exhaust the administrative remedies.[30]

3. The Tenth Circuit Decision

Affirming in part and reversing in part the district court's decision, the Tenth Circuit declared that the BLM's decision to issue the lease without first preparing an EIS was reasonable,[31] in that the lease issuance itself was not a major federal action significantly affecting the quality of the human environment. The court grounded its conclusion on the bases that (1) substantial mitigating measures were imposed on Marathon's activities; (2) further environmental appraisals prior to any surface disturbance were required; (3) the possibility of future drilling

20. FED. R. CIV. P. 103.
21. *Id.* at 1184.
22. *Id.* at 1187. The court noted that the North Fork well area has always been a multiple-use area, as recently reaffirmed by Congress when it enacted the Wyoming Wilderness Act of 1984. *See* Wyoming Wilderness Act of 1984, Pub. L. No. 98-550, 98 Stat. 2807 (1984).
23. *Park County*, 817 F.2d at 614.
24. *Park County*, 613 F. Supp. at 1187.
25. *Park County*, 817 F.2d at 612.
26. *Id.*
27. *Id.* at 613.
28. *Park County*, 613 F. Supp. at 1186-87.
29. *Id.* at 1186.
30. *Id.*
31. *Park County*, 817 F.2d at 624.

activities at time of lease issuance were remote; and (4) federal agencies would have significant involvement in any future exploration activities.[32]

Judge McKay, writing for the court, removed the procedural hurdles erected by the lower court's decision. He declared that Park's action was not time-barred under the Mineral Lands Leasing Act of 1920, that the equitable doctrine of laches did not bar Park from pursuing its action, and that the failure to exhaust the administrative remedies doctrine was inapplicable to Park in this case.[33] The Tenth Circuit refused to address, however, the adequacy of the EIS covering the APD. It had declared this issue moot since the well was completed as a dry hole.[34]

a. *NEPA Not Subject to MLLA's Statute of Limitations*

In an issue of first impression, the district court held that a NEPA challenge to an oil and gas lease on federal forest land issued without an EIS is not subject to the ninety day statute of limitations found in the Mineral Lands Leasing Act of 1920.[35] The statute, in the pertinent part, provides that "[n]o action contesting a decision of the Secretary involving an oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter."[36] Park knew as early as 1983 that the lease was issued without an EIS, but chose not to bring this action until 1985.[37] The Tenth Circuit, in concluding the trial court had erred, adopted the reasoning established by the Ninth Circuit Court in *Jones v.*

32. *Id.*

33. *Id.* at 619.

34. *Id.* at 614-15. The court discussed the case-or-controversy requirement for federal court jurisdiction: the litigant must have suffered actual injury "that can be redressed by favorable judicial decision." *Park County*, 817 F.2d at 614. The court concluded that the "redressability arm of the case-or-controversy requirement is not satisfied here." *Id* at. 615. There was no meaningful remedy which Park County could obtain because the completion of all activities authorized by the permit to drill had been completed. Thus, it concluded, reversal of the district court's denial of a preliminary injunction prohibiting drilling would result in an "empty gesture." *Id.* at 615. The court conceded that although redressability was possible when the suit was initiated (well activity in progress), the court forfeited its jurisdiction at the time the well was plugged, abandoned and reclaimed. "[A] court can determine the merits of a controversy only if jurisdiction exists at all stages of the proceeding." *Id.* at 615 (quoting Amalgamated Sugar v. Bergland, 664 F.2d 818, 822 (10th Cir. 1981)).

Plaintiffs addressed the mootness issue by arguing that in spite of the fact that the North Fork well was plugged and abandoned, the issue surrounding the adequacy of the EIS was of such "great public importance" it required consideration by the court. The court rebutted that the "[e]motional involvement in a law suit is not enough to meet the case-or-controversy requirement." *Id.* (quoting Ashcroft v. Mathis, 431 U.S. 171 (1977) (per curiam).

35. 30 U.S.C. § 226-2 (1982). The court overruled the district court's finding which declared that the statute was "clear and unambiguous and that no action contesting an oil and gas lease decision shall be maintained unless taken within 90 days." *Park County*, 613 F. Supp. at 1186. The lower court's decision was based on the rationale that NEPA challenges can be devastating to the predictability of title, which is precisely what the statute is intended to guard against. *Id. See also* Geosearch v. Andrus, 508 F. Supp. 839, 845 (D. Wyo. 1981).

36. *Park County*, 817 F.2d at 616 (quoting 30 U.S.C. § 226-2 (1982)).

37. *Id.*

Gordon.[38]

i. *Jones v. Gordon* Analysis

In *Jones*, an operator of an aquatic zoological park, Sea World, applied for a permit to capture killer whales for purposes of scientific research and public display.[39] The Marine Mammal Protection Act of 1972 (MMPA)[40] provides authority for such proposed ventures. In May of 1984, Jones sought declaratory and injunctive relief against the National Marine Fisheries Service in federal court alleging that the Service's issuance of the permit to Sea World without preparation of an EIS violated NEPA.[41] The Service contended that Jones' action was time-barred by the sixty day statute of limitations found in § 104(d)(6) of the MMPA,[42] since Jones did not file his action until six months after the Service issued the permit to Sea World.[43]

The Ninth Circuit, affirming the lower court's decision, held that the statute of limitations period set forth in the MMPA does not apply to NEPA challenges since NEPA itself provides an independent source of jurisdiction for Jones' action.[44] The court interpreted the statute of limitations in the MMPA to apply to "substantive" elements of the permit only, and not to the "procedural" requirements of NEPA.[45] Thus, since Jones' challenge was essentially procedural in nature, the sixty day statute of limitations did not operate to bar his action.[46]

By direct analogy to *Jones*, the Tenth Circuit reasoned in *Park County* that the statute of limitations embodied in the MLLA only applied to "actions contesting either the lease issuance or substantive decisions relating to the lease itself."[47] In short, since a NEPA challenge is procedural in nature and does not attack the substantive elements of an oil and gas lease, the MLLA's provision simply does not apply to NEPA attacks. Therefore, they held that a NEPA challenge to the issuance of oil and gas leases on federal forest lands is not subject to the ninety day statute of limitations found in the MLLA.[48] The court also held the eq-

38. 792 F.2d 821 (9th Cir. 1986).
39. *Id.* at 823.
40. 16 U.S.C. §§ 1361-1407 (1982). The statute authorizes the Secretary to issue permits for the taking or importation of any marine mammal.
41. *Jones*, 792 F.2d at 823.
42. Section 104(d)(6) of the MMPA provides that:
> Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit. Such review, which shall be pursuant to Chapter 7 of Title 5, may be initiated by filing a petition for review in the United States District Court for the district wherein the applicant for a permit resides, or has his principal place of business, or in the United States District Court for the District of Columbia, *within sixty days* after the date on which such permit is issued or denied. (emphasis added).

16 U.S.C. § 1347(d)(6) (1982).
43. *Jones*, 792 F.2d at 824.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Park County*, 817 F.2d at 616.
48. *Id.* at 616-17.

uitable doctrine of laches as the sole defense against an untimely NEPA challenge since NEPA contains no statute of limitations.[49]

b. *Application of Laches Under NEPA*

While the laches doctrine is invoked at the discretion of the trial court, courts have held that "laches must be invoked sparingly in environmental cases because ordinarily the plaintiff will not be the only victim of alleged environmental damage. A less grudging application of the doctrine might defeat Congress' environmental policy."[50] With this qualification in mind, the Tenth Circuit overruled the district court's application of laches[51] in the instant case. By reasoning that the district court abused its discretion by invoking the doctrine of laches, it held that the district court failed to explicitly recognize that laches must be invoked sparingly in NEPA cases in order to protect Congress' environmental policy.[52]

Contrary to the district court's ruling, the Tenth Circuit did not perceive Park's tactical decision to fight the APD first rather than the lease issuance as constituting unreasonable delay. The court stated that evidence of an unreasonable delay in pressing a known claim, coupled with prejudice to the defendant resulting from such delay, was necessary to sustain a laches claim. They viewed Park's decision as a tactical maneuver and not as an unreasonable delay causing prejudice to the defendants. The court recognized that because Park was an organization with limited financial resources, it was forced to pursue the one claim that could result in the maximum benefit.[53] The two year delay in challenging the lease issuance was not due to a lack of vigilance, but rather, because "plaintiffs expected that their strategic decision to focus on the APD approval would render challenge to the underlying lease issuance

49. *Park County*, 817 F.2d at 617. In the context of NEPA challenges, there are three criteria that must be satisfied before laches can be applied: (1) a delay in asserting a right or a claim; (2) such delay was not excusable; and (3) there was undue prejudice to the defendants as a result of the delay. Sierra Club v. Cavanaugh, 447 F. Supp. 427, 429 (D. S.D. 1978).

50. *Id.* (quoting Preservation Coalition, Inc., v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982)). "[L]aches . . . has received a lukewarm reception in suits presenting environmental questions, for not only will others than the plaintiff suffer the possible adverse environmental effects, but the agency will escape compliance with NEPA, a result not to be encouraged." Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1324 (8th Cir. 1974).

51. *Park County*, 613 F. Supp. at 1186. The district court was convinced that Park knowingly delayed the filing of a known claim concerning the lease issuance and that such delay prejudiced the defendants. Park was aware no later than June 1983, that the North Fork lease was issued without an EIS and failed to bring an action at that time. Instead, Park demanded that an EIS be prepared on the North Fork APD even though it was convinced that such APD would never be approved. Once the APD was approved, Park County reversed its position and brought an action challenging the issuance of the North Fork lease. *Id.*

52. *Park County*, 817 F.2d at 617.

53. *Id.* at 617-18. The court further added that "[t]he general public, whose interest plaintiffs essentially represent in environmental cases, should not be penalized for plaintiffs decision to pursue the avenue that they thought to be most fruitful in vindicating their concerns." *Id.* at 618.

superfluous."[54]

Moreover, the court failed to find that Marathon was prejudiced by the two year delay.[55] In determining whether a delay is prejudicial, the pertinent inquiry is whether substantial work on the project has been completed before suit is brought.[56] Here, the North Fork well had been completed and reclaimed and further drilling under the lease had yet to transpire. Therefore, the court resolved that preparation of an EIS at this point in time could still reasonably be expected to ameliorate any feared environmental damage arising from future lease activities.[57]

The court did not find that the one million dollar expenditure by Marathon or the costs incurred by the Environmental Assessment (EA) and EIS delay constituted prejudice.[58] The use of capital expenditures in defining prejudice was eroded by the way the court defined the relationship between laches and NEPA. Specifically, the dispositive issue seems to be not the amount of dollars spent, but rather what "percentage of total costs has already been committed."[59] Furthermore, the court considered any increase in costs due to delay as an irrelevant factor of prejudice since NEPA, by its very nature, contemplates such delay.[60]

c. *Exhaustion of Administrative Remedies*

The thirty day period to appeal the lease issuance to the Interior Board of Land Appeals (IBLA) had long passed when Park lost on the APD issue.[61] Hence, since Park could not appeal to the IBLA even if it had wanted to, the court stated that the administrative process was not disrupted. Moreover, the *Park County* court found that the *McKart* factors, which are necessary to promote the exhaustion doctrine, were inapplicable to NEPA cases.[62] *McKart* presupposes that an administrative agency possesses expertise beyond that of the courts and that it is there-

54. *Park County*, 817 F.2d at 618. In the environmental arena, laches will not attach if (1) the party has made an attempt to make its position known to the agency before filing suit; (2) the agency makes some response to such request; and (3) physical developments such as partial construction or drilling have not taken place that would motivate citizens to investigate the legal basis for challenging the agency's action. Watershed Associates Rescue v. Alexander, 586 F. Supp. 978, 984 (1982). In the instant case, the initial challenge to the APD, rather than the lease itself, constituted Park County's attempt to make its overall position known to the BLM and Forest Service. Furthermore, absent additional drilling, there was no immediate physical indication that drilling activity would soon resume. Hence, the public had no on-the-ground evidence that would motivate their interest to seek legal redress; thus, the delay associated with pursuing their claim did not constitute laches.

55. *Park County*, 817 F.2d at 618.

56. *Watershed*, 586 F. Supp. 978, 985.

57. *Park County*, 817 F.2d at 619. For example, in light of more probing information found in an EIS, as opposed to an environmental assessment, additional lease stipulations may be devised which could further protect the environment. *Id.*

58. *Id.* at 618.

59. *Id.*

60. *Id.*

61. *Id.* at 619. *See* 43 C.F.R. § 4.410-.411 (1986).

62. The *McKart* factors are: (1) avoidance of premature interruption of the administrative process; (2) deference to bodies possessing expertise in areas outside the conventional

fore better qualified to handle the issue affecting that agency's decision.[63] In the NEPA context, however, the *Park County* court opined that it was every bit as qualified as the agency to pass judgment on NEPA claims, and that application of the exhaustion doctrine in this case would undermine the goal that prompted NEPA's development; therefore, it concluded that the trial court erred when it applied the exhaustion doctrine.[64]

d. *EIS Not Required For Issuance of Oil and Gas Lease*

The *Park County* court upheld the trial court's ruling that the BLM's lease issuance was not unreasonable. Thus, at the leasing stage, with the proper stipulatory controls, an EIS was held not to be required.[65] The court found that "the hybrid goal [of the] nation is to encourage the development of domestic oil and gas production while at the same time ensuring that such development is undertaken with an eye towards environmental concerns."[66] The *Park County* court stated that the goals of NEPA must be harmonized with the seemingly divergent views of both the Federal Land Policy and Management Act of 1976[67] (FLPMA) and the Energy Security Act,[68] which "explicitly [establishes] a national policy to end dependence on foreign energy sources."[69]

e. *Application of NEPA*

NEPA is essentially a procedural statute; it does "not require agencies to elevate environmental concerns over other appropriate considerations."[70] It simply requires that an agency take a "hard look" at the environmental consequences of any major federal action.[71] In the instant case, it is the BLM's and Forest Service's responsibility to determine whether an EIS is required prior to lease issuance.[72] To aid in this determination, the agency is required to prepare an environmental assessment (EA).[73] The EA process allows the agency to identify adverse environmental consequences that may arise from the contemplated op-

experience of judges; (3) recognition of executive and administrative autonomy; and (4) development of a factual record. McKart v. United States, 395 U.S. 185, 193-94 (1969).

63. *Park County*, 817 F.2d at 620.

64. *Id.*

65. *Id.* at 624. The district court applied an arbitrary and capricious standard to the agency's decision of whether an EIS must be prepared. *Park County*, 613 F. Supp. at 1186. *See also* Cabinet Mountains Wilderness v. Peterson, 685 F.2d. 678 (D.C. Cir. 1982); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir.), *cert denied*, 412 U.S. 908 (1972). However, the Tenth Circuit used a reasonableness standard when it reviewed the agency's action.

66. *Park County*, 817 F.2d at 621.

67. 43 U.S.C. § 1701-84 (1982). Section 1701(a)(12) stands for the proposition that public lands must be managed in a manner which recognizes the nation's need for domestic sources of minerals, food, timber and fiber from public lands.

68. 42 U.S.C. § 8701(b)(1) (1979).

69. *Park County*, 817 F.2d at 620.

70. *Id.* (quoting Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983)).

71. *Id.* (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976)).

72. *Id.* at 620.

73. 40 C.F.R. § 1501.4(b) (1986).

eration. If the envisioned environmental harm can be substantially mitigated through the use of protective measures and restrictions on lease activity, this exercise will lead to a Finding of No Significant Impact ("FONSI"), in which case an EIS will not be required. Should such mitigating measures fail to satisfy a sufficient number of environmental concerns, however, an EIS will be required.[74]

Based on the strength of the EA that was drafted prior to issuance of the contested lease,[75] the BLM determined that the lease issuance itself did not warrant prior preparation of an EIS.[76] To determine whether an EIS should have been prepared, the role of the reviewing court is a narrow one. Its role is to determine whether it is reasonable for the BLM and the Forest Service to conclude that "the action under review will have no significant environmental consequences."[77] The party challenging the agency's decision "shoulders the burden of establishing that the FONSI was unreasonable."[78] Finally, in its analysis of whether an EIS is required under NEPA, the BLM and Forest Service may properly weigh the mitigating measures it will impose on lease ac-

74. *Park County*, 817 F.2d at 621. Federal onshore oil and gas leases are issued through the Department of Interior-BLM pursuant to the Mineral Leasing Act of 1920, as amended in 30 U.S.C. §§ 181-226 (1982). Upon lease issuance, the lessee is entitled to conduct exploration and/or drilling activities in accordance with the terms and conditions of the lease, subject to any stipulations attached to the lease. Often, as in this case, special lease stipulations require approval of activities by the Forest Service, which is the surface managing agency. If lease offerings affect lands administered by the Forest Service, the BLM submits them to the Forest Service for review. The Forest Service makes a recommendation whether the lease should be issued and, if so, recommends mitigating measures in the form of lease stipulations that will control the environmental impacts that may be caused by lease activity. It is the general practice of the BLM to accept Forest Service recommendations.

The Forest Service administers responsibility over the EA process. In addition, when the lessee or its designated operator exercises its rights to drill under the oil and gas lease, it is required to file a proposed operating plan to the BLM in order to receive an approved permit to drill. 43 C.F.R. § 3162.3-1(a) (1986). Environmental documents pursuant to NEPA are prepared prior to approval of the proposed operations. 43 C.F.R. § 3162.5-1(a) (1986). The BLM and Forest Service work in tandem to scrutinize the proposed plan in light of NEPA and, if appropriate, tailor environmental stipulations allowing the operator to fulfill his operating plan while minimizing any impact his operations may have on the environment. Brief for Appellees/Cross Appellants at 5-7, Park County Resource Council v. Department of Agriculture, 817 F.2d 609 (10th Cir. 1987).

75. *Park County*, 817 F.2d at 621. The Forest Service prepared an EA exceeding 100 pages. It evaluated the effects of, and alternatives for, its recommendations on oil and gas lease offers involving the Shoshone National Forest. The Forest Service opted to recommend lease issuance with appropriate stipulations to protect surface resources. The EA also recommended against leasing where strict statutory control over operations would be insufficient to avoid unacceptable irreversible damage to resources. *Id.*

76. *Id.* On November 9, 1979, the Regional Forester issued a Finding of No Significant Impact ("FONSI"). Hence, its final determination stated that there would be no significant impact on the human environment as a result of oil and gas lease issuance under the stipulations promulgated by the Forest Service. *Id.*

77. *Id.* at 621. There is a split among the circuit courts as to the appropriate standard of review in evaluating whether an agency's determination to forego an EIS should be overturned. *Id.* at note 4. The Tenth, Third, Fifth, Eighth, and Ninth Circuits adhere to the "reasonableness standard." The First, Second, Fourth, and Seventh Circuits apply the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard, as set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). *Id.*

78. *Park County*, 817 F.2d at 621 (citing Vieux Carre Property Owners, Residents & Associates v. Pierce, 719 F.2d 1272, 1279 (5th Cir. 1983)).

tivity which serve to reduce negative environmental impacts.[79]

As a result of these factors, the *Park County* court held that Park failed to meet its burden. The Court concluded that the BLM and the Forest Service took the requisite "hard look" at the environmental consequences of oil and gas leasing, and that the FONSI was "within the bounds of reasonable decision making."[80]

The issuance of the oil and gas lease was fundamentally a paper transaction, that is, the lease issuance itself did not allow the lessee to do anything. A gamut of environmentally mitigating measures were in place forcing the lessee to obtain prior federal approval and conduct futher environmental analysis before carrying out any surface disturbing activities.[81] Hence, the BLM and Forest Service maintained tight control over future activities. They reserved the right to impose strict modifications, or in the case of threatened or endangered species, disallow those activities that they considered detrimental.[82]

Park argued that an EIS must be prepared at the leasing stage because they were convinced that exploratory drilling would eventually lead to full field development.[83] They argued that if such effects are not considered at the leasing stage, they could not adequately be addressed at a later time.[84] The court noted, however, that there are no definite foreseeable effects of full field development at the leasing stage.[85] Indeed, oil and gas exploration statistics prove that one exploratory success, let alone full field development, is extremely tentative and speculative at the leasing stage.[86] The court recognized that requiring a cumulative EIS, which contemplated full field development at the leasing stage, would result in a gross misallocation of resources and would not provide a useful environmental analysis for major federal actions that affect the environment.[87]

The court added that when an APD for a specific site is proposed, an EIS evaluating the myriad environmental concerns should be initiated.[88] The purpose of an EIS can only be fully realized when a project

79. *Id.*

80. *Id.* at 622 (quoting Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 125 (1983)).

81. *Id.*

82. *Id.* The court in *Park County* relied on Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), where the major issue was whether the lease of Indian land to a corporation constituted a "federal" action, which would trigger NEPA. *Id.* In that case the court held that an EIS was required prior to lease issuance because there were plans to develop the leased land. The *Park County* court held that *Davis* "does not stand for the proposition that an EIS is required whenever the Federal Government leases land." *Park County*, 817 F.2d at 622.

83. *Park County*, 817 F.2d at 622.

84. *Id.*

85. *Id.* at 623.

86. *Id.* Exploration activities take place on only one out of ten federal leases issued and development activities are conducted on only one of ten of those leases on which exploration activities have been approved and completed.

87. *Id.*

88. *Id.* at 623.

is *proposed* not merely *contemplated*.[89] "[T]he project must be of sufficient definitiveness before an evaluation of its environmental impact can be made and alternatives proposed."[90] Otherwise, requiring an EIS at the leasing stage is like "demanding that the Department specify the probable route of a highway that may never be built from points as yet unknown over terrain as yet unchartered in conformity with state plans as yet undrafted. A more speculative exercise can hardly be imagined."[91]

4. *Conclusion*

At first blush it appears the oil and gas industry can claim a victory in that the BLM is not required to prepare a cumulative EIS prior to issuance of an onshore federal oil and gas lease, because such action does not constitute a "major federal action significantly affecting the quality of the human environment."[92] This ruling, however, rests on the tender underpinnings that the reviewing agency reasonably identify the potential environmental harm arising from speculative lease activities and that these concerns are adequately embodied in an EA with companion lease stipulations mitigating any adverse environmental effects. NEPA contains no statute of limitations, thus leaving the equitable doctrine of laches as the sole remaining affirmative defense available to the lessee who is forced to defend against a NEPA challenge.[93] Since courts sparingly apply laches to environmental issues raised in the name of NEPA, the weakness of the laches defense is obvious. This effectively means that exploration and development plans for federal leases will remain susceptible to NEPA attack until these activities have been completed and reclaimed.

II. FEDERAL COAL LEASE READJUSTMENTS

A. *Background*

The companion cases of *Coastal States v. Hodel*[94] and *FMC v. Hodel*[95] dealt with the statutory application of the rules and regulations governing the leasing of federal coal lands. The primary issues presented to the Tenth Circuit concerned the timeliness of the Bureau of Land Management's (BLM) coal lease readjustment practices and the reasonableness of the terms mandated thereunder. The results of these two cases dramatically change the vested rights conferred upon pre-Federal Coal Leasing Amendment Act[96] leases, a result that will have a far reaching

89. *Id.* (citing Weinberger v. Catholic Action, 454 U.S. 139, 146 (1981) (emphasis in orginal)).

90. *Id.* at 624 (quoting Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1237 (10th Cir. 1971), *vacated on other grounds*, 409 U.S. 1021 (1972) (emphasis added)).

91. *Id.* (quoting County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1379 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978)).

92. *Id.*

93. *See supra* notes 50-60 and accompanying text.

94. 816 F.2d 502 (10th Cir. 1987).

95. 816 F.2d 496 (10th Cir. 1987).

96. 30 U.S.C.S. § 207(a) (Law. Co-op. Supp. 1986).

impact on the mining and development of western federal coal lands.

B. *Coastal States Energy Co. v. Hodel*

1. Facts

Coastal States Energy Company (Coastal) owns and operates an underground coal mine in Sevier County, Utah, known as the SUFCO Mine.[97] In March 1985, the BLM attempted to readjust two federal coal leases[98] owned by Coastal pursuant to the Mineral Lands Leasing Act of 1920 (MLLA)[99] and the regulation promulgated thereunder. These two leases embrace the largest portion of the coal reserves making up the SUFCO Mine. The two leases, issued pursuant to the MLLA,[100] carried royalty burdens equal to 15 cents per ton of coal mined.[101]

In accordance with the MLLA, the leases were issued for an indeterminate period of time, subject to the BLM's right to reasonably readjust and fix the terms and conditions of each lease at the end of twenty years from the date of issuance and thereafter at the end of each succeeding twenty-year period.[102] Thus, on September 1, 1981, and February 28, 1982, the two leases in question (the "SL" lease and "U" lease, respectively) were subject to readjustment.[103]

Two months before the end of the second twenty-year period, the BLM notified Coastal that it had intended to readjust the SL lease. The notice did not outline the readjustment terms, but simply stated that the terms and conditions would be forwarded within two years, and that the readjustment would take effect sixty days after the anniversary date.[104] Seventeen days after the second twenty-year period had expired, the BLM sent Coastal a Notice of Proposed Readjustment of Lease, and notified Coastal that it had sixty days in which to file objections to the pro-

97. The SUFCO Mine employs over 250 people. In recent years Coastal has made capital improvements to the mine in amounts in excess of $33,000,000. To date, the mine has produced over two million tons of coal, of which 80% of the annual production is committed and sold pursuant to long term coal supply contracts. The price that Coastal receives for this coal is directly tied to the royalty it must pay to the federal government pursuant to the underlying coal lease. Opening Brief for Appellant at 6, Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987).

98. *Coastal*, 629 F. Supp. at 12. On September 11, 1941, Coastal's predecessor, Lorenzo R. Hansen, as Lessee, entered into coal lease Number SL-062583 (the "SL" Lease) with the United States. *Id.* On March 1, 1962, the United States, as Lessor, and Coastal State's predecessors, Southern Utah Fuel Company and Equipment Rental Service, as Lessees, entered into coal lease Number U-062453 (the "U" Lease), *Id.*

99. Mineral Lands Leasing Act of 1920, 30 U.S.C. § 185 (1985).

100. *See* 30 U.S.C. § 207 (1976) which mandated that each federal lease contain the following material terms: a royalty of not less than 5 cents per ton of coal mined payable on a quarterly basis; annual lease rentals topping out at no greater than $1.00 per acre on the fifth anniversary date; lease term was for an indeterminate period of time conditioned upon diligent development and continued operations.

101. *Coastal*, 629 F. Supp. at 12.

102. 30 U.S.C. § 201-07 (1976).

103. *Coastal*, 629 F. Supp. at 12.

104. *Id. See also* BLM Instruction Memorandum No. 80-463 (April 17, 1980) requiring that such notices be sent to lessee at least 120 days prior to the end of the current twenty year period.

posed terms or surrender the lease.[105]

In similar fashion Coastal received a readjustment notice from the BLM affecting the U lease. Two months prior to the U lease's twenty-year anniversary, specific readjustment terms were proposed.[106]

The Secretary proposed the readjustment of several lease provisions[107] similar for both leases, mandating an increase in the royalty rate from 15 cents per ton to 8% of the value of the coal removed by underground mining methods.[108] Coastal, objecting to the proposed readjustments, made a timely protest to the BLM. The BLM refused to amend the proposed readjustments, forcing Coastal to appeal the BLM's decision to the Interior Board of Land Appeals (IBLA).[109] The IBLA affirmed the BLM's decision,[110] after which Coastal appealed to the Federal District Court for the District of Utah, challenging both the readjustments and the underlying regulations and policies upon which they were grounded.[111] The district court entered summary judgment in favor of the BLM, holding that: "(1) [the] readjustment process was not required to be completed prior to end of lease term; (2) the Federal Coal Leasing Amendments Act (FCLAA) royalty provisions apply to readjustments of a pre-FCLAA lease; and (3) the regulations (underlying the BLM's action) were valid."[112] Coastal appealed this adverse decision to the Tenth Circuit Court of Appeals.[113] Judge McWilliams affirmed the lower court's decision and ruled that (1) the coal lease readjustments were timely and (2) that the FCLAA applies to pre-FCLAA leases.[114]

2. The Tenth Circuit Decision

The two principle issues presented on appeal were (1) whether the BLM preserved the right to formally readjust the leases after the expiration of the twenty year anniversary date by serving Coastal with a notice of intent to readjust the coal leases before the expiration of their twenty year anniversary date, and (2) whether Section 6 of the FCLAA, and the regulations and policies promulgated thereunder should apply to pre-FCLAA leases on their anniversary dates.[115]

105. *Id.* Coastal filed its objections with the BLM regarding the SL lease on November 24, 1981.

106. *Id.*

107. In addition to the royalty readjustment the BLM had proposed readjusting the following terms: (1) increase in the bonding requirement from $3,000 to $450,000; (2) change in royalty payments from monthly to quarterly; and (3) the deletion of the right to credit rental payments against royalty payments. *Coastal*, 629 F. Supp. at 12-13.

108. *Coastal*, 629 F. Supp. at 12.

109. *Id.* at 13.

110. 70 I.B.L.A. 386 (Feb. 9, 1983).

111. *Coastal*, 629 F. Supp. at 13.

112. *Id.* at 9.

113. Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987).

114. *Id.* at 502.

115. *Id.*

a. *Timeliness of the Readjustment*

Coastal reasserted it's argument made in the district court, that for readjustment to be effective, the terms of the readjustment must be final before the end of the leases' twenty-year anniversary period.[116] The Department of Interior took the contrary position, that final readjustment is effective so long as the BLM sends a notice of intent to readjust to the coal lessee prior to the end of the twenty years.[117] Both parties claimed that *Rosebud Coal Sales Co. v. Andrews*[118] is controlling.

i. The Tenth Circuit's Interpretation of the *Rosebud* Decision

In *Rosebud*, the Tenth Circuit held that the BLM's attempt to readjust the terms and conditions of a coal lease was unlawful, when the notice of intent to readjust was provided two and one half years after expiration of the lease's twenty-year period.[119] The *Rosebud* court, however, did not address the issue of whether filing a notice of intent to readjust prior to expiration of the twenty year period preserved the right to readjust the lease after expiration of such time.[120] In the instant case, however, the district court, by relying heavily on the Tenth Circuit's contemporaneous decision in *FMC v. Hodel*,[121] expanded the rationale of *Rosebud*. It declared that "[a]ll *Rosebud* required was that Notice of Readjustment be given on or before the Twenty-year anniversary date of the lease," to preserve the Secretary's right to readjust.[122] The district court claimed that its finding was consistent with the MLLA, the FCLAA (1976) and the language embodied in the leases themselves.

The MLLA, as amended by the FCLAA (1976) establishes the framework by which the government must abide in the leasing of federal coal lands to private parties. The statute, as amended, vests the Secretary of the Interior with the right to readjust the terms and conditions of a coal lease at the end of the lease's anniversary period.[123] Coastal argued that the phrase, "at the end of" such period, is unambiguous and must be afforded its plain meaning, which required the readjustment to be final at the end of the twenty-year period for it to be effective.[124] The district court, however, found Coastal's statutory interpretation too narrow and unconvincing. The court insisted that such interpretation is subject to the examination of all relevant statutes and regulations

116. *Coastal*, 629 F. Supp. at 13.
117. *Id.*
118. 667 F.2d 949 (10th Cir. 1982).
119. *Id.* The court emphasized that it was not "difficult to reach the conclusion that the readjustment was to be when each twenty-year period expired, on that date and not at a later time." It concluded that the statement of time " 'at the end of' on its face is not susceptible to any variation as it is a precise time." *Id.* at 951.
120. *Coastal*, 629 F. Supp. at 13.
121. 816 F.2d 496 (10th Cir. 1987). *See also infra* notes 159-91 and accompanying text.
122. *Coastal*, 629 F. Supp. at 13 (quoting Gulf Oil v. Clark, 631 F. Supp. 29 (D.N.M. 1985)).
123. 30 U.S.C.A. § 207 (Law. Co-op. 1971).
124. *Coastal*, 629 F. Supp. at 13.

promulgated thereunder. Since there are numerous regulations governing the readjustment process, the district court concluded that the requirements of these regulations created a readjustment process as opposed to requiring the BLM to readjust the leases in a single act.[125] As a result, the otherwise plain meaning of the word "at" as interpreted in *Rosebud* has turned from a particular point in time, to an entire period of time required for readjustment.

ii. Reasonableness of the Coal Leasing Regulations

Coastal next attacked the reasonableness of the regulation process that had been established to accomplish the mandated readjustments. As authorized in the MLLA, the Secretary promulgated regulations that implemented the specifics of the FCLAA. This resulted in the installation of a comprehensive procedure whereby the Secretary would be required to notify the lessee, prior to the expiration of the twenty-year lease term or any succeeding ten-year period thereafter, of whether readjusted terms would be made prior to the end of such period.[126] If the Secretary fails to notify the lessee of its intent to readjust, this shall be deemed a waiver of its right to readjust for the ensuing lease period.[127] The regulations further provide that the Notice to Readjust must inform the lessee when the specific terms will be transmitted, and that such transmission must be done within two years upon receipt of notice. If the BLM fails to comply within this two year period it waives its right to readjust.[128] Finally, the regulation scheme allows the lessee a sixty-day period following receipt of the readjusted terms to lodge an objection thereto with the IBLA.[129]

Coastal asserted that the foregoing regulations must be set aside because they were "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law."[130] The court analyzed the reasonableness of the regulations by the standards set out by the Adminis-

125. *Id.* at 15.

126. *Id.* at 14. *See* 30 U.S.C. § 207 (1976). *See also* 43 C.F.R. § 3451.1(a)(1) (1981) (which subjects the two leases to readjustment at the end of their current twenty year period and at the end of each ten year period thereafter).

127. *Coastal*, 629 F. Supp. at 14. *See also* 43 C.F.R. § 3451(d)(1) (1981) which states that: "[t]he Secretary shall, prior to the expiration of the current or initial twenty year period or any succeeding ten year period thereafter, notify the lessee of any lease which becomes subject to readjustment after June 1, 1980, whether any readjustment of terms and conditions will be made prior to the expiration of the initial twenty year period or any succeeding ten year period thereafter. On such a lease the failure to so notify the lessee shall mean that the United States is waving its right to readjust the lease for the readjustment period in question." *Id.* The BLM sent Coastal notice, required by this Section, 63 days prior to the end of the second year period of the SL Lease and well in advance of the end of the initial twenty year period of the U Lease. *Coastal*, 629 F. Supp. at 12.

128. *Coastal*, 629 F. Supp. at 14. *See* 43 C.F.R. § 3451.1(d)(2) (1981).

129. *Id.* at 14-15. *See* 43 C.F.R. § 3451.1 (1981).

130. *Coastal*, 629 F. Supp. at 17. Coastal asserts that the Secretary violated the Administrative Procedures Act, which in pertinent part required the Court to "hold unlawful and set aside agency action, findings and conclusions found to be (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law . . . , (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by statues." 5 U.S.C. § 706(2)(a) (1982).

trative Procedures Act (APA).[131] A regulation is considered arbitrary and capricious only if the agency relied on factors which were not intended by Congress or if it failed to consider the crucial aspects of the problem, or issued a decision so implausible as to defy reality.[132] The court found the BLM's regulations to be consistent with the APA and accordingly held that the regulations were not arbitrary, capricious, or an abuse of agency discretion.[133] "Congress has authorized the Secretary to 'prescribe necessary and proper rules and regulations to carry out and accomplish the purposes of the Act of 1920."[134] Since Congress failed to define the procedures by which readjustment was to take place, the regulations established by the BLM setting forth those procedures are within the BLM's authority so long as the regulations are not contradictory to the MLLA.[135] Furthermore, the recognized policy of the FCLAA was "to provide a more orderly procedure for the leasing and development of coal presently owned by the United States and to assure its development in a manner compatible with public interest."[136] The court concluded that the regulations promulgated by the Secretary were consistent with the goals of the MLLA, and therefore they were within the bounds of the Secretary's authority.[137]

In *Rosebud*, the court concluded that the plain meaning of "at the end of" each twenty year period was clear, that "it is a precise point in time and not susceptible to any other meaning."[138] By adopting the lower courts analysis, as discussed above, the Tenth Circuit in essence transformed this "precise time" into a continuum whereby the process of readjustment may take place over a period of time, provided that the process begins before the end of the lease period.[139]

b. *Application of FCLAA to Pre-FCLAA Leases*

Citing section 7 of the MLLA the court noted that "leases shall be for an indeterminate period . . . upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of Interior may determine, *unless otherwise provided by law at the expiration of such periods*."[140] The court, relying heavily on *FMC*,[141] interpreted this

131. 5 U.S.C. § 706(2)(A) (1982).
132. *Coastal*, 629 F. Supp. at 17-18.
133. *Id.* at 17. The court concluded that the APA Standard was satisfied since the BLM complied with the Act by publishing the challenged regulations for comment and incorporating some of the comments received in the final regulation. *Coastal*, 816 F.2d at 505. In fact, the district court noted that Coastal did not object to the challenged rule when proposed. *Coastal*, 629 F. Supp. at 16.
134. *Coastal*, 629 F. Supp. at 18.
135. *Id.*
136. *Id.* (quoting H.R. REP. No. 681, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 1943).
137. *Id.* at 19.
138. *Id.* 667 F.2d at 951.
139. *Coastal*, 816 F.2d at 505.
140. 41 Stat. 437 § 207 (1920).
141. 817 F.2d 496 (10th Cir. 1987).

language to mean that Congress empowered the Secretary with the right to impose any new lease term or condition, no matter how broad or wide sweeping those changes might be, at the readjustment stage of the subject leases.[142] The Tenth Circuit conceded this was a very broad authority, subject only to the stipulation "unless otherwise provided by law . . . ."[143] The Tenth Circuit, departing from the trial court, recognized that this language required the statutes in effect at the time of readjustment to be incorporated into the leases.[144] Hence, at readjustment time, the Secretary was required to readjust the leases in conformity with the FCLAA.[145]

Close examination of the court's interpretation of the FCLAA reveals that the FCLAA transformed the lessee's lease from an indeterminate term coal lease to one with a finite period, which will expire when commercial production ceases. Coastal argued that such a change would undermine the fundamental character of the lessee's vested property rights, a result they concluded, was not intended by Congress when it enacted the FCLAA.[146] Furthermore, by applying the FCLAA to pre-FCLAA leases, Coastal asserted that such statutory application served to interfere with Coastal's antecedent rights, thus giving the statute retroactive effect.[147] Coastal relied on the general proposition that such retroactive application of the FCLAA must be supported by explicit "unequivocal and inflexible import of the terms [of the statute] and the manifest intention of the legislature."[148] Coastal claimed the government failed to make such necessary showing in this case. The district court concurred with Coastal's argument, however, it did not view the application of the FCLAA to pre-FCLAA leases as interfering with antecedent rights through retroactive application.[149] To the contrary, the district court asserted that the Secretary "specifically reserved the power to readjust the leases, both in the leases themselves and in the Act of 1920, as amended."[150] The district court concluded, and the Tenth Circuit affirmed, that the powers granted to the Secretary by Congress in no way altered the rights that the original leases gave to Coastal.[151]

i. The Eight Percent Royalty

The MLLA of 1920 set the minimum royalty rate at five cents per

142. *Coastal*, 816 F.2d at 505.
143. *Id.*
144. *Id.* The trial court determined that 'the unless otherwise provided by law' language only allows the Secretary to readjust leases "unless the law in effect at the time of readjustment has taken that right away." *Coastal*, 629 F. Supp. at 20. The Tenth Circuit interpreted the same language to mean that the Secretary was required to base readjustments according to the law in effect at the time of readjustment. *Coastal*, 816 F.2d at 506.
145. *Coastal*, 816 F.2d at 506.
146. *Coastal*, 629 F. Supp. at 20.
147. *Id.*
148. *Id.* (quoting Union Pacific v. Larimie, 231 U.S. 190 at 199 (1913)).
149. *Id.* at 20-21.
150. *Id.* at 21.
151. *Coastal*, 816 F.2d at 506.

ton.[152] This rate was increased by the FCLAA to not less than 8% of the value of the coal removed from an underground mine, subject to the proviso that the BLM may select a lesser amount, but in no case less than 5%.[153] The BLM argued that this regulation required the imposition of the 8% royalty rate at readjustment time and that a lower rate could not be considered.[154] It further asserted that Coastal, if finding the 8% rate excessive, could file application for relief under Section 39 of the MLLA.[155] Coastal rebutted the BLM's argument asserting that the regulations required the imposition of the 5% rate as the authorized minimum royalty rate.[156] The district court affirmed the BLM's position that the 8% rate was the reasonable minimum rate.[157] The Tenth Circuit aligned itself with the district court's analysis, with one minor departure. The Tenth Circuit concluded that the Secretary, prior to installing an 8% rate, must take into consideration conditions that would justify the imposition of the lower 5% rate.[158]

C. FMC v. Hodel

1. Facts

Unlike the mining operation in *Coastal States*[159] the two leases at issue here make up a surface coal mine near Kemmerer, Wyoming, known as the Skull Point Mine.[160] Both leases were issued in March,

152. *Supra* note 100 and accompanying text.

153. C.F.R. § 3473.3-2(a)(3) (1979).

154. *Coastal*, 816 F.2d at 506.

155. *Id. See* 60 Stat. 957 (1946), *reprinted in* 30 U.S.C. § 209 (1982). This section allows the Secretary to reduce or waive a royalty rate whenever he judges it necessary in order to promote development or allow the lessee to successfully operate. The royalty readjustment period is limited to a maximum of three years. Furthermore, the royalty relief may be terminated at the annual evaluation period or upon transfer of lease ownership. *Coastal*, 816 F.2d at 536 n.7.

156. *Coastal*, 816 F.2d at 507. Coastal relied on the underground readjustment royalty regulations promulgated by the Secretary, primarily 43 C.F.R. § 3451.1 (a)(2) (1976) which states: "[a]ny lease subject to readjustment which contains a royalty rate less than the minimum royalty prescribed in § 3473.3-2 of this title shall be readjusted to conform to the minimum prescribed in that Section." They also relied on Section 3473.3-2(a)(1) which provides in pertinent part that: "[r]oyalty rates shall be determined on an individual basis prior to the lease issuance . . . " and Section 3473.3-2(a)(3) which states: "[a] lease shall require payment of a royalty of not less than 8% of the value of the coal removed from an underground mine, except that the authorized officer may determine a lesser amount, *but in no case less than 5% if conditions warrant.*" *Coastal*, 816 F.2d at 507 (emphasis added).

157. *Coastal*, 816 F.2d at 507.

158. *Id.*

159. *Id.* at 502 (10th Cir. 1987).

160. The two coal leases are lease W-061421 and lease W-061422. FMC has spent millions of dollars to produce coal from its mine. The majority of its production fuels FMC's Kemmerer coal generated electrical facility and Green River Trona plant. In fact, FMC spent in excess of $70 million converting its Trona Plant from natural gas to coal generation. The balance of FMC's production is sold under spot purchase orders and long term contracts. In addition, the mine is classified as one of only two mines in the country (the other being Pittsburgh & Midway's mine directly adjoining and in direct competition with FMC's mine) as a special bituminous coal mine. This classification is awarded to mines when the cost of extracting coal increases over the life of the mine and the mine is therefore exempt from certain reclamation standards. FMC v. Watt, 587 F. Supp. at 1546

1963, pursuant to the MLLA and "called for a royalty payment of 17 1/2 cents per ton of coal while providing for periodic readjustment of the terms and conditions of the lease at twenty year intervals."[161]

The twenty year anniversary date for both leases was March, 1983, some seven years following the enactment of the FCLAA.[162] The BLM sent FMC actual notice[163] of its intent to readjust, and a petition of the specific proposed terms and conditions prior to the twenty year anniversary of the leases.[164] The readjusments increased the royalty rate from the present 17 1/2 cents per ton to 12 1/2% of the value of the coal mined.[165] FMC objected to the timeliness and substance of the proposed terms.[166] On administrative appeal the Interior Board of Land Appeal (IBLA) upheld the BLM's judgment that the royalty readjustment was timely and that the adjusted terms were lawful.[167] FMC filed a petition for review in the United States District Court for Wyoming.[168] The IBLA's decision was affirmed in part, and reversed in part, by the district court. The court held that the readjustment was timely but unlawful.[169] Both parties appealed to the Tenth Circuit Court of Appeals. Judge McWilliams held that the royalty readjustment was both timely and lawful.[170]

2. The Tenth Circuit Opinion

Like *Coastal* before it, the central issues on appeal in *FMC* concerned whether (1) the BLM waived its right to readjust FMC's leases for failure to provide final readjusted terms within the anniversary deadline, and (2) whether the FCLAA should be applied to pre-FCLAA leases on their post-FCLAA anniversary dates.[171]

a. *Timeliness of Readjustment*

FMC argued that readjustment occurs when the BLM issues its final decision and the lessee is made aware of what the terms and conditions will be.[172] FMC based its position on its interpretation of Section 7 of the MLLA.[173] FMC took the position that under the MLLA, a final BLM decision to readjust terms and conditions of a coal lease cannot take

(1984); *see also* Surface Mining Control & Reclamation Act of 1977, 30 U.S.C. § 1277 (1977).

161. FMC v. Hodel, 816 F.2d at 498 (10th Cir. 1987).
162. *Id.*
163. FMC received the BLM's notice on August 23, 1982. *FMC*, 587 F. Supp. at 1546.
164. *Id.* The actual new terms were proposed by the BLM on December 22, 1982.
165. *FMC*, 816 F.2d at 498. This is a royalty increase of over 1,000%. *See FMC*, 587 F. Supp. at 1548.
166. *Id.*
167. 74 I.B.L.A. 389 (1983).
168. *FMC*, 816 F.2d at 498.
169. FMC v. Watt, 587 F. Supp. 1584 (1984).
170. *FMC*, 816 F.2d 496 (10th Cir. 1987).
171. *Id.* at 499-500.
172. *Id.* at 499.
173. *Id.*

effect when the terms are set after the anniversary date.[174] Here, the final terms occurred thirty seven days after the lease's anniversary date.[175] Thus, argued FMC, since the readjustment of the existing leases did not occur *at the end* of twenty years after the date of the leases, as required by the MLLA and the leases themselves, the readjustment was void.[176]

The BLM argued that so long as it sends notice to the lessee of its intent to readjust a lease prior to the twenty-year anniversary date, it reserves the right to establish final readjusted terms at a later date, and that such practice is in compliance with both the statute and the language of the leases.[177] As in *Coastal States*, both parties placed reliance on *Rosebud Coal Sales Co. v. Andrews*.[178]

i. *Rosebud* Revisited

As previously stated, in *Rosebud* the anniversary date of readjustment was April, 1975.[179] However, no notice of any type was sent to the lessee until two and a half years after the expiration of the second twenty-year lease period. Both the district court and the Tenth Circuit found that such a belated adjustment attempt was "untimely and thereby barred."[180] However, the Tenth Circuit in the instant case *strongly suggested* that its *Rosebud* holding incorporates the notion that if the BLM sends a Notice of Intent to readjust the terms and conditions of a coal lease "on or shortly before the 20-year anniversary period" such notice operates to preserve the BLM's rights under the MLLA and the language of the lease to readjust the terms in a reasonable fashion thereafter.[181]

b. *Application of FCLAA to Pre-FCLAA Leases*

The district court found that the BLM's application of Section 6 of the FCLAA (specifically the 12 1/2% royalty mandated therein) to FMC's leases was "arbitrary, capricious, and an abuse of discretion."[182] It conceded that the 12 1/2% royalty rate is now a statutory minimum. But it stopped short of applying it to pre-FCLAA leases by recognizing that such application would abrogate the provision of the leases which provides for reasonable readjustment.[183] The district court viewed the imposition of a 1,000% royalty increase imposed without any inquiry into the factual basis supporting such an increase as arbitrary and as defying notions of equity.[184]

174. *Id.*
175. *Id.*
176. *Id.* (emphasis added).
177. *Id.*
178. 667 F.2d 949 (10th Cir. 1982).
179. *Id.* at 950.
180. *Id.* at 953.
181. *FMC*, 816 F.2d at 500.
182. *FMC*, 587 F. Supp. at 1547.
183. *Id.* at 1549.
184. The district court noted that the method for readjustment applied to pre-FCLAA

The Tenth Circuit found the district court's judgment untenable in light of its interpretation of the MLLA and the language in the leases. The court construed the statute and the lease language to mean that the Secretary may fix "such a new royalty rate as he, or she, may determine is proper, unless the law in effect at the expiration of such twenty-year period provides differently."[185] Thus, the court concluded that, the Secretary had no choice but to impose the 12 1/2% royalty rate, since it was the rate mandated by law at the readjustment period.[186] Implicit in the court's analysis is that the statutory language not only militates against the use of the language in the lease calling for reasonable readjustment, but actually subordinates this reasonableness requirement to the "unless otherwise provided by law" language found in Section 7 of the MLLA.[187]

c. *Retroactive Application of FCLAA*

FMC argued, and the district court agreed, that "mandatory application of the 12 1/2% royalty rate to pre-existing leases, without factual evaluation *is* retroactive application of the provision, which everyone concedes was not intended and is not proper."[188] The district court opined that readjustment of an existing lease is not a new event, rather it is part of the inherent process of the original lease, and to mandatorily apply a 12 1/2% royalty rate materially altered the original term of the lease.[189] No such expressed intent can be found in the FCLAA.[190] The Tenth Circuit found no merit to FMC's argument or the district court's ruling. It concluded that the Secretary clearly had the right to set new terms on the readjustment date and that it is not retroactive application of FCLAA to set new terms in accordance with existing law.[191]

C. *Conclusion*

The implications of *Coastal States*[192] and *FMC*[193] deserve closer at-

leases called for the construction of an evidentiary basis based on an individual analysis of each coal lease up for readjustment. Items analyzed by the BLM with regard to pre-FCLAA cases included: (1) the "existence of a competitive bituminous coal mine which is not subject to readjustment and, therefore, the allegedly mandatory 12 1/2% royalty rate could not be applied until 1998; [and (2)] the very nature of plaintiff's mine, which presumably will be forced to produce less coal as a 12 1/2% royalty rate contributes to making the costs of mining prohibitive." *FMC*, 587 F. Supp. at 1548.

185. *FMC*, 816 F.2d at 501.

186. *Id.*

187. The court discounts the harsh economic realities caused by the readjustment by shifting the burden to Congress. *FMC*, 816 F.2d at 501.

188. *FMC*, 587 F. Supp. at 1548 (emphasis supplied). The district court based its holding on *Rosebud* wherein the court concluded that "[t]he Section 7 amendment provided for a primary term and also for the royalty to be not less than 12.5%. There is no suggestion whatever that the amendment was to be retroactive and the contrary is indicated." *Id.* (quoting *Rosebud* 667 F.2d at 952).

189. *FMC*, 587 F. Supp. at 1548.

190. 30 U.S.C. § 201 (1982).

191. *FMC*, 816 F.2d at 502.

192. *Id.*

193. *Id.* at 496.

tention and further judicial review.

Coal mining is a unique business. It often takes more than ten years to move a mine from the exploration stage, through the permitting process, to actual development. This process requires the expenditure of millions of dollars before one ton of coal can be mined. To justify this expenditure, long term coal sales contracts must be secured. These contracts serve to provide a stable and assured fuel supply for the primary end user and a predictable and assured market for the miner. The long term sales contracts, coupled with the long term nature of pre-FCLAA leases, provided the miner with the necessary confidence and security upon which to undertake the large capital investment required for the successful development of the large, often remote, federal coal reserves.

Congress, aware of the unique nature of the coal business, deliberately provided for indeterminate term leases so that coal companies would have a reliable and a stable estate upon which to plan their investments.[194] Now, as a result of *Coastal States* and *FMC*, the lessee's estate has been transformed from an indeterminate term lease to a much lesser defeasible interest: one which makes coal production a condition precedent to the continuation of that interest. Moreover, the 1,000% increase levied against the leases is repugnant to the notion of reasonable predictability of lease adjustments envisioned by Congress and bargained for by the lessees when they entered into the coal lease contract. The courts claimed that retroactive adjustment was not employed in these cases;[195] the results of the application of FCLAA to pre-FCLAA leases, however, suggests otherwise.

III. Antecedent Tribal Claims Under the Indian Tribal Claims Commission Act

A. Navajo Tribe of Indians v. New Mexico[196]

1. Overview

The principle established in this case is quite simple: all Indian claims, regardless of their nature, that accrued before 1946 and which were not lodged with the Indian Claims Commission by 1951 are forever barred. In the instant case, the Navajo Tribe lost its only remedy available under the law because of the timeliness of their action in accordance with the Indian Claims Compensation Act (ICCA).[197]

194. The legislative history of the MLLA suggests that Congress chose indeterminate coal leases and phosphate leases primarily to satisfy what Congress perceived to be a greater need for reliability of investment in coal mines and phosphate plants. *See* 51 Cong. Rec. 14,945 (Sept. 12, 1914).

195. *FMC*, 816 F.2d at 500.

196. 809 F.2d 1455 (10th Cir. 1987).

197. Navajo Tribe of Indians v. State of N.M., 809 F.2d 1455, 1470-71 (10th Cir. 1987). Indian Claims Commission Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (1946) (formerly codified as amended at 25 U.S.C. 70-70V (1976)) (omitted from current code because Indian Claims Commission terminated on September 30, 1978).

2. Facts

Executive Order Number 709 (Original Order),[198] issued by President Theodore Roosevelt, conveyed 1.9 million acres of land to the Navajo Tribe, augmenting the original Navajo Reservation as established by the Treaty of 1868. Subsequently, discoveries revealed that the boundaries of the reservation created by the Original Order intruded upon the boundary of the Jicarilla Apache Reservation. President Roosevelt rectified the problem by issuing Executive Order Number 744 (Amendatory Order),[199] which redefined the lands granted under the Original Order. Both Executive Orders were designed to create temporary reservations of land (allotted lands) which were to be assigned to and occupied by qualified individual Navajo tribal members.[200]

Within five months following the issuance of the Amendatory Order, Congress enacted section twenty-five of the Act of 1908[201] which authorized the President to return all unalloted parcels to the public domain when he was satisfied that all qualified Navajo tribal members had been settled.[202] In December of 1908, President Roosevelt exercised the authority granted under the this Act and issued Executive Order 1,000 (Final Order),[203] restoring to the public domain for further dispo-

198. The Order states:

> It is hereby ordered that the following-described tract of country in the Territories of Arizona and New Mexico, viz: [description of metes and bounds] is hereby, withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the present Navajo Reservation: *Provided*, That this withdrawal shall not affect any existing valid rights of any person.

Exec. Order No. 709 (1907) *reprinted in* H.R. 1663, 60th Cong., 1st Sess., 2 (1908).

199. The Order states:

> Whereas it is found that the Executive order of November 9, 1907, setting apart certain lands in Arizona and New Mexico as an addition to the Navajo Indian Reservation, conflicts in part with Executive order of November 11, 1907, setting apart certain lands as an addition to the Jicarilla Indian Reservation, N. Mex., said Executive order is hereby so amended that the description of the tract of land set apart as an addition to the Navajo Reservation shall read as follows: [description of metes and bounds].

Exec. Order No. 744 (1907), *reprinted in* H.R. 1663, 60th Cong., 1st Sess., 2-3 (1908).

200. *Navajo*, 809 F.2d at 1458-59.

201. Act of May 29, 1908, ch. 216, 35 Stat. 444 at 457.

202. This legislation was in direct response to the concerns of non-Indian settlers who believed the Indians would hold the land for tribal purposes too long. *Navajo*, 809 F.2d at 1458. The Act of 1908 provided in pertinent part:

> That whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation in New Mexico and Arizona created by Executive Orders [709/744] have been allotted, the surplus lands in such part of the reservation shall be restored to the public domain and opened to settlement and entry by proclamation of the President.

Act of May 29, 1908, ch. 216, 35 Stat. 444 at 457.

203. Executive Order Number 1,000 (1908) states:

> It is hereby ordered that the unallotted lands in Tps. 17, 18, 19, 20, and 21 N.,Rs. 5, 6, 7, and 8 W., and Tps. 22 and 23 N., Rs. 6, 7, and 8 W. of the New Mexico principal meridian, withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the Navajo Reservation by Executive orders dated November 9, 1907, and January 28, 1908, be, and the same are hereby, restored to the public domain, except the following-described lands, embracing 110 unapproved allotments, namely: [description of land].

Exec. Order No. 1000 (1908).

Subsequent to Executive Order 1000, President Taft issued Executive Order 1284 on

sition, unallotted lands within the reservation created by the Original Order and as amended by the Amendatory Order.[204]

Following the enactment of the ICCA of August 13, 1946,[205] the Navajo Tribe filed a claim seeking compensation under section two of the ICCA for the cession of its lands, which included the lands defined in the Original Order and Amendatory Order, under the Treaty of June 1, 1868.[206] The Tribe successfully argued that it held aboriginal title to the subject lands at the time of the 1868 Treaty and that the United States had paid an unconscionably low price for the land.[207] As a result of the complaint, the United States Court of Claims awarded the Navajo's $14.8 million for the loss sustained.[208]

Thereafter, the Tribe brought this second action in October 1982, in the Federal District Court of New Mexico, seeking a declaratory judgment that the Tribe held equitable title to the unallotted lands that were added to the Navajo reservation by the Original and Amendatory Orders and that the United States breached its fiduciary duty to the Tribe by prematurely restoring the lands to the public domain.[209] The district court dismissed the Tribe's complaint, holding that it lacked subject matter jurisdiction to hear the case because the Tribe's claim against the United States accrued prior to 1946 and, thus, fell within the exclusive jurisdiction of the Indian Claims Commission.[210] At the same time, the Court dismissed the complaint of the private defendants. The Tribe appealed the decision to the Tenth Circuit Court of Appeals. Judge McKay, writing for the court, held that: (1) the Tribe's claim was cognizable exclusively under the ICCA; (2) the Tribe's claim was compensable only by money damages; (3) the claim was barred by the statute of limitations under the ICCA; and (4) the district court properly dismissed the action

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January 16, 1911, restoring the remaining unallotted lands in that reservation to the public domain. Act of May 29, 1908, ch. 216, 35 Stat. 457.

204. *Navajo*, 809 F.2d at 1459. This order was issued in spite of the fact that over one-half of the eligible Navajo allottees had not received allotments. *Id.*

205. *See supra* note 203 and accompanying text. Prior to enactment of the ICCA, Indian tribes could not litigate claims against the United States. *Navajo*, 809 F.2d at 1460. Although the Court of Claims was available to hear claims against the United States, Congress specifically excluded from that court's jurisdiction the power to hear Indian claims based on treaties. *Id. See*, Act of March 3, 1863, ch. 92, 12 Stat. 765 at 767. "The ICCA confined the Commission's jurisdiction to tribal claims that accurred before its 1946 enactment, while it conferred jurisdiction on the Court of Claims to adjudicate any tribal claim accruing after 1946 that would be cognizable in the Court of Claims if the claimant were not an Indian tribe." *Navajo*, 809 F.2d at 1460. Further, Congress limited the period for filing claims to five years. The ICCA further provided that the Commission was to be dismantled 10 years after its creation. Due to the Commission's enormous case load, however, the period to hear pre-1946 claims was extended several times until 1978. *Id.* at 1461.

206. Navajo Tribe of Indians v. United States, 23 Ind. Cl. Comm. 244 (1970).

207. *Navajo*, 809 F.2d at 1461-62.

208. *Id.* at 1462.

209. *Id.*

210. *Id.* In addition, the district court held that, as to the remaining defendants, "under Rule 19(b) of the Federal Rules of Civil Procedure, the action could not proceed against them in the absence of the United States as grantor of the patents through which those defendants derive title." *Id.* at 1462-63.

against the private defendants.[211]

3. The Tenth Circuit Decision

The primary issue addressed by the Tenth Circuit Court was whether the Tribe's claim fell within section 12 of the ICCA. If the claim did qualify as a section 12 action, the district court then lacked jurisdiction over the action against the United States, since the statute of limitations had expired under the ICCA.[212] Second, the Tenth Circuit had to determine whether the district court abused its discretion by dismissing all remaining defendants pursuant to Rule 19(b) of the Federal Rules of Civil Procedure. Since the United States was deemed an indispensable party, it could not be joined and without it the action could not proceed.[213]

a. *"Claim" as Defined Under the Indian Claims Commission Act*

The Tribe argued that the district court erred by categorizing the Tribe's action as a claim within the exclusive jurisdiction of the ICCA, rendering the action susceptible to the statute of limitations in said Act.[214] The Tribe claimed that its title to the land reserved, under the Original and Amendatory Orders, was never extinguished because the President breached the fiduciary requirement not to return the lands to the public domain until the allotment process had been completed.[215] Based on this argument the Tribe interpreted the word "claim," within the meaning of ICCA, to mean exclusively a demand for money for its land.[216] In other words, since "the Commission was only authorized to award money damages for extinguishment of title to Indian lands, this suit, which seeks to establish the Tribe's existing title to land, could not have been entertained before the Commission."[217] Finding the Tribe's argument unpersuasive and that the action did indeed fall under the ICCA the district court dismissed the complaint against the United States for lack of subject matter jurisdiction.[218] The basis of the district court's holding was derived primarily from *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States*[219] and *Oglala Sioux Tribe v. Homestake Mining Co.*[220]

The *Oglala* cases resolved issues directly on point with those issues appealed in *Navajo Tribe*. In *Oglala I*, the United States Supreme Court affirmed a $17.1 million award to the Sioux Nation for the "taking" of

211. *Navajo*, 809 F.2d at 1463.
212. *Id.* at 1470.
213. *Id.* at 1471. The remaining defendants were the State of New Mexico, Santa Fe Mining, Norman Ashcroft, Fernandez Company, and Don R. Smouse.
214. *Id.* at 1463.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) [hereinafter *Oglala I*].
220. 722 F.2d 1407 (8th Cir. 1983).

the Black Hills of South Dakota which were decreed as part of their reservation by an 1877 Act.[221] Following the decision, the Oglala filed suit against several parties including the United States seeking restoration of the lands for which the Sioux Nation received compensation. The Sioux Nation argued that the 1877 Act was unconstitutional and, therefore, void.[222] The district court dismissed the Oglala's action against the United States for lack of subject matter jurisdiction and dismissed the action against the private defendants after concluding that the United States was an indispensable party.[223] In upholding the district court's decision, the Eighth Circuit held that the ICCA created a "one time, exclusive forum" for the resolution of pre-1946 Indian Treaty claims.[224] Although the ICCA's awards are limited to money damages, the court nonetheless determined that "Oglala's action to quiet title, 'as an Indian claim accruing before 1946 and arising under the constitution, [came] within [the] exclusive jurisdiction of the Indian Claims Commission.' "[225]

Based on the persuasive authority presented by the Oglala cases, the court readily adopted the principle that the ICCA bars any action against the United States or third parties seeking the return of tribal lands that were allegedly taken from the Tribe by the unlawful conduct of the United States prior to 1946. The Tribe also argued that the exclusive jurisdiction provision of the ICCA should only apply to the them if it was seeking monetary damages as opposed to the return of its lands. The court found this argument untenable, since the ICCA was enacted specifically to provide a remedy for all possible accrued claims existing before its passage.[226]

In addition, the Tribe attempted to escape the exclusivity of the ICCA by distinguishing its claim from the one asserted in *Oglala I and II*. The Tribe asserted that unlike *Oglala I and II*, which were predicated on the unconstitutional taking for which the Tribe had already received compensation, the instant case was one where the Navajo's title was never extinguished and, therefore, its cause of action did not raise the unconstitutional taking issue.[227] In essence, the Tribe argued that unconstitutional takings claims are not cognizable under the ICCA. The

221. *Navajo*, 809 F.2d at 1463. *See* United States v. Sioux Nation, 220 Ct. Cl. 442, 601 F.2d 1057 (1979), *aff'd*, 448 U.S. 371 (1980).

222. *Navajo*, 809 F.2d at 1463. *See Oglala I*, 650 F.2d at 141-42.

223. *Id. See Oglala I*, 650 F.2d at 143-44.

224. *Oglala I*, 650 F.2d at 143.

225. *Navajo*, 809 F.2d at 1464 (quoting *Oglala I*, 650 F.2d at 143). The *Oglala II* case involved an action against a private defendant named in *Oglala I* and was dismissed on the basis of res judicata. *Oglala II*, 722 F.2d at 1411.

226. *Navajo*, 809 F.2d at 1465-66. Congress was concerned that some meritorious Indian claim might be inadvertently omitted from the Commission's jurisdiction. Therefore, it recommended that the jurisdiction conferred upon the Commission be as broad as possible. "The bill would establish . . . a body, responsible to the Court of Claims and the Supreme Court of the United States with respect to all legal controversies. It would require all pending Indian claims of whatever nature, contractual and non-contractual, legal and nonlegal, to be submitted to this fact- finding body within five years, and would outlaw claims not so submitted." *Id.* at 1465.

227. *Id.* at 1464.

court found this argument unpersuasive, and concluded that the Tribe's claim was cognizable under the ICCA, since the taking was one which arose under executive orders of the President. Claims which arise under executive orders are specifically covered under section 2 of the ICCA and, therefore, are within the jurisdiction of the Commission.[228] Moreover, as illustrated in *Yankton Sioux Tribe v. United States*,[229] the ICCA "clearly granted jurisdiction to litigate just what the Navajo Tribe would like to litigate in this case - validity of Indian title to land."[230] As in *Yankton*, if the Tribe here had timely brought its actions under the ICCA, its sole remedy would have been an award of money damages.[231]

Finally, the Tribe attempted to categorize its claim as an action to quiet title.[232] Such action, however, invokes the Quiet Title Act of 1972, which contains a twelve year statute of limitations that was exceeded by the Tribe in the instant case.[233]

b. *Indispensability of the United States*

The Tribe argued that the district court erred in holding that the claim against the remaining defendants must be dismissed pursuant to Federal Rule of Civil Procedure 19(b). Relying on Rule 19(b), the district court opined that since the action against the United States had failed and given that the United States was deemed an indispensable party to the litigation, the action against the private defendants should also be dismissed. Implementation of Rule 19(b) is largely left to the discretion of the trial court. Therefore, the reviewing court will disturb the trial court's holding only if it finds that the trial court abused its

228. *Id.* at 1471. Under section 2 of the ICCA the Commission was empowered to hear cases falling under the following five broad categories:

> (1) claims in law or equity arising under the constitution, laws, treaties of the United States, and Executive Orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

25 U.S.C. § 70(a) (1976).

229. 272 U.S. 351 (1926).

230. *Navajo*, 809 F.2d at 1466. In *Yankton*, the Tribe claimed title to a piece of land known as the Red Pipe-Stone Quarry. It sought judicial reformation of its title, not compensation for the taking of the land by the United States. The Tribe prevailed in that the Supreme Court recognized that it owned the property in fee. However, because the land was subsequently conveyed to bona fide third party purchasers by the United States, the Court ordered monetary compensation. Yankton v. United States, 272 U.S. 351 (1926).

231. *Navajo*, 809 F.2d at 1467.

232. *Id.* at 1469. The Tribe argued in the alternative, that since its claim was not for monetary damages it had the right to classify its action as a Quiet Title Action, which falls outside the bounds of the ICCA, and thus vests the district court with subject matter jurisdiction.

233. *Navajo*, 809 F.2d at 1469.

discretion.[234] Here, the Tenth Circuit court found no such abuse and affirmed the lower court's dismissal.[235] The Tenth Circuit adopted the trial court's reasoning that the Tribe's claim against the remaining defendants was, in reality, a challenge to the validity of the transaction by which the United States assumed title to the subject land. "It is a fundamental principle of the law that an instrument may not be cancelled by a court unless the parties to the instrument are before the court."[236]

The Tenth Circuit was satisfied with the lower court's inquiry as to whether in "equity and good conscience" it could find the United States indispensable. The Tenth Circuit found that to avoid potential prejudice both to the interest of the United States and those of the other defendants, dismissal of the remaining defendants was required.[237]

The court conceded, however, that by affirming the dismissal, the tribe had no alternative adequate remedy at law. The court reasoned, however, that the weight afforded this particular factor should be minimal because it arose from the tribe sleeping on its rights and not from the actions of a third party.[238]

4. Conclusion

The court was compelled to uphold the legislative intent behind the ICCA, in which the Act was established to be the exclusive remedy for Indian claims arising before 1946.[239] As the ICCA's sponsor stated:

> [L]et us see that the Indians have their fair day in court so that they can call the various governmental agencies to account on the obligations that the federal Government assumed. And let us make sure that when the Indians have their day in court, they have an opportunity to present all their claims of every kind of shape, and variety, so that this problem can truly be solved once and for all without coming back to haunt us or our successors.[240]

Here, the Navajo tribe had a claim that was cognizable only under the ICCA; however, by sleeping on its rights and not bringing its action timely, it missed its only window of opportunity provided under the law.

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234. *Id.* at 1471; *See also* Glenny v. American Metal, 494 F.2d 651 (10th Cir. 1974).

235. *Id.* at 1476.

236. *Id.* at 1472 (quoting Terra v. Morton, 360 F. Supp. 452 (D.N.M. 1973), *aff'd*, 498 F.2d 240 (10th Cir. 1974)).

237. *Id.* at 1472. The trial court found:

> (1) the claims against the non-federal parties rested on documents of title or possession derived from the United States; (2) that the tribe seeks to cancel all such instruments; (3) that this court has affirmed the principle that all parties to an instrument must be present, else it may not be cancelled; (4) that, more specifically, validity of a deed or patent issued by the Federal Government cannot be questioned in suit by a third party against the grantee; and (5) that the Eighth Circuit Court has found indispensability in analogous circumstances.

Id.

238. *Id.* at 1473.

239. *Id.* at 1465.

240. 92 CONG. REC. H5312 (1946) (statement of Rep. Jackson, Chairman, House Committee on Indian Affairs).

IV. FERC INTERPRETATION

A. Martin Exploration Management Co. v. FERC[241]

1. Overview

This case presents a challenge by natural gas producers to the Federal Energy Regulatory Commission's (FERC) natural gas pricing regulations. Specifically challenged are those provisions which provide that natural gas which qualifies for both a ceiling price or regulated price, and a deregulated price, as established by the complex statutory scheme in the Natural Gas Policy Act of 1978 (NGPA)[242] must be deemed to be deregulated for purposes of price determination.[243]

2. Facts

In the NGPA, Congress developed an intricate pricing system by which natural gas was divided into numerous pricing categories and assigned a maximum lawful price.[244] In response to the pricing system embodied in section 121 of the NGPA, FERC issued a notice of proposed rule making to institute partial decontrol for intrastate gas, generally, and gas produced from "new wells,"[245] defined as operations which commenced on or after February 19, 1977, specifically.[246] This

241. 813 F.2d 1059 (10th Cir. 1987).

242. 15 U.S.C. §§ 3301-3432 (1978). Specifically, the producers challenged FERC Order 406 codified at 18 C.F.R. § 270.208 (1986) which provides in pertinent part that:

> First sales of natural gas that is deregulated natural gas . . . is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

Id.

243. 813 F.2d 1059 (10th Cir. 1987).

244. *Martin*, 813 F.2d at 1062. The NGPA is a comprehensive esoteric scheme outlining Congress' intent to settle the market and price imbalance that have historically plagued the intrastate and interstate gas markets. In 1938 Congress enacted the Natural Gas Act (NGA), Pub. L. No. 75-688, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. 717-717W (1976)). "The NGA was enacted in response to reports suggesting that the monopoly power of interstate pipelines was harming consumer welfare." *Martin*, 813 F.2d at 1062 (quoting Public Service v. Mid-Louisiana, 463 U.S. at 327 (1983)). "The NGA authorized the Federal Power Commission (FPC was superceded by FERC in response to the Department of Energy Organization Act of 1977, 42 U.S.C. § 7101, et seq., 7134) to establish such price ceilings for the sale of interstate gas for resale as were 'just and reasonable.' " *Martin*, 813 F.2d at 1062; (citing in part 15 U.S.C. § 717(c)(a) (1976)). The NGA did not regulate the price of gas sold in intrastate markets. This resulted in intrastate gas commanding higher prices than the regulated interstate gas, which created an artificially high demand for interstate gas and a coincident shortage in the interstate market.

In response to this market imbalance, Congress and the President endeavored to establish legislation providing for predictable and steady supplies of natural gas in both the intrastate and interstate gas markets. Their efforts resulted in the NGPA of 1978 which "did not adopt either the uniform regulation or the complete deregulation approach in their entirety; rather, the bill was the 'careful reconciliation of two strong, but divergent, responses to the natural gas shortage.' " *Id.* at 1063; (quoting Public Service v. Mid-Louisiana, 463 U.S. at 331 (1983)).

245. *Martin*, 813 F.2d at 1063. The NGPA defines a new well as one whose surface drilling began on or after February 19, 1977, or which was deepened by at least 1,000 feet after that date. *See* 15 U.S.C. § 3301(3) (1978).

246. Section 121 of the NGPA defines a portion of the complicated pricing system. In

proposed rule making was entitled Order Number 406.[247] Order 406 essentially assigned a deregulated price to gas that qualifies for both a regulated incentive price and deregulated price.

The price categories established under the NGPA are not mutually exclusive, "a particular sale may be 'dually qualified' within a 'new' or 'old' gas category and also a 'difficult to produce category.' "[248] This provides the producer with two pricing categories from which to choose. Each category is defined and a procedure for price determination is set out in the statute.[249] FERC's proposed rule would eliminate the producers pricing election.

The purpose of the regulated incentive price scheme was to increase the availability of difficult to produce gas and encourage production from otherwise marginal wells.[250] FERC construed this policy to mean that natural gas producers should be denied access to a still-regulated category if such access would result in a higher price over a deregulated gas price.[251] Several parties contested FERC's proposed order, but FERC upheld the essence of Order No. 406 when it promulgated Order Number 406(A).[252] Order 406(A) again stated that whenever gas qualifies for a deregulated and regulated price, the deregulated price category would prevail.[253]

Unhappy with FERC's rehearing results, the gas producers sought judicial review to the Tenth Circuit Court of Appeals pursuant to the judicial review provision found in the NGPA.[254] The Tenth Circuit affirmed in part and reversed in part, holding that if natural gas qualifies under more than one pricing category or for an exemption from such a pricing category, then the statute requires application of the category that would result in the highest price. This means that if gas qualifies for both a regulated and deregulated category, the category which yields the highest price shall prevail. The court also ruled that the application of a special rule that limits the price obtainable pursuant to an indefinite price escalator clause to any indefinite price escalator clause in existing or successor intrastate contracts that was or would have been in excess of one dollar per million BTU's on December 31, 1984, was a reason-

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essence the NGPA "divides natural gas production into numerous categories that are distinguished by the date that production began from a well or the particular type of drilling involved." *Martin*, 813 F.2d at 1063. The three gas categories are "old" gas, "new" gas, and "difficult to produce" gas.

247. *See supra* note 242.

248. *Martin*, 813 F.2d at 1064.

249. *Id.* at 1064-65; *see also* NGPA § 503, 15 U.S.C. § 3413 (1978).

250. *Martin*, 813 F.2d at 1065.

251. *Id.* at 1066. This case centers around the interpretation of § 121(b)(5) which states: "If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable." *See* 15 U.S.C. § 3311(b)(5) (1978).

252. *Martin*, 813 F.2d at 1065; (Order 406-A, RM 84-14-000, III FERC Stats. Regs. (CCH) 30,614 (November 16, 1984)).

253. *Martin*, 813 at 1072. The court also reviewed FERC Order 406(B), which addressed the application of price increases under indefinite price escalator clauses.

254. *Id.* at 1065.

able interpretation of the statutes that deregulated intrastate, natural gas.[255]

3. The Tenth Circuit Opinion

The court addressed (1) whether Section 101(b)(5) of the NGPA gives natural gas producers the inherent right to elect any applicable NGPA pricing category, regulated or deregulated, that would result in the highest price for its product; and (2) whether the commission's regulation regarding the impact of Indefinite Price Escalator Clauses found in gas purchase contracts on otherwise decontrolled sales of gas was reasonable in light of the congressional intent underlying the NGPA.[256]

a. *Standard Of Review For FERC Actions*

The threshold inquiry concerning the standard of review applicable to FERC interpretations of the NGPA by the court is whether Congress has addressed the precise issue. If Congressional intent is unambiguous, the court, as well as the agency, must give it effect.[257] It is the traditional stance of the court to defer to the agency's position when it has chosen between alternative possible constructions of an ambiguous statute, especially in a highly complex statutory design as is found in the NGPA.[258] The court stated that "[w]here the plain words of the statute do not answer a particular question, the agency interpretation must be reasonable, but it need not be the only reasonable interpretation or the interpretation that the reviewing court would adopt."[259] The court found FERC's regulations to be in direct contravention to the clear intent of Congress, and therefore held FERC's regulation void, as it was applied to incentive price determination.[260]

b. *Interpretation of NGPA Pricing System*

Gas producers argued that Congress, by enacting section 101(b)(5) of the NGPA, expressly conferred upon producers the right to select the highest price its gas could achieve under the applicable pricing categories. They also argued that the commission's regulation automatically eliminated this statutory right of election.[261] The court, finding the producer's argument dispositive, concluded that Congress "anticipated precisely" the dual category pricing question in section 101(b)(5), and that FERC could not deny gas producers a right which Congress specifically

255. *Id.* at 1059, 1065.
256. *Id.* at 1065.
257. *Id.* (quoting Chevron v. Natural Resources, 467 U.S. 837, 842-843 (1984)).
258. *Id. See also* Union Texas v. FERC, 721 F.2d 146 (5th Cir. 1983).
259. *Id. See, e.g.*, Chemical v. Natural Resources, 470 U.S. 116, 125 (1985).
260. *Id.*
261. *Id.* at 1066. FERC interprets the "cease to apply" language of § 121 of NGPA, that applies to the deregulation of certain categories of gas, to mean that "if gas has been determined to be in one of the listed categories, there is no longer a ceiling price for such a gas even if the gas has been determined to be in a category that is not listed." *Id.*

provided.[262]

c. *Incentive Pricing Under Section 101(b)(5)*

In deciding an issue of first impression, the Tenth Circuit held that section 101(b)(5) applied to those categories of gas "providing for any maximum lawful price or for any *exemption* from such a price."[263] FERC argued that reference to "any exemption from such a price" does not refer to deregulated gas, but allows FERC to establish special ceiling prices in particular situations.[264] The court responded that FERC's ability to establish special ceiling prices in certain situations is covered by section 101(b)(5); however, the court also declared that section 101(b)(5) applied to deregulated gas.[265]

The producers argued that Congress established higher ceiling prices for certain categories of natural gas, i.e., those gases that are considered difficult to produce, for the express purpose "[of assuring] adequate supplies of natural gas at fair prices."[266] Two of these categories, stripper wells and tight formation producing gas, fall within dual pricing categories: incentive pricing under sections 108 and 107(c)(5), respectively; and, deregulated prices under sections 102 and 103.[267] When faced with such a pricing dilemma, the producers argued that section 101(b)(5) allows them to elect the provision which could result in the highest price, assuming the underlying contract permits such an election. Any other interpretation, producer's argued, eliminating the pricing election would circumscribe the intent of Congress.[268] Embracing the producers analysis, the court concluded that FERC's orders rested on the erroneous assumption that gas can be determined to qualify for a particular category without going through the specific determination procedure set forth in the statute. The court therefore concluded that FERC's interpretation could not be upheld.[269]

The court noted that the NGPA was a hard fought compromise

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262. *Id.* at 1066.

263. *Id.* at 1067 (emphasis supplied).

264. *Id.*

265. *Id.* In support of its position the court points out that its interpretation of the word "exemption" is also consistent with the meaning of "exemption" as found throughout the NGPA, specifically § 101(b)(9), which provides: "In the case of . . . any price which is established under any contract for the first sale of natural gas which is *exempted* under Part B of this subchapter from the application of a maximum lawful price under this subchapter, such maximum lawful price, or such exemption from such a maximum lawful price shall not supercede or nullify the effectiveness of the price established under such contract." *Id.* (emphasis added). *See also* 15 U.S.C. § 3311(b)(9) (1978); Pennzoil v. FERC, 645 F.2d 360, 374 (5th Cir. 1981), *cert. denied*, 454 U.S. 1147 (1982).

266. *Martin*, 813 F.2d at 1070 (quoting Transcontinental v. State, 106 S. Ct. 719 (1986)).

267. *Id.* at 1064.

268. When addressing Section 121(b)(5) the court quoted Senator Jackson who noted that it "stands for the proposition that a producer may claim or apply for the highest price to which he is entitled. It does not imply an administrative duty to compel a State or Federal agency to search through the various price classifications under the Act and find the permissible price." *Id.* at 1070 (quoting 124 CONG. REC. 29,109 (1978)).

269. *Martin*, 813 F.2d at 1070.

"and a careful reconciliation of two strong, but divergent responses to the natural gas shortage."[270] The overall purpose of the Act was "to provide incentive prices to encourage exploration and development of new reserves in the short-term, and to gradually substitute market forces for regulated prices by phasing in deregulation in 1985 and 1987."[271] The court emphasized that the NGPA is not exclusively a deregulation statute, but rather a combination of phased deregulation and incentive pricing, that serves to maximize gas production from all phases of the gas exploration effort. The general wisdom was that natural gas prices would rise steadily in the future.[272]

> Prices have actually dropped drastically, however, and this accounts for the anomalous situation we now see: producers seek the regulated ceiling price rather than the deregulated market price. As enunciated in section 101(b)(5), the category which could result in the highest price is available to producers. Hence, "gas that has been qualified in both a regulated and deregulated category will now be sold at the regulated price until the market price rises above the ceiling price." Therefore, provided the market price remains below the ceiling price section 101(b)(5) will have the unanticipated effect of operating as a price floor for producers.[273]

The court also remarked that Congress surely possessed the authority to amend this perhaps unintended application of the NGPA, however, since Congress has to date refrained from doing so, the courts' only role is "simply to give effect to the words Congress has chosen."[274] Accordingly, the court held that "FERC acted contrary to the intent of Congress as evidenced in the unambiguous language of section 101(b)(5)."[275]

d. *Application of Indefinite Price Escalator Clauses*

The court also reviewed a segment of FERC Order 406-B, concerning the deregulation of intrastate gas.[276] The relevant statutory provision, 15 U.S.C. § 3331(a)(3),[277] "deregulates intrastate gas that is sold under a contract that had set a price in excess of $1.00 on December 31,

270. *Id.* at 1070 (quoting Public Service v. Mid-Louisiana, 463 U.S. at 331).

271. *Id.* at 1070 (quoting FERC Reg. 49 Fed. Reg. at 36,401; § 49 Fed. Reg. at 46,878).

272. *Id.*

273. *Id.* at 1071.

274. *Id.* at 1072.

275. *Id.*

276. *Id.* at 1072; Rule 406-B, issued February 15, 1985, RM 84-14000-30, FERC (CCH) 61,152, adopts rules under NGPA § 121(a)(2), 15 U.S.C. § 3331(a)(3); § 121(e), 15 U.S.C. § 3321(e) and 15 U.S.C. § 3315 (b)(3)(A).

277. Section 121(a)(3) provides for the deregulation of "natural gas sold under an existing contract, any successor to an existing contract, or any rollover contact if (A) such natural gas was not committed or dedicated to interstate commerce on November 8, 1978; and (B) the price paid for the last deliveries of such natural gas occurring on December 31, 1984, or, if no deliveries occurred on such date, the price that would have been paid had deliveries occurred on such date is higher than $1.00 per million BTU's." 15 U.S.C. § 3331(a)(3).

1984."[278]

Of the gas producers involved in this litigation, only Shell Oil Corporation contested FERC Order 406-B. This Order, which essentially allowed for any gas found to be sold at a price established under an indefinite price escalator clause, returns that gas to a controlled status thus subjecting its price to the limitations set forth in Sections 121(e) and 105(b)(3)(A) of the NGPA.[279] Congress enacted these statutes in response to the fear that "following deregulation, the operation of indefinite price escalator clauses . . . could operate to increase rapidly intrastate gas prices following deregulation."[280]

Shell concurred with the commission that the pricing rule in section 105(b)(3)(A) operates to limit only those price increases created by an indefinite price escalator clause. Shell's position departs from that of the Commission on the issue of what gas category is subject to the pricing rule. Shell urged a narrow interpretation of the statute that would provide that "the limitation applies to intrastate contracts only 'if they were above $1.00 on December 31, 1984 *solely by reason of indefinite price escalator clauses*.' "[281] This argument advanced by Shell was found by the Commission to be inconsistent with the governing statutory provisions and the legislative history.[282] FERC concluded "that the limitations imposed by sections 121(e) and 105(b)(3)(A), apply to any indefinite price escalator clause in an existing or successor intrastate contract that is, or would have been, in excess of $1.00 per MMBTU's on December 31, 1984."[283]

The crucial difference between the two positions is that the "FERC interpretation does not focus on how the price was established on December 31, 1984, while Shell would limit the application of the special rule to those circumstances in which the indefinite price escalator clause established the price on December 31, 1984."[284] The court concluded that FERC's interpretation of the statute was reasonable and that the language of the statute did not require the interpretation promoted by Shell.[285]

5. Conclusion

While oil and gas producers struggle with the unprecedented low gas prices plaguing the contemporary market, this case reaffirms the

278. *Martin*, 813 F.2d at 1072.

279. *Id.* at 1073. Sections 121(e) and 105(b)(3)(A) serve to limit the price that can be established by an indefinite price escalator clause.

280. *Id.* at 1072-73; quoting 124 CONG. REC. 38,365 (1978) (Statement of Rep. Dingell).

281. *Id.* at 1073 (quoting Supplemental Initial Brief of Shell Offshore Inc. and Shell Western E & P, Inc. in Brief for Appellant at 12, Martin Exploration Management Co. v. FERC, 813 F.2d 1059 (10th Cir. 1987) (emphasis supplied)).

282. *Id.* For example, the conference report makes it clear that *how* the December 31, 1984, price exceeds $1.00 is irrelevant.

283. *Martin*, 813 F.2d at 1073 (quoting FERC 49 Fed. Reg. at 50, 641).

284. *Id.* at 1073.

285. *Id.* at 1074.

producers' right to elect whichever gas category could result in the highest price for its product. Such ruling serves (1) to encourage drilling and production of natural gas, particularly tight gas sands which are found in ample supply in certain areas of the Rocky Mountain Region of the United States; and (2) promotes the Congressional intent to establish a viable gas market characterized by predictable supplies and prices of natural gas.

CONCLUSION

In general, the natural resource extraction industry did not fare well in a number of cases decided during this survey period. In *Park County*, the court found that the paper transaction of issuing an onshore federal oil and gas lease does not automatically trigger the EIS requirement found in NEPA. Once a lease has been issued, however, virtually unrestricted court access is available to claims pursued in the name of NEPA. In *Coastal States* and *FMC*, the court decided that a coal lease subject to readjustment will be adjusted according to the law in effect at the time of readjustment, regardless of how drastic it changes the terms and conditions of the original coal lease contract. In *Navajo Tribe of Indians*, the court held firm to the congressional intent behind the Indian Claims Commission Act, by holding that any Indian claim arising before 1946 and not timely filed with the Commission is forever barred. Finally, in *Martin Exploration Management Co.*, the court concluded that incentive natural gas pricing means that producers may elect the highest price for its natural gas if such gas falls into both a regulated and deregulated category.

It seems evident that based on the cases analyzed during this survey period, the Tenth Circuit Court will not be accused of showing favoritism to the extractive industries that do business within its jurisdictional borders. It appears that the narrow statutory construction practiced by the court in the cases discussed herein, requires future industry litigants to approach the Tenth Circuit forum with much care and caution.

David N. Karpel

ADDENDUM

After the preceeding article was accepted for publication, the United States Supreme Court reversed the Tenth Circuit's *Martin Exploration Management Co. v. FERC*[1] decision in *FERC v. Martin Exploration Management Co.*[2] The entire Court joined in Justice Brennan's opinion except Justice White who took no part in the decision. The Court upheld FERC's interpretation[3] of The Natural Gas Policy Act of 1969 (NGPA).[4]

The NGPA established various categories of natural gas for the purposes of phased price deregulation and also set up a three stage elimination of price ceilings.[5] Recognizing that many of the catagories overlapped, Congress provided in § 101(b)(5) of the NGPA "[i]f any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable."[6]

Many gas producers had entered long term contracts containing a two tiered pricing structure. If the gas was regulated the contract price was usually near the ceiling allowed by law; if the gas was deregulated the contract price was based on market price.[7] Because market prices had plunged below the regulated price ceilings, the producers stood to reap higher prices if their gas was classified as regulated rather than deregulated.[8]

The Court held the language of the NGPA "[i]f any natural gas qualifies under more than one provision of this title . . . the provision which could result in the highest price shall be applicable" meant that where gas could be classified as regulated or deregulated it would be classified as deregulated.[9] The Court reasoned that a deregulated classification *could* result in a higher price than a regulated price.[10] The Justices rejected the Tenth Circuit's reasoning that "could" in § 101(b)(5) meant that the gas must be classified according to the highest price that could be obtained at any particular point in time.[11] Reasoning that "the conditional meaning of 'could' makes perfect sense if the statute does not refer to particular contracts but rather to the generic situation of parties in a precontract state: the provision that allows the parties to contract to the highest conceivable price applies."[12]

After examining the legislative history of the NGPA, the Court

1. 813 F.2d 1059 (10th Cir. 1987).
2. 108 S.Ct. 1765 (1988).
3. FERC Order 406 codified at 18 C.F.R. § 270.208 (1986).
4. 15 U.S.C. § 3311(b)(5) (1978).
5. 108 S.Ct. at 1768.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1769.
12. *Id.*

found the Tenth Circuit's decision contrary to the whole thrust of the Act because it would have the effect of changing a statutory scheme of price ceilings and deregulation to one of unintended price supports for producers.[13] No one involved in the legislative process suggested producers should receive more than deregulation would allow. Deregulation was seen as "the maximum economic incentive" for producers.[14]

Finally, the Court rejected the Tenth Ciruit's decision because it would make the applicable provision of the NGPA vary from producer to producer, contract to contract and day to day depending on the market price of gas for any particular type of gas.[15] The Court found "[t]he statute is phrased in a general way that implies that all gas fitting the same overlapping provisions will be treated the same, and one would normally expect that a regulatory regime would apply uniformly rather than varying in such a chaotic fashion."[16] The Justices found no Congressional intent that the classification of gas should turn on contractual terms.[17]

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

TAXATION

OVERVIEW

This survey article summarizes and discusses six important Tenth Circuit decisions made in the area of taxation during the survey period. The United States Court of Appeals for the Tenth Circuit, in *United States v. Schmidt*,[1] placed two limitations on the fifth amendment privilege allowing a taxpayer not to produce business records during a tax investigation. First, *Schmidt* requires the taxpayer to prove by specific evidence that the danger of self-incrimination was substantial and real. Second, *Schmidt* holds that the taxpayer may only claim the privilege for specific documents and individual questions. In *United States v. Kansas*,[2] the Tenth Circuit found that the Kansas tax system,[3] which used military income to compute tax brackets for Kansas source income, did not violate the Soldiers' and Sailors' Relief Act's[4] ban on taxing military compensation. Another decision of the court, *United States v. Payne*,[5] limited the good faith misunderstanding of law defense to certain criminal tax prosecutions. The Tenth Circuit held the defense may only be used where the mistake of law is not based on a misunderstanding of the United States Constitution. In *Smalldridge v. Commissioner of Internal Revenue*,[6] the court held that a taxpayer could not switch his tax return status to "married, joint" after the Commissioner had filed a tax return in the taxpayer's name with a "married, separate" status. *First Western Government Securities, Inc. v. United States*,[7] dealt with a Revenue Agent Ruling (RAR) which mentioned the plaintiff had invoked the privilege against self-incrimination. The court held that the RAR could be disclosed to the public because it was not "return information" within Internal Revenue Code (I.R.C.) section 6103(a). Finally, *Flanagan v. United States*,[8] establishes that a split interest transfer, pursuant to I.R.C. section 2055(e)(2), does not occur where property under a will is transferred to charity via a settlement agreement.

I. INTERPRETATION OF FIFTH AMENDMENT PRIVILEGE NOT TO PRODUCE DOCUMENTS IN CERTAIN CIRCUMSTANCES

A. *Background*

The United States Supreme Court has determined that the *contents*

1. 816 F.2d 1477 (10th Cir. 1987).
2. 810 F.2d 935 (10th Cir. 1987).
3. KAN. STAT. ANN. §§ 79-32,109(h) (1984), 79-32,110(a) & (b) (1979), 79-32,115(d) & (e) (1979), 79-32,116 (1978), and 79-32,117 (1982).
4. 50 U.S.C. APP. § 574 (1981).
5. 800 F.2d 227 (10th Cir. 1986).
6. 804 F.2d 125 (10th Cir. 1986).
7. 796 F.2d 356 (10th Cir. 1986).
8. 810 F.2d 930 (10th Cir. 1987).

of *business* records[9] prepared voluntarily in the normal course of business are not privileged under the fifth amendment.[10] In *United States v. Doe*,[11] however, the Court held the *act of producing* subpoenaed business records may be privileged.[12] The Court reasoned that when a taxpayer produces his business records, he makes certain admissions including the fact that the records exist, that they are in his possession or control, and that they are authentic.[13] The Supreme Court held that these admissions are privileged under the fifth amendment if the facts and circumstances indicate the admissions are "testimonial" and "incriminating."[14]

The Supreme Court, however, did not provide a definite standard for either "testimonial" or "incriminating".[15] When the Tenth Circuit tried to apply this test to the fact pattern in *Schmidt*,[16] it attempted to give meaning to the concept of "testimonial self-incrimination". It did so by holding that a taxpayer could only invoke the self-incrimination privilege for the act of producing business records where 1) the taxpayer proved by *specific evidence* that the danger of self-incrimination was substantial and real[17] and 2) the taxpayer claimed the privilege only for *specific documents* and individual questions.[18]

B. United States v. Schmidt

1. Statement of Case

In this case,[19] Mr. and Mrs. Schmidt were being audited regarding their federal income tax liability for 1981 to 1983. On two different occasions, the Internal Revenue Service (I.R.S.) issued an administrative summons to Mr. and Mrs. Schmidt which directed them to testify before

9. The *contents* of *personal* records are privileged under the fifth amendment. The Supreme Court has attempted to justify this distinction between personal and business records on two grounds. First, the Court has held that individuals have no privacy interest in organization records. Second, the Court has held that the government interest in controlling business crime outweighs any personal privacy concerns. Some commentators, believing these distinctions are no longer persuasive, have argued that the contents of both personal and business records should be privileged. *E.g.*, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640 (1986).

10. Bellis v. United States, 417 U.S. 85, 88 (1974); United States v. White, 322 U.S. 694, 698 (1944); Wilson v. United States, 221 U.S. 361, 384-85 (1911). *See generally* S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE, 385-88 (2d ed. 1984); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 679-98 (1968) (for a discussion of the rationales underlying the fifth amendment).

11. 454 U.S. 605 (1984).

12. *Id.* at 612.

13. *Id.* at 613 (quoting Fisher v. United States, 425 U.S. 391, 410 (1976)).

14. *Doe*, 465 U.S. at 613; Fisher v. United States, 425 U.S. 391, 410 (3rd Cir. 1976); *accord* Curcio v. United States, 354 U.S. 118, 125 (2nd Cir. 1957).

15. In fact the Court's ambiguity led one judge to sarcastically thank the Court for its "amphibolic guidance" in creating "the most recent example of . . . uncertainty [in the law.]" *In re Grand Jury Subpoenas Served Feb. 27, 1984*, 599 F. Supp. 1006, 1008-09 (E.D. Wash. 1984) (Opinion of Quackenbush, J.).

16. 816 F.2d 1477 (10th Cir. 1987).

17. *Id.* at 1481.

18. *Id.* at 1481-82.

19. 816 F.2d 1477 (10th Cir. 1987).

Revenue Agent Kawbata and to produce certain documents. Both times, the Schmidts appeared as ordered and were willing to answer questions. They claimed, however, a fifth amendment privilege against self-incrimination based on *Doe*,[20] and therefore refused to produce any documents. On both occasions, Agent Kawbata terminated the proceeding because the Schmidts declined to produce the subpoenaed documents.

The I.R.S. sought judicial enforcement of the summonses to require production of these documents. The United States District Court for the District of Utah granted the I.R.S. an order for enforcement. The taxpayers appealed.[21]

2. Discussion and Analysis of Tenth Circuit Opinion

The Tenth Circuit Court of Appeals affirmed the district court's decision that the Schmidts had not properly invoked the fifth amendment privilege in order for them to not produce business records. As noted above, the United States Supreme Court held the act of producing subpoenaed business records privileged if the production involved a risk of "testimonial self-incrimination"[22] because the act of producing would force the taxpayer to make certain admissions.[23] The Tenth Circuit applied the United States Supreme Court's "testimonial self-incrimination" standard to the *Schmidt* fact pattern by interpreting the standard to include two restrictions.[24] First, the taxpayer would have to prove by specific evidence that the danger of self-incrimination was substantial and real. This would require the taxpayer to prove that he or she had a " 'reasonable cause to apprehend danger' upon giving a responsive answer that 'would support a conviction' or 'would furnish a link in the chain of evidence needed to prosecute.' "[25] The Schmidts did not meet this burden. The court referred to the Schmidts' claim of self-incrimination as "speculative and generalized."[26] The court, however, did not reveal what evidence the Schmidts had offered or what degree of specificity would be necessary in the future to substantiate a fifth amendment self-incrimination privilege.[27] Second, the Tenth Circuit limited the

20. *Id.* at 1480 (citing *Doe*, 465 U.S. at 605). *See supra* notes 9-18 and accompanying text.

21. *Schmidt*, 816 F.2d at 1478-80.

22. *Id.* at 1480 (citing *Doe*, 465 U.S. at 611-612).

23. *Doe*, 465 U.S. at 613 n.11 ("enforcement of the subpoenas would compel [the taxpayer] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [the taxpayer's] fifth amendment rights.").

24. For a survey of the many ways Doe could be interpreted see Note, *The Fifth Amendment and Production of Documents After United States v. Doe*, 66 B.U.L. REV. 95 (1986).

25. *Schmidt*, 816 F.2d at 1481 (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)). *Accord* Marchetti v. United States, 390 U.S. 39, 53 (1968) (risk of self-incrimination must not be "merely trifling or imaginary . . . .").

26. *Schmidt*, 816 F.2d at 1481.

27. This may be a shortcoming in the opinion because to the extent that the "specific evidence" test is left undefined, the court is merely trading one ambiguous standard (Supreme Court's "testimonial self-incrimination") for another. In this respect, future courts and attorneys may not find a great deal of guidance in this opinion.

fifth amendment self-incrimination privilege to specific documents and individual questions. The Schmidts could not claim a blanket, generalized privilege not to produce any of the documents demanded in the summons. They would have to produce some documents, but would be allowed to claim some specific documents as privileged.[28]

3. Implication of Holding

There is still a great deal of uncertainty as to when the act of producing business documents is "testimonial" and "incriminating" such that a taxpayer may claim a fifth amendment privilege not to produce records. However, the Tenth Circuit appears to be defining these terms by focusing on the degree of specificity. Thus, in the future, it appears that the Tenth Circuit will require a taxpayer to present evidence proof that there is a substantial and real danger of self-incrimination. Additionally, the court will allow the privilege to be invoked only for specific documents.

II. INTERPLAY BETWEEN KANSAS INCOME TAX STATUTE AND THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940

A. *Background*

Before the Soldiers' and Sailors' Civil Relief Act of 1940[29] (SSCRA) was enacted by Congress, there was a dispute among the states regarding which state(s) should be able to tax the income of military personnel. For example, a service person might be a resident of Colorado, but be stationed in New Mexico pursuant to military orders. The service person would be put in the difficult position of being taxed on the same military compensation in both states. Congress stopped this inequity by enacting the SSCRA which vested the sole right to tax income of military personnel in the home state ("residence" or "domicile") of such persons, as opposed to the state where service persons were stationed.[30] In *United States v. Kansas*,[31] the court addressed whether the Kansas tax system[32] indirectly taxed military income in violation of the SSCRA.

B. United States v. Kansas

1. Statement of Case

The Kansas income tax statutory scheme was more complicated

28. *Schmidt*, 816 F.2d at 1481-82 (citing Borgeson v. United States, 757 F.2d 1071, 1073 (10th Cir. 1985) (*per curiam*); United States v. Hodgson, 492 F.2d 1175, 1177 (10th Cir. 1974)). *Accord*, United States v. G & G Advertising Co., 762 F.2d 632, 635 (8th Cir. 1985).

29. 50 U.S.C. APP. § 574 (1981).

30. *See* 50 U.S.C. APP. § 574 (1981); California v. Buzard, 382 U.S. 386, 393 (1966); Dameron v. Brodhead, 345 U.S. 322, 325-6 (1953) (construing H.R. REP. No. 2198, 77th Cong., 2d Sess., at 6 (1942); S. REP. No. 1558, 77th Cong., 2d Sess. (1942)).

31. 810 F.2d 935 (10th Cir. 1987).

32. KAN. STAT. ANN. §§ 79-32,109(h) (1984), 79-32,110(a)(b) (1979), 79-32,115(d)(e) (1979), 79-32,116 (1978), and 79-32,117 (1982).

than the illustration given above. When calculating *tax brackets* for *non*-military income earned in Kansas (Kansas source income), the Kansas statutes took into account the military wages of non-resident service personnel stationed in Kansas. Inclusion of this military income would push the taxpayer into a higher tax bracket, causing the Kansas source income to be taxed at a higher rate than if the military wages had not been considered.

The Kansas tax system made a real dollar difference in the tax liability of service persons.[33] Indeed, both Kansas and the United States agreed that including military wages in Kansas tax-rate calculations would result in higher Kansas state income taxes.[34]

The United States contended that the Kansas tax system was an indirect tax on military income because the taxpayer would have had a lower Kansas tax liability if not for his service earnings. Kansas argued that its tax statutes did not levy an indirect tax on military income because the tax was actually levied only on Kansas source income and not the military income.

The United States District Court for Kansas did not allow a full trial on the issue of whether the Kansas tax system imposed a tax on military income. Rather, it dismissed the United States' complaint. The United States appealed, arguing the Kansas income tax statutes conflicted with the SSCRA's prohibition against taxing military pay. Therefore, the United States contended, that the Kansas provisions should be struck down under the Supremacy Clause of the United States Constitution.[35]

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33. The United States illustrated:

> Assume that a nonresident serviceman stationed in Kansas earns $10,000 from his military employment and earns an additional $10,000 of Kansas source income. In that circumstance, his Kansas adjusted gross income would be $20,000. Assuming for the sake of simplicity that he has no Kansas deductions or exemptions, his Kansas taxable income would also be $20,000 and the tentative tax computed on that income would be $1,200. See KAN. STAT. ANN. § 79-32, 110(a) (1979). The serviceman's modified Kansas source income would be $10,000, *i.e.*, his $20,000 Kansas adjusted gross income less his military income. Thus, the final tax due would be $600 ($1,200 x $10,000/$20,000). Had the serviceman in the above example, however, earned only the $10,000 Kansas source income, his tax liability would have been $450. KAN. STAT. ANN. § 79-32, 110. Accordingly, the serviceman in the example, *solely* as the result of the inclusion of his military compensation in the tax formula, would be required to pay $150 more in Kansas income tax than if his military compensation were excluded from such formula.

Brief for Appellant at 12-13, United States v. Kansas, 810 F.2d 935 (10th Cir. 1987).

34. *Kansas*, 810 F.2d at 936. In fact, the Tenth Circuit noted that these higher income taxes would most often hit some of our more destitute military families, those who were forced to supplement their incomes with second jobs because the family units could not make ends meet on the military pay alone. *Id.* at 936, n. 2.

35. In the process of concluding that the Kansas income tax statutes did not violate the SSCRA, the Court of Appeals for the Tenth Circuit gave a concise review of its Supremacy Clause analysis. (*Kansas*, 810 F.2d at 936-38 (citing Louisianna Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355 (1986), Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985), State Corp. Comm'n v. Federal Communications Comm'n, 787 F.2d 1421, 1425 (10th Cir. 1986)). The court noted that a state law will be struck down under the Supremacy Clause if it "conflicts with a federal law or a federal constitutional right." *Kansas*, 810 F.2d at 937. A conflict has been established where the state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). With these princi-

2. Discussion and Analysis of the Tenth Circuit's Opinion

The Court of Appeals for the Tenth Circuit affirmed the district court's decision to dismiss the United States' complaint.[36] The appellate court relied heavily on the Supreme Court's decision in *Sullivan v. United States*.[37] In that case, the Court held that a state statute, which imposed a 3.5 percent sales tax on retail sales and a complimentary use tax, did not violate the SSCRA. The Supreme Court reasoned that this statutory scheme taxed the property sold or used rather than the military income spent to pay the taxes.[38] The Tenth Circuit applied *Sullivan* to the instant case by holding that the Kansas statutes were merely a potentially higher tax on income derived in Kansas, rather than an indirect tax on the military income, even though military income was used to compute tax brackets.[39]

The Tenth Circuit also noted that nontaxable property could be used to calculate tax brackets. Such a practice was not a violation of the *due process clause* of the fourteenth amendment.[40] The Tenth Circuit relied on two older Supreme Court cases[41] for the proposition that using nontaxable property as a measure for calculating other taxes was not a tax on the nontaxable property.[42]

3. Implication of Holding

In future cases, this decision could be limited to its facts. The language of the opinion, however, is sufficiently broad that it might be cited in later decisions for the general proposition that the SSCRA allows some forms of indirect taxation on service income. This would be the

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ples in mind, the Tenth Circuit will follow the U.S. Supreme Court's two-step test of (1) construing the state and the federal statute and (2) determining whether the two statutes as construed conflict with each other. *Kansas*, 810 F.2d at 937 (citing Chicago & N. W. Transp. Co. v. Kalo Brick & Title Co., 450 U.S. 311, 317 (1981), Perez v. Campbell, 402 U.S. 637, 644 (1971), and United States v. Onslow County Bd. of Educ., 728 F.2d 628, 635 (4th Cir. 1984)).

36. Even though it held against the military in this case, the court of appeals recognized the United States Supreme Court's directive to interpret the Act " 'with an eye friendly to those who dropped their affairs to answer their country's call.' " *Kansas*, 810 F.2d at 937 (quoting California v. Buzard, 382 U.S. 386, 395 (1966) (quoting Le Maistre v. Leffers, 333 U.S. 1, 6 (1948)). *See also* Boone v. Lightner, 319 U.S. 561 (1943). The court also recognized the SSCRA's purpose, "to broadly free servicemen of the burden of supporting the governments of the states where they are present solely in compliance with military orders." *California*, 382 U.S. at 393; *Dameron*, 345 U.S. at 326.

37. 395 U.S. 169 (1969).

38. *Id.* at 175. The Supreme Court also noted that the SSCRA could not be interpreted beyond its express purpose. "[SSCRA] does not relieve servicemen stationed away from home from all taxes of the host State. It was enacted with the much narrower design 'to prevent multiple State taxation of the property.' " *Id.* at 180.

39. *Kansas*, 810 F.2d at 938.

40. The United States did not raise due process or equal protection arguments and conceded that there were no due process violations. *Kansas*, 810 F.2d at 938. Rather, the United States assault on the Kansas tax system was grounded solely on the Supremacy Clause.

41. *Id.* (citing Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412 (1937); Maxwell v. Bugbee, 250 U.S. 525 (1919)).

42. *Id.* (quoting *Maxwell*, 250 U.S. at 539).

case where the tax is most appropriately categorized as a tax on some property other than military income, rather than a tax on service compensation.

III. Good Faith Misunderstanding of Law Defense to a Criminal Prosecution for Not Filing Income Tax Returns

A. *Background*

Section 7203 of Title 26 of the United States Code makes it a crime to willfully fail to file income tax returns. In the past, the Tenth Circuit had recognized some defenses to this provision by establishing that a taxpayer did not meet the required element of willfulness if he acted through "negligence, inadvertence, justifiable excuse, mistake, or due to a good faith misunderstanding of the law."[43] The Tenth Circuit further made it clear that a good faith misunderstanding of law was based on a subjective standard (the taxpayer's personal state of mind) as opposed to an objective test (reasonable taxpayer standard).[44]

In *Phillips*, for example, the defendant's conviction for willfully failing to file income tax returns was reversed by the Tenth Circuit because a jury instruction had stated, "[a] mistake of law must be *objectively reasonable* to be a defense . . . ."[45] In holding that the mistake of law defense must be measured by a subjective standard, the Tenth Circuit relied on Supreme Court decisions which inferred that a subjective standard should be employed in assessing willfulness in criminal tax prosecutions.[46] The Tenth Circuit also cited other circuit court decisions which required a subjective test for measuring willfulness in criminal tax prosecutions.[47]

Yet, in the *United States v. Payne* decision,[48] the Tenth Circuit may have slightly undercut the subjective standard for the mistake of law defense. The court of appeals held that where the mistake of law is based on a misunderstanding of our highest law, the United States Constitution, the subjective standard for willfulness is not applicable.

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43. United States v. Harrold, 796 F.2d 1275 (10th Cir. 1986); United States v. Phillips, 775 F.2d 262 (10th Cir. 1985); United States v. Ware, 608 F.2d 400 (10th Cir. 1979).

44. *Phillips*, 775 F.2d at 264.

45. *Id.* at 263.

46. The Supreme Court has defined willfulness as an "intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12 (1976) (quoting United States v. Bishop, 412 U.S. 346, 360 (1973)).

47. *See* United States v. Aitken, 755 F.2d 188, 191 (1st Cir. 1985); United States v. Burton, 737 F.2d 439, 443 (5th Cir. 1984); United States v. Krager, 711 F.2d 6, 7 (2d Cir. 1983); United States v. Ingredient Technology Corp., 698 F.2d 88, 97 (2d Cir. 1983), *cert. denied*, 462 U.S. 1131 (1983); Cooley v. United States, 501 F.2d 1249, 1253 n.4 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975); Mann v. United States, 319 F.2d 404, 409-10 (5th Cir. 1963), *cert. denied*, 375 U.S. 986 (1964); Yarborough v. United States, 230 F.2d 56, 61 (4th Cir. 1956), *cert. denied*, 351 U.S. 969 (1956); Battjes v. United States, 172 F.2d 1, 4 (6th Cir. 1949).

48. 800 F.2d 227 (10th Cir. 1986).

B. United States v. Payne

1. Statement of Case

Mr. Payne's misunderstanding of the law revolved around his interpretation of the fifth and thirteenth amendments to the Constitution. He believed the fifth amendment permitted him to not file a tax return and that the federal tax system violated the thirteenth amendment's prohibition against involuntary servitude.[49]

Mr. Payne filed tax returns for the years 1965 to 1975. Yet in 1976, increasingly aware of constitutional concerns surrounding the payment of income tax, Mr. Payne filed what he called a "fifth amendment" return in which he refused to pay taxes. He soon amended his 1976 return, however, and met his tax liability for that year. Finally, in 1977, Mr. Payne decided to express his constitutional objections to the tax system by not filing any tax return.[50]

The Tenth Circuit admitted that Mr. Payne was "certainly fixed in his beliefs and perhaps sincere." However, it concluded that Mr. Payne was "very misguided and must now suffer the consequences."[51] The "consequences" were one year in prison, three years of probation after incarceration, and ten thousand dollars in fines.

2. Discussion and Analysis of the Tenth Circuit's Opinion

a. *Good Faith Misunderstanding of Law as Defense for Failure to File Income Tax Returns*

On appeal, before the Tenth Circuit, Mr. Payne objected to the district court's instructions to the jury on the ground that the instructions resulted in an objective standard for "good faith misunderstanding of the law." Specifically, Mr. Payne objected to the jury instruction stating that Mr. Payne's "belief that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the requirements of the law."[52] The Tenth Circuit upheld this instruction by distinguishing between people who understand the conditions of the law but refuse to meet the law's criteria, and those people who mistakenly believe the law does not require them to act.[53] It would appear that this distinction would support the subjective test *if* the jury were allowed to decide whether the defendant fits into the former or into the latter category. Mr. Payne might have truly misunderstood the fifth and the thirteenth amendments to the Constitution. On the other hand, he might have had a perfect understanding that the Constitution required him to file tax returns, but stubbornly refused to do so notwithstanding such knowledge. Mr. Payne was entitled to have the jury make this decision. The

49. *Id.* at 228.
50. *Id.*
51. *Id.* at 229.
52. *Id.* at 228.
53. *Id.* at 228 (quoting *United States v. Ware*, 608 F.2d 400, 405 (10th Cir. 1979). *See also United States v. Harrold*, 796 F.2d 1275, 1282-83 (10th Cir. 1986); *Phillips*, 775 F.2d at 264.

complained of instruction appears to assume that any misunderstanding of constitutional law cannot be held in good faith—that such a belief does not constitute a good faith misunderstanding.[54]

It is difficult to understand why the court would seemingly remove from the jury's consideration whether a misunderstanding of the Constitution could constitute a good faith misunderstanding of law. After all, the court has already mandated that misunderstandings of other less important laws must be considered by the jury as relevant to the willfulness/intent element.[55]

b. *Admissibility of Certain Evidence in Criminal Tax Prosecution for Not Filing Income Tax Returns*

The Tenth Circuit held that the I.R.S. could present evidence of Mr. Payne's gross income.[56] The court found such evidence admissible on the grounds that it showed that his failure to file was "willful." Thus, the evidence showed that Mr. Payne knew he had made enough income to trigger the filing requirement.[57] In another evidentiary ruling, the Tenth Circuit determined that Mr. Payne would be prevented from showing that, despite his large gross income, his actual tax liability was minuscule. The court held that such evidence was irrelevant.[58] Yet, Federal Rule of Evidence 401 makes it very difficult to exclude evidence on relevance grounds.[59] The fact that his actual tax obligation was minuscule should therefore be relevant to determine whether he actually misunderstood the Constitution or understood it perfectly but was just attempting to avoid a large tax bill.[60]

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54. The jury appeared to rely on the court's instruction that a misunderstanding of constitutional law would not negate the element of willfulness. Mr. Payne's brief on appeal pointed out that the jury "requested clarification of intent" by asking the judge, "Does this [the intent element embodied in willfulness] mean that Mr. Payne simply intended not to file returns . . . or was his purpose for not filing?" Brief for Appellant's at 7, United States v. Payne, 800 F.2d 227 (10th Cir. 1986). The judge responded by repeating the same instruction quoted earlier. Thus, it appears the jury was confused as to whether Mr. Payne's "purpose for not filing," which was his misunderstanding of the Constitution, was relevant to the intent element of willfulness.

55. As the Appellant's Brief notes, there is little difference between:

> A) I did not believe I was legally required to file because the statutory provisions of Title 26 [of the United States] Code do not apply to me; or,
>
> B) I did not believe I was legally required to file because the provisions of the Constitution forbid it. That [is] why the tax system is a voluntary system and legally I do not have to volunteer to file because the [c]ourts will not require me to voluntarily waive my [c]onstitutional [r]ights.

Brief for Appellants at ——, United States v. Payne, 800 F.2d 227 (10th Cir. 1986).

56. *Payne*, 800 F.2d at 229. Mr. Payne's income was approximately $100,000. per year.

57. Interestingly enough, Mr. Payne was willing to stipulate that his gross income was over the dollar figure necessary to trigger the filing requirement. However, the I.R.S. refused this offer, insisting instead on the jury's hearing exactly how much Mr. Payne made. It would appear that if the I.R.S. truly sought admission of this evidence to prove that the filing requirement had been triggered, a stipulation to that effect would have reached this goal most convincingly.

58. *Payne*, 800 F.2d at 229 (citing United States v. Stillhammer, 706 F.2d 1072, 1075 (10th Cir. 1983) and United States v. Garcia, 553 F.2d 432 (5th Cir. 1977)).

59. Evidence is relevant where it makes any fact of consequence more or less probable. FED. R. EVID. 401.

60. Mr. Payne objected to the dual effect the following two evidentiary rulings: 1) the

4. Implication of Holding

This decision appears to modify the subjective standard of *Phillips* for determining willfulness in criminal tax prosecutions. The Tenth Circuit apparently will not allow a defendant the benefit of the subjective standard when the law of the United States Constitution is misunderstood rather than any other law.

IV. INTERPLAY BETWEEN INTERNAL REVENUE CODE SECTIONS 6013 AND 6020

A. *Background*

Section 6013 of the Internal Revenue Code[61] provides that a married individual who has filed a separate return for a given year may, under certain circumstances, switch to a married, joint return. Usually, a married couple will minimize tax liability by filing jointly instead of separately. Thus, section 6013 allows a married taxpayer to reduce his tax liability by switching to the joint status. This is the case even where the taxpayer does not realize that the joint status is more favorable until after he had filed a separate return.

Section 6020 of the Internal Revenue Code allows the Commissioner to file a return for a taxpayer when that individual has not done so himself.[62] The issue of whether a taxpayer could utilize I.R.C. section 6013 by switching to a married, joint status after the Commissioner had already filed on behalf of the taxpayer, pursuant to I.R.C. section 6020, was addressed in *Smalldridge v. Commissioner*.[63]

B. Smalldridge v. Commissioner

1. Statement of Case

Mr. Smalldridge did not file his federal income tax returns for several years. His employer, however, withheld taxes throughout this period and sent a wage statement to the I.R.S. Based on this data, but without any information regarding items such as deductions or exemptions which would reduce tax liability, the Commissioner filed a return for the taxpayer pursuant to I.R.C. section 6020. When filing these returns "on behalf of" Mr. Smalldridge, the Commissioner elected the married, separate status for the taxpayer even though Mr. Smalldridge had filed using married, joint status for a number of years.[64] As is typical for most taxpayers, Mr. Smalldridge's tax liability would have been

I.R.S. refusal to allow stipulation, and 2) the I.R.S. opposition to demonstrating that his actual tax liability was minimal. Mr. Payne felt the combined effect of these rulings prejudiced the jury by painting a picture of a rich man, well able to pay his taxes, who nonetheless proceeded to deprive his country of an assumably great amount of money. *Payne*, 800 F.2d at 227.

61. I.R.C. § 6013 (1984).

62. I.R.C. § 6020 (1984).

63. 804 F.2d 125 (10th Cir. 1986).

64. *Id. See also* Brief for Appellant at 5, Smalldridge v. Commissioner, 804 F.2d 125 (10th Cir. 1986) [hereinafter Brief for Appellant Smalldridge].

lower if the Commissioner had elected married, joint status for him.[65]

Mr. Smalldridge petitioned the United States Tax Court to allow him to switch his return status from married, separate status to married, joint status pursuant to I.R.C. section 6013(b). The tax court dismissed Mr. Smalldridge's petition, however, holding that the taxpayer's option to switch status would not be allowed where the Commissioner had filed a tax return for the taxpayer. Mr. Smalldridge appealed on the grounds that 1) a correct reading of I.R.C. section 6013 and section 6020 together, would not allow the Commissioner, while purportedly acting on behalf of the taxpayer, to refuse to consider anything which would reduce tax liability; and 2) allowing the I.R.S. to file a return for the taxpayer pursuant to I.R.C. section 6020 without allowing the taxpayer to switch to a married, joint status under I.R.C. section 6013 was a taking of property without due process of law under the fifth amendment to the United States Constitution.[66]

3. Discussion and Analysis of the Tenth Circuit's Opinion

a. Interplay Between Internal Revenue Sections 6013 and 6020

Section 6013 of I.R.C. only allows the taxpayer to switch to a married, joint status where he has not been sent a notice of deficiency. Mr. Smalldridge had been sent such a notice. However, Mr. Smalldridge argued that this part of section 6013 should be applicable only where the taxpayer himself had filed a return. This would prevent the Commissioner from choosing the separate status where the taxpayer had used the joint status for years and joint status would significantly reduce tax liability.[67]

The court of appeals did not accept Mr. Smalldridge's argument and reasoned that the Commissioner had to make some election of status in order to file a return.[68] The court held that once the Commissioner had filed a return for Mr. Smalldridge, the taxpayer was "in the same position" as if he himself had elected to file and did file a return.[69]

This reasoning seems flawed. While the Commissioner did have to make some election regarding status, there was no reason for him to choose a status which went against all past practice of the taxpayer and which would generally result in a higher tax liability.[70] Further, the taxpayer was not "in the same position" as if he had filed a separate return. If Mr. Smalldridge himself had filed a separate return, he would not have received a notice of deficiency. Instead, he would have been able to switch to the married, joint status. Indeed, the very essence of Mr.

65. *See supra* notes 45-46.
66. *Smalldridge*, 804 F.2d at 126.
67. *Id.* at 128.
68. *Id.* at 127.
69. *Id.* at 128. *See also* Conovitz v. Commissioner, 39 T.C.M. (CCH) 929, 931 (1980); Rev. Rul. 70-632, 1970-2 C.B. 286.
70. *Smalldridge*, 804 F.2d at 125. *See* Brief for Appellant Smalldridge at 5 and n.43.

Smalldridge's appeal was the fact that he was put in an entirely different position than he would have been if he had filed himself.[71]

b. *Due Process of Law*

Mr. Smalldridge also appealed on the basis that allowing the I.R.S. to file a return for the taxpayer pursuant to I.R.C. section 6020 without allowing the taxpayer to switch to a married, joint status under I.R.C. section 6013 was a taking of property without due process of law under the fifth amendment. Smalldridge argued that he had done nothing which would lead a reasonable person to believe that he gave up his property right to switch to a married, joint status.[72]

Interestingly, although the court did recognize that one of the grounds for the appeal was that the deficiency had been assessed without due process of law,[73] the Tenth Circuit did not discuss this due process issue. Thus, it is evident that the court must have read appellant's brief, which devoted several pages to the due process issue, however, the Tenth Circuit ignored the issue in its opinion.[74]

4. Implication of Holding

Where a taxpayer for any reason neglects to file a tax return, he or she is taking the risk that the Commissioner will file a return on his or her behalf. If the Commissioner acts as he did in this case, the Commissioner's filing a return could result in the taxpayer incuring a greater tax liability than if the taxpayer had filed himself. This is so because the Commissioner may take all the evidence of a taxpayer's income while ignoring any deductions, exemptions, and past status practices which minimize tax liability.

V. MEANING OF "RETURN INFORMATION" WITHIN INTERNAL REVENUE CODE SECTION 6103 AND WHEN RETURN INFORMATION MAY BE DISCLOSED BY THE INTERNAL REVENUE SERVICE UNDER SECTION 6103(H)(4)

A. *Background*

Section 6103(a) of I.R.C. makes information on tax returns confi-

71. *Smalldridge*, 804 F.2d at 126-27.

72. As appellant Smalldridge stated in his brief:

> The Smalldridge's had for a number of years previous to the years in question, always filed joint tax returns, and the I.R.S. had no basis to believe that any change had occurred in their status so as to prohibit or terminate that election . . . . General due process notions require that the Petitioners, before they are deprived of the benefit of the joint filing election, be on reasonable notice of the effect of their actions.

Brief for Appellant Smalldridge at 5-6.

73. *Smalldridge*, 804 F.2d at 126.

74. The opinion appeared to rely on a type of you-made-your-bed-now-lie-in-it philosophy. For instance, the court began its analysis by proclaiming, "[t]he failure of the taxpayer to himself file any return for those years is the inescapable root of the present problem." *Smalldridge*, 804 F.2d at 127.

dential and prohibits the I.R.S. from disclosing it.[75] Return information is defined in I.R.C. section 6103(b)(2)[76] as specifically including the taxpayer's identity and whether he is subject to an investigation.[77] A number of exceptions exist to the general non-disclosure rule.[78] One of these is I.R.C. section 6103 (h)(4)(C). This provision allows disclosure of return information where 1) the disclosure is to a judicial or administrative proceeding; 2) the return information involves a transactional relationship between a party to the proceeding and the taxpayer; and 3) the return information directly affects the resolution of an issue in the proceeding.

First Western Government Securities, Inc. v. United States[79] involves a Revenue Agent Ruling (RAR) which revealed the fact that the president of First Western had invoked the fifth amendment privilege. First, the court considered whether the RAR was tax return information.[80] Second, assuming arguendo that the RAR was return information, the court considered whether the RAR fit within the exception to the non-disclosure rule.[81]

B. First Western Government Securities, Inc. v. United States

1. Statement of Case

Sidney Samuels was president of both First Western Government Securities Incorporated and Samuels, Kramer and Company (the Corporations). The I.R.S. suspected the Corporations of promoting abusive tax shelters.[82] During an investigation of twenty-five of the Corporations' customers, the I.R.S. served seventy-five summonses on Mr. Samuels which called for both testimony and production of corporate records. At Mr. Samuels' deposition, he invoked his fifth amendment privilege against self-incrimination 135 times.[83]

Before Mr. Samuels's deposition, a RAR had been sent to some of the Corporations' customers. The RAR explained why the I.R.S. was disallowing certain of the customers' deductions as abusive tax shelters. After Samuels's deposition, the I.R.S. revised the RAR to include the fact that Mr. Samuels had invoked the fifth amendment privilege. This revised RAR was sent to many of the Corporations' Denver customers.[84]

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75. I.R.C. § 6103(a) (1987).
76. I.R.C. § 6103(b)(2) (1987).
77. Different circuits have ennunciated varied standards for return information. For a very extensive discussion of the circuit interpretations, see Note, *Information Disclosure and Competent Authority: A Proposal*, 17 CASE W. RES. 485 (1985).
78. Many commentators believe that I.R.C. § 6103 should be interpreted to allow for greater disclosure. For some persuasive arguments in favor of that position see Comment, *The Freedom of Information Act and the I.R.S. Confidentiality Statute: A Proper Analysis*, 54 U. CIN. L. REV. 605 (1985).
79. 796 F.2d 356 (10th Cir. 1986).
80. *Id.* at 359.
81. *Id.* at 360.
82. *Id.* at 357.
83. *Id.* at 357-58.
84. *Id.* at 358.

Mr. Samuels and the Corporations filed suit against the I.R.S. claiming that this disclosure was tax return information and thus fell within the nondisclosure protection of I.R.C. section 6103(a). The district court granted summary judgment[85] in favor of the I.R.S.; subsequently, Mr. Samuels and the Corporations appealed.

2. Discussion of the Tenth Circuit's Opinion

The Tenth Circuit affirmed the district court's decision that Mr. Samuels' invocation of the fifth amendment was not "return information." The court also held, that even if it were considered to be return information, it fit within an exception to the non-disclosure rule.[86]

a. *Meaning of Return Information*

The Tenth Circuit began its analysis of whether Mr. Samuels' invocation of the fifth amendment privilege was tax return information by noting the standard for tax return information established by the Sixth Circuit.[87] The Sixth Circuit Court of Appeals held that information is confidential tax return information where a "nexus" exists between "the data obtained and the furtherance of obligations controlled by Title 26."[88]

The Sixth Circuit applied this nexus standard in *Mid-South Music v. United States Department of the Treasury.*[89] In that case, the I.R.S. sent letters to taxpayers which mentioned plaintiff's name and stated that the taxpayers would be audited if they claimed certain deductions. The court reasoned that the letters contained return information because they revealed both plaintiff's identity and the fact that plaintiff was under investigation.[90]

The Tenth Circuit carefully noted the Sixth Circuit's standard for return information, but it did not specifically adopt or reject it. The Tenth Circuit found that it did not need to adopt a standard for the instant case because Mr. Samuels' invocation of the fifth amendment privilege was not return information under any standard.[91] First, the

85. The Tenth Circuit reiterated that its test for summary judgment under FED. R. CIV. P. 56, is whether any genuine issue of material fact remains when all evidence is construed in favor of the party opposing the motion for summary judgment. *Id.* at 357.

86. *Id.* at 360.

87. *Id.* at 358-59. The Tenth Circuit also noted the standards for tax return information developed by other circuits: The Ninth Circuit and the District of Columbia Circuit had defined return information not to include "data in a form which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer." Long v. United States I.R.S., 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). *See also* Neufeld v. I.R.S., 646 F.2d 661 (D.C. Cir. 1981). Thus, data tapes and check sheets were not return information where all mention of taxpayer names, addresses, and social security numbers were expunged. *Long*, 596 F.2d at 362.

88. *In re* Grand Jury Investigation, 688 F.2d 1068 (6th Cir. 1982), *reh. denied*, 696 F.2d 449 (1982).

89. 579 F. Supp 481 (M.D. Tenn. 1983), *aff'd in part, rev'd in part*, 756 F.2d 23 (6th Cir. 1984).

90. *Mid-South Music*, 756 F.2d at 25.

91. *First Western*, 796 F.2d at 359-60.

invocation was not made during an audit of Mr. Samuels. Instead, his statements were made during an investigation of his customers in Dallas. The court found that the nondisclosure protection of I.R.C. section 6103 could only be invoked by a party under investigation.[92] Second, the RAR did not contain return information because it did not disclose plaintiffs' names in the context that they would be investigated.[93]

b. Exception to Non-Disclosure General Rule

The Tenth Circuit noted that even if the invocation of the fifth amendment was based upon return information, the I.R.S. had a right to disclose the information under an exception to the non-disclosure rule.[94] The Tenth Circuit held that this exception to the non-disclosure rule had been met. First, the audit of the plaintiffs' customers was an administrative proceeding. Second, a transactional relationship existed between the plaintiffs and the plaintiffs' customers, who were parties to the proceeding. Finally, Mr. Samuels' invocation of the fifth amendment, regarding the return information, directly affected the resolution of an issue in the proceeding.[95]

3. Implication of Holding

While the Tenth Circuit found that it did not need to adopt a standard for return information to decide the instant case, it did carefully review the Sixth Circuit's nexus test. Although predicting which standard a court will adopt is always uncertain, the *First Western* decision could indicate that the Tenth Circuit is strongly considering the nexus test.

VI. INTERPRETATION OF SPLIT INTEREST TRANSFERS WITHIN INTERNAL REVENUE CODE SECTION 2055(E)(2)

A. *Background*

Section 2055(a) of the I.R.C. permits charitable contributions to be deducted from a decedent's gross estate before computing estate taxes. I.R.C. section 2055(e)(2), however, disallows such deductions if the

92. *Id.* at 359.

93. *First Western*, 796 F.2d at 359. The two elements present in the Sixth Circuit's *Mid-South Music* decision were also present in the instant case: 1) plaintiff was identified by *name*; and 2) an *investigation* of plaintiff, if not explicitly expressed, was clearly implied because a person would have no reason to invoke the fifth amendment privilege unless an investigation was occurring or threatened.

94. *First Western*, 796 F.2d at 360-61 (following I.R.C. § 6013(h)(4)(C) (1984).

95. *Id.* at 360-61. The Fifth Circuit held that I.R.C. § 6103(h)(4)(C) granted an exception to the non-disclosure rule only where the information was disclosed to federal officials as opposed to the general public. Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir. 1979), *cert. denied*, 444 U.S. 842 (1979). The Tenth Circuit specifically rejected the Fifth Circuit's interpretation. The Tenth Circuit held that I.R.C. § 6103(h)(4)(C) applied to disclosures made to anyone because (in contrast to § 6103(h)(1), (2), and (3)) the statutory language did not specifically limit itself to disclosures made to federal officials. *First Western*, 796 F.2d at 360. The Tenth Circuit's decision on this matter is in accord with Davidson v. Brady, 559 F. Supp. 456 (W.D. Mich. 1983), *aff'd*, 732 F.2d 552 (6th Cir. 1984).

charitable contributions are deemed to be split interest transfers. A split interest transfer occurs when property under a decedent's will is first transferred to a noncharitable entity, such as an heir or devisee, and then transferred to a bona fide charity.[96] In *Flanagan v. United States*,[97] the Tenth Circuit decided whether a split interest transfer had occurred where property passed under a settlement agreement to a bona fide charity.

B. Flanagan v. United States

1. Statement of Case

On April 21, 1976, Frank Parkes died, leaving an estate valued in excess of one million dollars. With the exception of a few bequests, Mr. Parkes devised his estate to a charitable trust for the purpose of furthering high standards in horse breeding and training. His heirs sought to have the will set aside. Eventually, the heirs and the trustees agreed to a settlement under which part of the estate went to an Oklahoma charitable foundation.

The estate filed its federal estate tax return claiming a charitable deduction for the property transferred to the foundation under the settlement agreement. The I.R.S. disallowed the charitable deduction on the ground that a split interest transfer had occurred.[98] The administrator of the estate paid the taxes allegedly owed and then sought a tax refund in the United States District Court for the Western District of Oklahoma. The district court denied the administrator's claim for a refund and the administrator appealed.

2. Discussion of the Tenth Circuit's Opinion

a. *Interpretation of Split Interest Transfer*

The Tenth Circuit Court reversed the district court's decision by holding that a split interest transfer did not occur where property under a will passed pursuant to a settlement agreement. The I.R.S. had held that a split interest transfer occurred in this situation and the district court accepted the I.R.S. determination. The Tenth Circuit disagreed with the I.R.S. reasoning because the court decided the reasoning was inconsistent with other I.R.S. determinations.[99] The court noted that logically the I.R.S. ruling concerning settlement agreements should

96. There are also some exceptions to the general rule that split interest transfers are disallowed: I.R.C. § 2055(e)(A) & (B) allow charitable contributions which are split interest transfers to be deducted from the decedent's gross estate when the contributions are in the form of a charitable remainder or a guaranteed annuity.

97. 810 F.2d 930 (10th Cir. 1987).

98. *Id.* at 933. The I.R.S. reached its decision by reasoning that the property first passed under the will and subsequently when the parties came to a settlement agreement, part of the property passed pursuant to that agreement. As a result of two different documents, the will and the settlement agreement, portions of the property passed to two different entities, a charitable and a noncharitable entity. The I.R.S. considered this a split interest transfer. Rev. Rul. 77-491, 1977-2 C.B. 332.

99. *Flanagan*, 810 F.2d at 933-34.

have applied to a spouse's election to set aside a will in order to take her statutory share. This is because both a settlement agreement and an election to take a statutory share have the effect of partially abrogating a will after the death of the testator.[100] It would have made sense for the I.R.S. to hold that all of the property passed under the will and then part of the property passed in a different manner when the spouse elected her statutory share.[101] The I.R.S., however, did not come to this conclusion. Instead, it decided that a settlement agreement would create a split interest transfer, whereas a spouse's election would not result in a split interest transfer.[102] The I.R.S. attempted to distinguish the two situations by holding that they had "different effects recognized for federal estate tax purposes."[103]

The Tenth Circuit stated that the I.R.S. position was "a distinction without a difference,"[104] and determined that neither a settlement agreement nor a spouse's election created a split interest transfer. The court held that such property only passed pursuant to the settlement agreement or to the spouse's election and never passed under the will. Thus, the property was never transferred to both a charitable and a noncharitable entity and consequently a split interest transfer did not occur.[105] Since a split interest transfer did not occur, a charitable contribution could be deducted from a decedent's gross estate. Accordingly, the district court's decision was reversed.[106]

b. *Weight of Revenue Rulings*

In reaching its decision regarding what constituted a split interest transfer, the Tenth Circuit overturned a Revenue Ruling. This ruling had erroneously determined that a split interest transfer occurred when property under a will was distributed according to a settlement agreement.[107] In overturning the ruling, the Tenth Circuit recognized that Revenue Rulings, while entitled to consideration, were in fact nothing more than an agency's opinion of the law.[108] The Tenth Circuit refused to "blindly resolve all doubts in favor of the I.R.S."[109] Rather, the court held that Revenue Rulings which interpreted legislation would have to be examined to determine whether they were in accord with congressional intent.[110]

Applying this holding, the court noted that Congress enacted I.R.C.

100. *Id.*
101. *Id.* at 934.
102. *Id.* at 933-34. *See* Rev. Rul. 77-491, 1977-2 C.B. 332 (property passing under settlement agreement is split interest transfer); Rev. Rul. 78-152, 1978-1 C.B. 297 (property passing under spouse's election is not split interest transfer).
103. *Flanagan*, 810 F.2d at 933; Rev. Rul. 78-152, 1978-1 C.B. 297.
104. *Flanagan*, 810 F.2d at 934.
105. *Id.* at 934.
106. *Id.* at 935.
107. *Id.* at 934 (overturning Rev. Rul. 77-491, 1977-2 C.B. 333).
108. *Flanagan*, 810 F.2d at 934.
109. *Id.* at 935.
110. *Id.* at 934 (citing Bob Jones Univ. v. United States, 461 U.S. 574, 596-97 (1983)).

section 2055 to promote charitable contributions.[111] Also, the Tenth Circuit specifically adopted the Seventh Circuit's finding that Congress placed a greater value on charitable contibutions than on estate taxes.[112] Since the Revenue Rulings regarding split interest transfers had the effect of maximizing taxes instead of charitable contributions, the Tenth Circuit determined that the Revenue Rulings were not consistent with congressional intent.[113]

3. Implication of Holding

The Tenth Circuit's decision may motivate parties engaged in future settlement agreements to allocate part of the property covered by the agreement to charity. Such an allocation will be rewarded by a tax deduction, which will promote the congressional purpose behind I.R.C. section 2055 which encourages charitable contributions.

CONCLUSION

This article has summarized certain taxation decisions of the United States Court of Appeals for the Tenth Circuit. *United States v. Schmidt*[114] restricted the fifth amendment privilege not to produce business records during a tax investigation. *United States v. Kansas*[115] held that using military income to compute tax brackets for Kansas source income did not violate the SSCRA[116] ban on taxing military compensation. *United States v. Payne*[117] narrowed the good faith misunderstanding of law defense in certain criminal tax prosecutions. *Smalldridge v. Commissioner*[118] held that a taxpayer could not substitute a married, joint tax return for a married, separate return filed by the Commissioner on the taxpayer's behalf. *First Western Government Securities, Inc. v. United States*[119] found that a Revenue Agent Ruling revealing plaintiff's invocation of the fifth amendment was not "return information" within I.R.C. section 6103(b)(2). Finally, *Flanagan v. United States*[120] established that a split interest transfer pursuant to I.R.C. section 2055(e)(2) does not occur when property left by a will is transferred to charity via a settlement agreement.

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111. *Id.* at 934; *See also* Commissioner v. Estate of Sternberger, 348 U.S. 187, 190 n.3 (1955); YMCA v. Davis, 264 U.S. 47, 50 (1924).
112. *Flanagan*, 810 F.2d at 934-35; *See also* Norris v. Commissioner, 134 F.2d 796 (7th Cir. 1943), *cert. denied*, 320 U.S. 756 (1943).
113. *Flanagan*, 810 F.2d at 934-35.
114. 816 F.2d 1477 (10th Cir. 1987).
115. 810 F.2d 935 (10th Cir. 1987).
116. 50 U.S.C. APP. § 574 (1981).
117. 800 F.2d 227 (10th Cir. 1986).
118. 804 F.2d 125 (10th Cir. 1986).
119. 796 F.2d 356 (10th Cir. 1986).
120. 810 F.2d 930 (10th Cir. 1987).