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CONSTITUTIONAL LAW

OVERVIEW

Constitutional law has assumed a new, personalized dimension for American citizens in recent years as litigants increasingly have availed themselves of federal statutes designed to provide remedies for infringements of constitutionally based guarantees.[1] This trend toward vindicating civil rights in the courts reflects the evolving socio-legal consciousness of the country and its concurrent emphasis on the protection of individual liberties. It is not surprising then that approximately half of the cases considered herein are statutory claims for the enforcement of civil rights. These cases are discussed in sections II and III below. While there is a growing tendency to assert equal protection claims by means of statutorily based actions, the Tenth Circuit also had occasion to decide several claims of a more traditionally "constitutional" nature. The decisions reviewed in section I all deal in some way or another with due process claims based directly on the fifth or fourteenth amendments.[2] Finally, cases which consider the application of constitutional principles to "specially situated"[3] groups of litigants are discussed in section IV.

I. DIRECT CONSTITUTIONAL CLAIMS

A. *Due Process—Obscenity Trials:* United States v. Friedman[4]

In 1970 Friedman was charged under 18 U.S.C. § 1465 (1970) with transporting an obscene book[5] in interstate commerce for the purpose of sale and distribution. Three years later the defendant appealed his conviction and the case was remanded to the trial court.[6] Retried under constitutional guidelines newly articulated

[1] *See* note 46 *infra*.

[2] The issue of state immunity from suit in federal court under the eleventh amendment was raised in Green v. Utah, 539 F.2d 1266 (10th Cir. 1976). For a discussion of this case and the eleventh amendment claim raised therein, see the Securities Overview *infra*.

[3] *See* note 130 *infra*.

[4] 528 F.2d 784 (10th Cir. 1976).

[5] The dominant theme of the book, *The Animal Lovers*, was sexual relations between human beings and animals.

[6] United States v. Friedman, 488 F.2d 1141 (10th Cir. 1973). *See* 52 DEN. L.J. 81, 81 n.4 (1975).

by the United States Supreme Court in *Miller v. California*,[7] Friedman was reconvicted and again appealed to the Tenth Circuit. Friedman claimed that, since the offense charged occurred before the Supreme Court decision in *Miller*, he should have been retried under the standard existing prior to that decision.[8]

The Tenth Circuit rejected the appeal on two grounds. First, the court held that Friedman had in effect been convicted by two juries—one utilizing the old obscenity standard, and another employing the *Miller* test. Therefore, the court reasoned, this defendant had been accorded more than the requisite due process.[9] Second, the court questioned whether Friedman had *ever* been entitled to be tried under the old standard since the test enunciated there had been formulated by a mere plurality of the Court. The Tenth Circuit noted that plurality opinions are not binding on lower courts.[10] The court concluded that Friedman therefore never had a right to expect that he would be tried under

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[7] 413 U.S. 15 (1973). On June 21, 1973 the Supreme Court decided four cases in addition to *Miller*, all dealing with the issue of obscenity: Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. 12 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973). Led by *Miller*, these cases established a new standard by which to judge obscenity. *See* note 8 *infra*.

[8] The pre-*Miller* standard that Friedman urged the court to apply developed out of Roth v. United States, 354 U.S. 476 (1957). *Roth* held that "obscenity is not within the area of constitutionally protected speech or press." *Id.* at 485. Nine years later in Memoirs v. Massachusetts, 383 U.S. 413 (1966), the Court "clarified" its position by attempting to articulate a definition of obscenity. A *plurality* opinion held that for something to be obscene:

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

383 U.S. at 418.

In *Miller* the Court specifically rejected this test, and adopted the following formulation:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24 (citations omitted).

[9] 528 F.2d at 788.

[10] *Id. See* United States v. Pink, 315 U.S. 203 (1942); Hertz v. Woodman, 218 U.S. 205 (1910).

the old standard. Noting that the book in question "would be considered obscene under any standard . . . even those of ancient Sodom and Gomorrah,"[11] the court affirmed the conviction.

B. *Due Process—Property Rights*

1. "Welfare" benefits: *Ryan v. Shea*[12]

This class action,[13] brought on behalf of certain recipients of Colorado Aid to the Needy Disabled (AND), challenged on due process grounds the constitutionality of procedures whereby welfare benefits were terminated. Under an act passed by Congress in 1972 and later amended,[14] state AND recipients who were receiving benefits in December 1973, and who had comenced receiving such benefits before June 1, 1973, would presumptively be eligible for benefits under an analogous federal program that was designed to replace the individual state programs beginning January 1, 1974.[15] Plaintiffs were individuals who were receiving state AND benefits in December 1973, but who had *not* commenced receiving these benefits by June 1, 1973. Realizing that limiting presumptive eligibility in this manner might result in overly harsh consequences, Congress amended the law to provide that pending individual eligibility determinations, recipients in plaintiffs' class would continue to receive presumptive benefits for up to one year after the effective date of the federal program.[16]

The program became effective and plaintiffs began receiving presumptive benefits. Later, an eligibility determination was made upon the basis of a "paper review" of records maintained under the state AND program.[17] If ineligibility was established by

[11] 528 F.2d at 789 (citing United States v. Marks, 520 F.2d 913 (6th Cir. 1975), where the Sixth Circuit similarly held that a film was obscene under both the *Memoirs* and *Miller* test).

[12] 525 F.2d 268 (10th Cir. 1975).

[13] For a discussion of the class action elements of this law suit see Federal Practice and Procedure Overview *infra*.

[14] Act of Oct. 30, 1972, Pub. L. No. 92-603, tit. III, § 301, 86 Stat. 1465, 42 U.S.C. § 1381 (Supp. II 1972), *as amended by* Act of Dec. 31, 1973, Pub. L. No. 93-233, § 9, 87 Stat. 957, 42 U.S.C. § 1382c (Supp. IV 1974). Both the Act and its amendment became effective January 1, 1974.

[15] The federal program was Supplemental Security Income for Aged, Blind, and Disabled (SSI).

[16] Act of Mar. 28, 1974, Pub. L. No. 93-256, § 1, 88 Stat. 52.

[17] This review was conducted without plaintiffs being given notice or an opportunity to be heard. 525 F.2d at 271.

this review, benefits were summarily terminated. Then and only then were individuals who had been terminated given the opportunity to have a full hearing on the question of eligibility. The question raised was whether plaintiffs were constitutionally entitled to a hearing *before* their presumptive benefits could be terminated.

The court, reaching the merits,[18] determined that the controlling issue was whether plaintiffs' interest in the presumptive payments fell within the protection of the rule announced in *Goldberg v. Kelly.*[19] There the Supreme Court held that under the due process clause of the fourteenth amendment, state welfare benefits could not be terminated before the recipient had been accorded an "adequate" evidentiary hearing.[20] The interest that a recipient had in his benefits was, therefore, held to merit procedural safeguards under the due process clause. Defendants argued that plaintiffs' interest in *presumptive* benefits was not as great as that of a recipient whose individual eligibility had already been established.[21] After examining the legislative history and applicable administrative procedures in depth, the court rejected defendants' argument and held that the constitutional interest involved was substantially similar to the one discussed in *Goldberg.*[22] Noting that the majority of federal courts which have considered this issue have reached the same conclusion,[23] the Tenth Circuit affirmmed the district court's order granting plaintiffs a permanent injunction against the administrators of the SSI program.

2. Athletics: *Albach v. Odle*[24]

The central issue in this case was whether participation in interscholastic public high school athletics is a constitutionally protected civil right. Appellant Albach attacked certain rules

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[18] For a discussion of the jurisdictional questions raised by this case, see Federal Practice and Procedure Overview *infra.*

[19] 397 U.S. 254 (1970).

[20] *Id.* at 261.

[21] 525 F.2d at 272-74.

[22] *Id.* at 274.

[23] *Id. See, e.g.,* Buckles v. Weinberger, 387 F. Supp. 328 (E.D. Pa. 1974); Brown v. Weinberger, 382 F. Supp. 1092 (D. Md. 1974) (citing unpublished opinions), *aff'd per curiam,* 529 F.2d 514 (4th Cir. 1975).

[24] 531 F.2d 983 (10th Cir. 1976).

adopted by the New Mexico Activities Association. Under these rules Albach was *automatically* barred from interscholastic competition for one year.[25] The Tenth Circuit affirmed the district court's dismissal on the ground that the case failed to raise a substantial federal question. In doing so, the court found controlling its earlier decision in *Oklahoma High School Athletic Association v. Bray.*[26] There, the Tenth Circuit had held that a controversy between a public school and a state athletic association over the question of whether the school might compete in interscholastic athletics did not present a justiciable federal question.

The court in *Albach* conceded that under certain circumstances public high school athletic regulations might have to withstand constitutional scrutiny. Such might be the case where a regulation operated to deprive a student of a *specific* right guaranteed by the constitution.[27] However, the court refused to hold that mere participation amounted to a constitutionally protected property interest.[28] The court ruled that since no specific consti-

[25] The pertinent rule barred from competition "any student who transferred from his home district to a boarding school or from a boarding school to his home district." *Id.* at 984.

[26] 321 F.2d 269 (10th Cir. 1963). *Accord,* Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1973).

[27] *See* Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975) (alienage discrimination); Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968) (racial discrimination); Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972) (invasion of marital privacy); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) (sex discrimination).

[28] The court considered and rejected the argument that Goss v. Lopez, 419 U.S. 565 (1974), in some way overruled *Bray.* In *Goss* the Supreme Court held that *under Ohio law* a student had a property interest in his public education sufficient to require a due process hearing before he could be suspended. 419 U.S. at 574. In *Goss* the Court spoke in terms of the "educational process." *Id.* at 576. The Tenth Circuit, seizing upon the phrase, read *Goss* as protecting only against a deprivation of the *whole* "educational process." Athletic participation was characterized as only one of the innumerable components, not in itself protected, which made up such a process. 531 F.2d at 985.

The position taken by the court in *Albach* was recently cited with approval by the federal district court in Colorado Seminary [University of Denver] v. NCAA, 417 F. Supp. 885, 895 (D. Colo. 1976). There the university, a member of the NCAA, refused to abide by an NCAA ruling which declared certain students ineligible to play hockey. The NCAA thereupon placed all university teams on probation. The university contended that it had been denied due process. Attempting to distinguish *Bray,* the university argued that the relationship between a college athlete and his institution was fundamentally different than the one between a public high school and its student athletes. The court noted that while withdrawal of a previously granted collegiate scholarship might invoke due process protections, no such deprivation had been shown. *Id.* Further, in accord with *Bray,* the

tutional right was at stake, "supervision and regulation of high school athletic programs remain within the discretion of appropriate state boards, and are not within federal cognizance under 42 U.S.C. § 1983 . . . .[29]

C. *Due Process—Procedural Rights:* United States v. Marines[30]

At the trial level, Marines[31] pled guilty to a charge of possession of marijuana and was sentenced to one year imprisonment. On appeal of his sentence, the Tenth Circuit affirmed and Marines petitioned for rehearing. On rehearing Marines raised two constitutional issues: (1) whether disposition of his appeal pursuant to Rules 8(d) and 9(d), Rules of Court for the Tenth Circuit,[32] denied him his fifth amendment right to due process; and

district court rejected the contention that participation in college athletic programs, because of its relationship to later employment in professional athletics, was sufficient to give plaintiffs a *liberty* interest protected by the due process clause. *Id. See also* Parish v. NCAA, 506 F.2d 1028, 1034 n.17 (5th Cir. 1975).

However, not all courts agree with this position. At least as far as *college* athletics are concerned, one federal district court has specifically held that before athletes can be suspended from a team they must be afforded a due process hearing. Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972). That same court had stated that "the opportunity to participate in intercollegiate basketball . . . is a property right entitled to due process guarantees because it may . . . lead to a very remunerative career in professional basketball and, because . . . it is an important part of the student athlete's educational experience." Regents of Univ. Minn. v. NCAA, No. 4-76-Civ.-468 at 7 (D. Minn., filed Dec. 2, 1976) (order granting temporary injunction). *See* McDonald v. NCAA, 370 F. Supp. 625 (C.D. Cal. 1974); Hunt v. NCAA, No. G-76-370-CA (W.D. Mich. Sept. 10, 1976). Compare the language in *Goss*, 419 U.S. at 576 ("educational process") with the court's formulation in *Regents of Univ. of Minn.*, No. 4-76-Civ.-468 at 7 ("educational experience"). Therefore, it would seem that while participation in public high school athletics does not in itself rise to the level of a constitutionally protected right, there is some question as to whether that is the case when participation in collegiate athletics is at issue.

[29] 531 F.2d at 985.

[30] 535 F.2d 552 (10th Cir. 1976).

[31] The criminal law aspects of *Marines* are discussed in the Criminal Law Overview *infra*.

[32] 10TH CIR. R. 8 provides:

> (c) The appellant shall have 15 days from the date of receipt of the motion to dismiss or affirm within which to file a response opposing the motion, addressing the merits. Such response, together with three copies and proof of service, shall be filed with the clerk. Upon the filing of such response, or the expiration of the time allowed therefor, the record on appeal, together with the motion and response, shall be distributed by the clerk to the court for its consideration. The time for filing briefs shall be tolled pending the disposition of the motion to dismiss or affirm.
>
> (d) After consideration of the papers distributed pursuant to the foregoing

(2) whether designating the opinion which affirmed Marines' conviction as "not for routine publication," pursuant to Circuit Rule 17,[33] violated his rights under the fifth and sixth amendments, as well as denying him equal access to the courts.

The court summarily dismissed the latter claim, stating that the court was "aware of no constitutional right to have an opinion published. Counsel for Marines is apparently laboring under a misapprehension that opinions designated 'not for routine publication' may not be cited."[34] Of somewhat more interest, however, was Marines' final claim—that assignment of his appeal to a court calendar providing for summary review based on written memoranda and without oral argument violated his due process rights under the fifth amendment.[35] The court met this objection

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paragraph, or on its own motion after notice to the parties, the court will enter an appropriate order.

Whenever the court, after reviewing an appeal, concludes that manifest error requires reversal or vacation of a judgment or order of the district court, or remand for additional proceedings, the court may enter an appropriate order after notice to the parties.

10TH CIR. R. 9(d) provides:

Calendar D cases shall consist of those cases in which a motion to affirm or dismiss has been filed pursuant to Rule 8(a) of these Rules and those in which notice has been given pursuant to Rule 8(d) of these Rules that the court is considering summary action on its own motion.

(1) Within 15 days after receiving notice that the court is considering summary action pursuant to Rule 8(d) on its own motion, the appellant may file in quadruplicate and serve on all parties to the appeal a memorandum addressing the merits, opposing such summary action.

(2) The appellee may simultaneously file in quadruplicate and serve on all parties to the appeal a memorandum addressing the merits supporting summary action.

(3) The same procedure and form as the preceding two paragraphs will be followed in those cases where manifest error is noted by the court pursuant to Rule 8(d), except that the appellee may oppose and the appellant may support summary action.

[33] 10TH CIR. R. 17 provides in pertinent part:

(c) The court or a panel thereof will determine when an opinion shall be published and will direct the clerk accordingly. The direction will appear on the face of the opinion. Unpublished opinions, although unreported and not uniformly available to all of the parties, can nevertheless be cited, if relevant, in proceedings before this or any other court. Counsel citing same shall serve a copy of the unpublished opinion upon opposing counsel.

[34] 535 F.2d at 555.

[35] The court commented that the most noteworthy consequence of assignment to the "summary calendar" D related to briefing. Full briefing is allowed under any other court calendar, whereas parties whose cases are assigned to calendar D may only submit memoranda which must be filed within 15 days after receipt of notice that the case has been

by reciting the well-established rule that dispensing with oral arguments does not violate due process.[36] Therefore, the petition was denied since it failed to allege that the defendant had been prejudiced by any time strictures which the rule placed on his attorney.[37]

D. *Due Process—Privilege Against Self-Incrimination:* United States v. Hansen Niederhauser Co.[38]

The primary constitutional question presented by this case was whether, based upon the fifth amendment privilege against self-incrimination, a corporate officer could refuse to comply with an administrative summons requesting him to produce corporate records. Additionally, the court considered whether appellant Niederhauser was denied due process of law when the district court held him in contempt for refusing to produce the records in question.

Niederhauser had been issued a summons by the Internal Revenue Service (IRS),[39] which was seeking corporate records to determine tax liability. In reply, Niederhauser stated that he did not know where the records were, and that even if he did, he would refuse to produce them. On appeal of the contempt order, the Tenth Circuit reaffirmed the principle that neither a corporation nor a corporate officer could assert a privilege against self-

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assigned to that calendar. However, these memoranda are not limited with respect to either length or content. 535 F.2d at 555-56.

[36] *Id.* at 556 (citing Federal Communications Comm'n v. WJR, The Good Will Station, Inc., 337 U.S. 265 (1949); United States v. Smith, 484 F.2d 8 (10th Cir. 1973), *cert. denied,* 415 U.S. 978 (1974)). *See also* George W.B. Bryson & Co. v. Norton Lilly & Co., 502 F.2d 1045 (5th Cir. 1974); NLRB v. Local 42, Int'l Ass'n of Heat & F.I. & A. Workers, 476 F.2d 275 (3d Cir. 1973); United States v. Johnson, 466 F.2d 537 (8th Cir. 1972), *cert. denied,* 409 U.S. 1111 (1973).

[37] Had Marines asserted prejudice due to any time limitations *arbitrarily* placed on his attorney, he might have been able to state a sixth amendment claim based on denial of effective assistance of counsel. *See* Fields v. Payton, 375 F.2d 624 (4th Cir. 1967); Garland v. Cox, 311 F. Supp. 1290 (W.D. Va. 1970). However, no such claim was made here.

[38] 522 F.2d 1037 (10th Cir. 1975).

[39] The court noted that the validity of such a summons has consistently been upheld by the Supreme Court. *Id.* at 1039. *See* Donaldson v. United States, 400 U.S. 517 (1971); United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946). Similarly, in the recent case of Elliot v. Bratton, No. 75-1713 (10th Cir., April 16, 1976) (Not for Routine Publication), the Tenth Circuit upheld, against a fourth and fifth amendment-based attack, the validity of an IRS summons ordering the production of bank records.

incrimination relative to corporate records.[40] The privilege against self-incrimination has historically been considered a personal privilege, applicable only to an individual's words or personal papers.[41] The other circuits considering this question have reached the same conclusion.[42]

Niederhauser's due process argument was based on his alleged inability to produce the records. He reasoned that the court could not hold him in contempt for failing to perform an impossible act.[43] The IRS had offered to make a showing at the contempt hearing of the existence of the requested documents. However, the district court elected to proceed without this evidence. On appeal, the Tenth Circuit held that to satisfy the requirements of due process there had to be at least "some showing regarding the existence of the records."[44] The case was remanded for the required evidentiary hearing.

II. STATUTORY CLAIMS: STATE ACTION AND 42 U.S.C. § 1983[45]

A. *Essential Elements—Generally*

In recent years section 1983 has become a frequently used weapon in the arsenal of civil rights plaintiffs who have litigated their constitutional claims in the federal courts.[46] During the pe-

[40] 522 F.2d at 1039 (citing Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906)).

[41] *See* Bellis v. United States, 417 U.S. 85 (1974) (collecting cases).

[42] *See, e.g.*, Fineberg v. United States, 393 F.2d 417 (9th Cir. 1968); Hair Indus., Ltd. v. United States, 340 F.2d 510 (2d Cir.), *cert. denied*, 381 U.S. 950 (1965).

[43] United States v. Bryan, 339 U.S. 323 (1950) announced the frequently cited rule that one charged with contempt for failing to comply with a court order makes a complete defense by *proving* that he is unable to comply. However, if the one so charged is responsible for the unavailability of documents in question, he cannot invoke the general rule in his own behalf. *Id.* at 330-31.

[44] 522 F.2d at 1040.

[45] 42 U.S.C. § 1983 (1970) provides:

> 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.

[46] Although enacted by Congress more than a century ago, section 1983 was infrequently invoked until relatively recent times. From 1871 to 1920 claims under section 1983 were raised in only 21 reported cases. 2 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1447 (3d ed. 1967). Then, in Monroe v. Pape, 365

riod covered by this survey the Tenth Circuit had occasion to dismiss two appeals by cursorily reviewing the necessary elements of a section 1983 claim. These cases state the minimum requirements for a section 1983 action.

In *Ward v. Baca*[47] appellant Ward brought a section 1983 action alleging that a United States marshal had acted to deprive him of his constitutional rights to counsel, bail, and a prompt arraignment. The Tenth Circuit, reviewing the district court's dismissal, held: "It is axiomatic that for an action brought pursuant to 42 U.S.C. § 1983 to be valid, two elements are necessary: 1) constitutional rights must be violated and 2) the constitutional deprivation must be caused by actions of those acting under color of state law."[48] The sole defendant in *Ward* was a federal officer acting under federal law. Therefore, the second essential element was not present and the trial court's order accordingly was affirmed.

In *Block v. Schaefer*[49] the question of state action was again at issue. Appellee Schaefer had reperfected a prior lien upon Block's truck and had sold the truck to satisfy the lien. Block brought a section 1983 action alleging that she had been deprived of her property without due process of law. Without reaching the question of whether Block's due process rights had been violated, the court affirmed the district court's order for summary judgment in favor of Schaefer on the ground that no state action was involved. The court noted that before an individual can be deemed an agent for purposes of fulfilling the state action require-

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U.S. 167 (1961), the Supreme Court held that a claim under section 1983 was stated when plaintiffs alleged that Chicago police officers wrongfully broke into their home. Since that time section 1983 has seen continued growth in its importance as a basis for litigation. In 1960, approximately 300 "civil rights" actions were filed, while in fiscal 1972 approximately 8,000 such actions were brought. 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3573, at 487 (1975). *See* Kates, *Liability of Public Entities Under Section 1983 of the Civil Rights Act,* 45 S. CAL. L. REV. 131 (1972); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections,* 60 VA. L. REV. 1, 250 (1974); Note, *Damages Under § 1983: The School Context,* 46 IND. L.J. 521 (1971); Note, *Civil Rights Act Section 1983: Abuses by Law Enforcement Officers,* 36 IND. L.J. 317 (1961); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983,* 55 MINN. L. REV. 1201 (1971); Note, *Constitutional Torts: Section 1983 Redress for the Deprived Debtor,* 14 WM. & MARY L. REV. 627 (1973).

[47] No. 75-1818 (10th Cir., June 24, 1976) (Not for Routine Publication).

[48] *Id.* at 2.

[49] No. 75-1836 (10th Cir., July 1, 1976) (Not for Routine Publication).

ment under section 1983, the party must have the *authority* to act officially for the state.[50] The Tenth Circuit held that Schaefer had been advancing only his own private interest, and had in no way been representing the state.[51]

The four cases discussed below present somewhat more delicate variations on the questions raised in *Ward* and *Block*. They demonstrate that while the essential elements of a cause of action under the provision may appear obvious, subtle and ofttimes complex questions arise when the stated requirements are applied to differing fact situations.

B. *School Annexation:* Board of Education of Independent School District No. 53 v. Board of Education of Independent School District No. 52[52]

School District No. 53 (Crooked Oak) brought a section 1983 action against adjoining School District No. 52 (Midwest), challenging the validity of a 1971 deannexation election. The election, held valid in two Oklahoma Supreme Court decisions,[53] resulted in the transfer of certain territory in Crooked Oak to Midwest. Crooked Oak asserted that it had an affirmative constitutional obligation to protect its integrated school system, and that the transfer had dismantled that system and had created a segregated one. Examining the facts,[54] the court of appeals ruled that the system was integrated both before and after the transfer, and could be operated as such on a continuing basis. The mere fact that certain "college preparatory" courses had to be eliminated

[50] *Id.* at 5. While the requirement for state action in a section 1983 case has generated a large body of law, the particular standard used by the court in *Block* is known as the "badge of authority" test. It developed from Monroe v. Pape, 365 U.S. 167 (1961) where the Court said: "Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a *badge of authority* of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." 365 U.S. at 171-72 (emphasis added). *See* 13 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 46, § 3573, at 491.

[51] No. 75-1836 at 5.

[52] 532 F.2d 730 (10th Cir. 1976).

[53] Austin v. State Bd. of Educ., 497 P.2d 218 (Okla. 1972) (directing Oklahoma school officials to implement the deannexation); Haller v. Austin, 487 P.2d 1360 (Okla. 1971) (approving the election procedures used).

[54] Rejecting the contention, the court noted that prior to the transfer Crooked Oak had a black enrollment of approximately 20%. After the deannexation this figure increased to approximately 42%. Numerically, Midwest had received 1,361 students of whom 70 were black. 532 F.2d at 732.

from the curriculum in Crooked Oak did not raise the problem to a constitutional level. However, the outcome might have been different had it been shown that students who desired these courses had been denied transfers to other districts where such courses were available.[55]

Ruling that no constitutional right had been infringed, the Tenth Circuit went on to hold that the transfer had not resulted from any state action. The court found that the election had been brought about solely by the efforts of codefendants-appellants Austin and Parker, who were private parties. They alone had circulated petitions calling for the election. The court acknowledged the principle that one need not be a state officer to act "under color of law" if one willfully participates in a joint activity with the state or its agent.[56] Yet here the state had not fostered the election. Indeed, county officials had fought (and lost) court battles in attempts to invalidate the elections.[57] Under these facts, the court affirmed the judgment in favor of Midwest.

C. *Election Filing Fees:* Gallagher v. Evans[58]

Appellants, who were candidates for various state offices in a 1972 New Mexico election, brought suit under section 1983 seeking restitution of primary election filing fees which they had paid under protest. The issue presented to the court was the constitutionality of a New Mexico statute[59] requiring certain can-

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[55] *Id.* at 733. The only analogous case seems to be Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y.), *appeal dismissed,* 497 F.2d 1027 (2d Cir. 1974), *aff'd,* 512 F.2d 37 (2d Cir. 1975). There, the district court was faced with the task of desegregating an identifiably black school. Judge Weinstein held that such a school's curriculum "must be arranged so that pupils transferring into the school have at least as good an education as they would have been afforded without the change." *Id.* at 757. The Tenth Circuit has skirted the issue of decreased quality in education addressed in *Hart* by implying the possibility of transferring students interested in taking courses now unavailable at Crooked Oak.

[56] 532 F.2d at 733.

[57] *See* Austin v. State Bd. of Educ., 497 P.2d 218 (Okla. 1972); Haller v. Austin, 487 P.2d 1360 (Okla. 1971).

[58] 536 F.2d 899 (10th Cir. 1976).

[59] 1969 N.M. Laws, ch. 240, § 176 (repealed 1973) (current version at N.M. STAT. ANN. § 3-8-26 (Supp. 1975). The current version sets an across-the-board fee of $50 for all candidates, except those for county offices, who pay $5. The repealed provision proved a fertile source of litigation. *See, e.g.,* Dillon v. Fiorina, 340 F. Supp. 729 (D.N.M. 1972); State *ex rel.* Apodaca v. Fiorina, 83 N.M. 663, 495 P.2d 1379 (1972), *cert. denied,* 416 U.S. 935 (1974).

didates to pay filing fees determined by a percentage of the salary of the particular position sought. In 1972 a federal district court had held part of that statute unconstitutional as applied to candidates for the United States Senate.[60] In *Gallagher,* the Tenth Circuit relied heavily on that decision, holding that "[t]he construction of a constitutional provision must be uniform . . . . All the candidates should be treated the same."[61] Thus, the court ruled that treating other candidates differently from United States Senatorial candidates would in itself amount to a denial of equal protection.[62]

D. *Teacher Firings:* Mogle v. Sevier County School District[63]

Mogel brought this civil rights action when the school at which he had been employed refused to renew his contract. The trial court granted summary judgment against Mogle on the

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[60] Dillon v. Fiorina, 340 F. Supp. 729 (D.N.M. 1972). The court struck down the provision as violative of equal protection. Under the contested provision, the filing fee required of a United States senatorial candidate was $2,550. *Id.* at 730.

[61] 536 F.2d at 902. While the result in *Gallagher* is arguably correct, the analysis is questionable. The court here was dealing with a *statutory* provision. The "uniform application" argument advanced in the majority opinion, while not often employed, relates in theory to *constitutional* provisions. *See* 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 123-24 (8th ed. 1927). The mere fact that the statute had previously been found unconstitutional *as applied* does not necessarily require the law to be voided in all subsequent cases. Further, the court held that the 1972 federal district court decision in *Fiorina* constituted a "change in conditions" justifying the outcome reached in *Gallagher.* 536 F.2d at 902. The court implied that because of this "change" the statute, which might have been valid at one time, was now invalid. *Id.* While the doctrine of "changed conditions" has at times been invoked when economic and social realities have shifted, no case cited by the Tenth Circuit in *Gallagher* supports the extension of the doctrine to the point where a prior decision of a court in a different case could serve as a changed condition justifying a later holding. "Changed conditions" such as these are more correctly called "precedents."

[62] The court was therefore able to ignore whether the filing fee requirement was reasonable. This issue, as the concurring opinion points out, may not have been so easy to decide given the rather unusual history of New Mexico election practices. Judge Barrett, quoting a prior New Mexico election case, wrote:

> New Mexico political history and legislative attempts to regulate elections are fascinating subjects. Three percent filing fees have been tried but found wanting. The modest expenditure was not sufficient to preclude the filing of "stooge" candidates. In New Mexico parlance, a "stooge candidate" is one who is filed by, or whose filing is caused or procured by a candidate or his adherents with a view to dividing the vote which would presumably be garnered by his opponent. Such efforts often developed along ethnic lines.

536 F.2d at 902-03 (Barrett, J., concurring)(quoting State *ex rel.* Apodaca v. Fiorina, 495 P.2d 1379, 1382 (N.M. 1972), *cert. denied,* 416 U.S. 935 (1974) (upholding the validity of the percentage fee system)).

[63] 540 F.2d 478 (10th Cir. 1976).

ground that no substantial federal question was raised. On appeal the Tenth Circuit held that a substantial federal question was presented, but that on the facts summary judgment was nonetheless proper. Hence, the judgment was affirmed.

Mogle had accepted a position as counselor at North Sevier High School in Utah for the 1969-70 school year. At the time, Mogle lived outside of the school district. Upon being hired, he was told that at some time he should move closer to the school. However, this was not stated as a condition precedent to his employment. Mogle did not move, and when contracts were being negotiated for the 1972-73 school year he was notified that his contract would not be renewed unless he were living in the North Sevier area by the first day of school. Despite a good faith effort, Mogle was unable to find housing. The school, requiring teachers to be residents of the school district in which they taught, refused to renew the contract. After mediation efforts proved fruitless this action was brought.[64]

Two constitutional issues were raised. First, Mogle asserted that imposing a residency requirement on only one class of employees denied him equal protection. Second, he argued that the residency requirement violated his right to due process by creating a conclusive and irrebuttable presumption that he could not satisfactorily perform his job unless he was a resident of the school district.

Discussing the equal protection claim, the court first considered what standard of review was to be applied to the residency requirement. The court reasoned that strict scrutiny was inappropriate and the "continuing residency" requirements should be subjected to the less demanding standards of the traditional rational relationship test.[65] The court's decision in this regard was

[64] The action was brought under not only section 1983 but also 42 U.S.C. § 1985 (1970), which provides in pertinent part that an action will lie against

> two or more persons in any State or Territory [who] conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law . . . .

The conspiracy element of this provision was not reached by the court in *Mogle* as the case was decided on the issues of whether Mogle had been deprived of either equal protection or due process of law.

[65] Recent Supreme Court holdings differentiate between requirements of "continuing

based primarily upon the Supreme Court's holding in *McCarthy v. Philadelphia Civil Service Commission.*[66] There, in a per curiam opinion, the Court applied a rational relationship test and upheld a municipal regulation requiring city employees to reside within city limits.

Having decided upon the appropriate standard of review, the court in *Mogle* found the residency requirement did not violate the equal protection clause. The court noted the justifications advanced for the policy and held that they were "not wholly unsubstantial."[67] With this holding the Tenth Circuit went a long way towards suggesting that almost any continuing residency requirement for public employment will withstand an equal protection attack.[68]

Turning to Mogle's due process claim,[69] the court took pains to distinguish the facts here from the two leading cases on the irrebuttable presumption doctrine, *Cleveland Board of Educa-*

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residency" (where to keep a job an individual must reside in a defined locale) and "durational residency" requirements (where one must reside in a defined area for a certain length of time before being able to do an act or receive a benefit). McCarthy v. Philadelphia Civil Serv. Comm'n, 425 U.S. 645 (1976) (per curiam). *See* Detroit Police Officer's Ass'n v. City of Detroit, 405 U.S. 950 (1972), *dismissing for want of substantial federal question* 385 Mich. 519, 190 N.W.2d 97 (1971). Only measures involving "durational requirements," affecting the fundamental right to interstate travel, have been held subject to strict scrutiny. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). One circuit court under facts almost identical to those in *Mogle* has gone so far as to flatly declare that cases involving the right to *intrastate* travel do not require the application of the strict scrutiny test. Warwell v. Board of Educ. of City School Dist., 529 F.2d 625 (6th Cir. 1976).

[66] 424 U.S. 645 (1976) (per curiam).

[67] 540 F.2d at 484. School superintendents, in affidavits, sought to justify the policy on the grounds that counselors above all other school employees should be readily accessible to students, parents, community and school officials; that certain services were not being provided students because the counselor lived outside the attendance area; that it was difficult for students and parents to become personally acquainted with the counselor under such conditions; that because of "folkways and mores" it was more difficult for a counselor living outside the district to become acquainted with the community where his students lived; and that career opportunities were not as readily discoverable by one living outside the school district. *Id.* at 485-86.

[68] *See* note 65 *supra.*

[69] After *Mogle* had been filed, the Tenth Circuit decided Weathers v. West Yuma School Dist., 530 F.2d 1335 (10th Cir. 1976). There, the court held that a non-tenured teacher did not have a property or liberty interest in his employment protected by the due process clause of the fourteenth amendment. After *Weathers* was decided Mogle dropped some of his due process claims, but the court still chose to note the irrebuttable presumption argument—perhaps because it had never been addressed in this context. *See* 540 F.2d at 483 n.4.

tion v. LaFleur[70] and *Vlandis v. Kline.*[71] The court noted that in *LaFleur* and *Vlandis* the presumptions involved were "unwarranted and a denial of due process" whereas in *Mogle* it had not been shown that the residency requirement involved a presumption against the plaintiff "on any particular point."[72] The Tenth Circuit relied upon the recent Supreme Court case of *Weinberger v. Salfi*[73] for the proposition that the doctrine concerning irrebuttable presumptions should not be applied when it would clash with a formal policy developed through the legislative process.[74] Evidently the court thought that even an informal, unwritten school board policy should be able to include "reasonable" conclusive presumptions regarding residency.

E. *Access to the Courts:* Silver v. Cormier[75]

This case presented a novel claim under section 1983. The gravamen of the complaint was that Cormier, acting under color of state law, had deprived Silver of his due process right of free access to the courts. Silver had sold land to the Denver Urban Renewal Authority (DURA), which had announced its intention to demolish a building located upon the property. Contrary to this announcement, however, DURA resold the property for a substantial profit. When Silver informed DURA that he was going to bring suit based on these facts, Cormier threatened to withhold from Silver a $10,000 going-out-of-business allowance to which Silver was statutorily entitled. Due to these threats, Silver delayed in enforcing his right to the monies due. Finally, he brought suit under section 1983. In addressing the constitutional claim, the court stated:

> Access to the courts of the United States is a constitutional right guaranteed by the due process clauses of the fifth and fourteenth

[70] 414 U.S. 632 (1974) (school board requirement that all pregnant teachers take forced maternity leave by fourth month held unconstitutional).

[71] 412 U.S. 441 (1973) (irrebuttable presumption that college student who had maintained out-of-state address at any time during previous year was out-of-state resident for tuition purposes held unconstitutional).

[72] 540 F.2d at 485.

[73] 422 U.S. 749 (1976).

[74] 540 F.2d at 485. However, the evidence in *Mogle* would suggest that the presumption established there was not the result of a thorough legislative process, but rather was an ad hoc informal determination made by a single individual—the school superintendent. *Id.* at 484.

[75] 529 F.2d 161 (10th Cir. 1976).

amendments. This right of access to the courts cannot be infringed upon or burdened. A public official's threats to a citizen to withhold monies due and owing, should legal proceedings on an independent matter be instituted, burdens or chills constitutional rights of access to the courts.[76]

III. RACIAL DISCRIMINATION: TITLE VII AND RELATED CLAIMS[77]

During the period covered by this survey the Tenth Circuit considered a number of cases involving charges of racial discrimi-

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[76] 529 F.2d at 163. The only cases which the Tenth Circuit cited as authority for its holding were criminal cases which had never previously been extended into the civil area. These criminal cases generally rest upon the principle that "prison officials may not unreasonably hamper inmates in gaining access to the courts." Evans v. Mosley, 455 F.2d 1084, 1087 (10th Cir. 1972). *See* Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973); Harbolt v. Alldredge, 464 F.2d 1243 (10th Cir.), *cert. denied*, 409 U.S. 1025 (1972); Sigafus v. Brown, 416 F.2d 105 (7th Cir. 1969); DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966); Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961). However, in *Silver*, the Tenth Circuit took a giant step in extending this rationale into the civil area. Such an extension is unprecedented, for the criminal cases are all linked by the fact that plaintiffs were inmates under virtually total control of prison officials. In *Silver*, the plaintiff was a sophisticated, unincarcerated businessman, free to communicate with lawyers, and to bring as many law suits as he desired.

There are some "free access" cases in the area of civil litigation. Yet they deal literally with *free* access. The landmark case of Boddie v. Connecticut, 401 U.S. 371 (1971), allowed indigent divorce litigants to file their case without paying the regular court fees. Some courts interpreted *Boddie* to presage an evolving rule favorable to indigents wishing to press civil claims. *See, e.g.*, Bacon v. Graham, 348 F. Supp. 996 (D. Ariz. 1972); O'Brien v. Trevethan, 336 F. Supp. 1029 (D. Conn. 1972). However, in United States v. Kras, 409 U.S. 434 (1973), the Supreme Court made it clear that *Boddie* was to be narrowly construed and applied only in the few situations where (1) only a court could resolve the conflict involved; and (2) where the issue in dispute was found to be "fundamental." *Id.* at 444-45. Thus, neither *Boddie* and its progeny, nor the line of criminal cases in the free access area seems to support *Silver*.

[77] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970), was specifically drafted to provide a remedy for those who had suffered the effects of discrimination in employment. However, Title VII is not an exclusive remedy. Facts which give rise to a claim under Title VII may also state a cause of action under other statutory provisions relating to the protection of civil rights, *e.g.*, 42 U.S.C. § 1981 (1970). *But see* text accompanying note 100 *infra*. Plaintiffs frequently base claims on these other statutory provisions in addition to Title VII because the scope of remedies available under Title VII is narrower than that available under other civil rights statutes. Under Title VII, the general rule is that neither punitive nor consequential damages may be awarded. Equal Employment Opportunity Comm'n v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974). Yet under other civil rights statutes, punitive or consequential damages may be awarded. *See, e.g.*, Sabol v. Snyder, 524 F.2d 1009 (10th Cir. 1975) (punitive damages awarded in section 1981 claim); McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975) *aff'd on other grounds*, 427 U.S. 160 (1976) (damages for embarrassment, humiliation, and mental anguish granted in section 1981 claim).

nation, primarily in employment practices. Approximately one-third of these suits,[78] however, was concerned mainly with narrow procedural questions under Title VII of the Civil Rights Act of 1964.[79] Of the remaining cases, five are of particular interest and are discussed below.[80]

A. *Hiring:* Sabol v. Snyder[81]

Plaintiff Sabol, a black practical and registered nurse, applied for an open position with the Kansas State Board of Education. Despite the fact that plaintiff was the only qualified[82] individual to submit a timely application, a less qualified white male who had submitted a late application was offered the job. Thereupon Sabol brought this suit charging racial discrimination in employment. At the trial level plaintiff was sucessful on her section 1981 claim.[83] On appeal, appellant Snyder's primary contention was that in light of *McDonnell-Douglas Corp. v. Green,*[84] a Supreme Court decision handed down after *Sabol* had been argued, plaintiff had failed to state a prima facie case of discrimination.

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[78] These cases, dealing principally with the question of time limits within which Title VII plaintiffs must file suit, are discussed in the Administrative Law Overview *supra.*

[79] 42 U.S.C. § 2000e (1970).

[80] In addition to those cases discussed in the text, the Tenth Circuit disposed of three further actions solely on evidentiary grounds: Love v. Philco-Ford Corp., No. 75-1138 (10th Cir., Aug. 20, 1976) (Not for Routine Publication); Buckley v. Coyle Public School Sys., No. 75-1143 (10th Cir., Feb. 6, 1976) (Not for Routine Publication); Collins v. Martin Marietta Corp., No. 75-1447 (10th Cir., Jan. 21, 1976) (Not for Routine Publication).

Stanley v. Continental Oil Co., 536 F.2d 914 (10th Cir. 1976), was dismissed because of failure on the part of plaintiff-appellant Stanley to prosecute. Stanley had alleged a violation under Title VII. Continental moved for summary judgment and submitted supporting affidavits. Stanley did not file counter-affidavits as required by court order and FED. R. CIV. P. 56. The trial court's dismisal was sustained on appeal.

[81] 524 F.2d 1009 (10th Cir. 1975).

[82] In addition to testimony concerning plaintiff's work experience and educational background, workshop evaluations of plaintiff were admitted into evidence over defendant's objection. These records were admitted under the business records exception to the hearsay rule, and their admission as such was upheld on appeal. 524 F.2d at 1012.

[83] 42 U.S.C. § 1981 (1970) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

[84] 411 U.S. 792 (1973).

McDonnell specified the elements needed to establish a prima facie case in a Title VII action.[85] A plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[86]

The Tenth Circuit concentrated on the last two elements since the first two were obviously met. Stretching the logic in *McDonnell*, the court found that the acceptance of an application after the announced cutoff date amounted to a rejection of Sabol even though cutoff dates were not strictly enforced. This "rejection," coupled with the subsequent hiring of the white male applicant, satisfied the court that the last two elements of the *McDonnell* test had been met.[87] The Tenth Circuit rejected as a sham appellant's business judgment defense that the white male was better qualified, and affirmed the trial court judgment granting Sabol not only actual, but also punitive damages and attorney's fees.[88]

B. *Hiring and Promotion:* Chicano Police Officer's Association v. Stover[89]

The Chicano Police Officer's Association and some of its members brought this civil rights action[90] alleging discrimination in both the hiring and promotion procedures used by the Albuquerque, New Mexico Police Department. The complaint alleged that the Department utilized discriminatory procedures based upon criteria not substantially related to job performance, with

[85] The Tenth Circuit applied the *McDonnell-Douglas* Title VII standard to Sabol's section 1981 claim noting that it had previously been so applied. 524 F.2d at 1012. However, this technique can no longer be used. *See* text accompanying note 100 *infra*.

[86] 411 U.S. at 802 (footnote omitted).

[87] 524 F.2d at 1012. The Tenth Circuit could have avoided this step in the analysis, holding that prior rejection was not required in all cases, by relying on a footnote in *McDonnell*, where the Court noted that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13.

[88] 524 F.2d at 1012-13.

[89] 526 F.2d 431 (10th Cir. 1975), *vacated*, 426 U.S. 944 (1976).

[90] Plaintiffs brought suit under 42 U.S.C. §§ 1981, 1983, and 1985 (1970).

the result that a disproportionate number of Spanish-speaking and Spanish-surnamed Americans were excluded from employment and promotions. On appeal, the Association contended that the trial court had erred in ruling that the plaintiffs lacked standing, and that they had not made a prima facie case of discrimination in promotion procedures.

After holding that the plaintiffs had standing,[91] the Tenth Circuit addressed the question of whether a prima facie case had been established. The court cited *Griggs v. Duke Power Co.*,[92] a leading Title VII case,[93] for the proposition that a plaintiff can make a prima facie case of discrimination by merely showing that the challenged procedures have a discriminatory result.[94] In light of *Griggs*, the Tenth Circuit ruled that the Association should have been allowed to introduce evidence of promotion test results from prior years, and the trial court's refusal to admit such evidence was error.[95] Further, as to test results which were admitted into evidence but which the trial court held insufficient to make out a prima facie case, the Tenth Circuit held that the size of the group tested was large enough to provide meaningful statistical data.[96]

On appeal, the Supreme Court vacated the Tenth Circuit judgment[97] and remanded for consideration in light of *Washington v. Davis*.[98] In *Washington*, unsuccessful black applicants for employment as police officers alleged that the use of a

[91] The Tenth Circuit held that because approximately 70% of the Chicano officers in the Department were members of the Association, the group had the requisite "direct stake" in the outcome. 526 F.2d at 436. In ruling that the individual members of the Association had standing, the court likened the officers' position to that of the plaintiffs in Marable v. Alabama Mental Health Bd., 297 F. Supp. 291 (M.D. Ala. 1969), where it was held that the secondary effects of discrimination on patients gave them standing to challenge staff hiring procedures. 526 F.2d at 436-37. *See also* Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967).

[92] 401 U.S. 424 (1971).

[93] The Tenth Circuit adopted the view that "the measure of a claim under the Civil Rights Act is in essence that applied in a suit under Title VII . . . ." 526 F.2d at 438 (citing Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972), and Sabol v. Snyder, 524 F.2d 1009 (10th Cir. 1975)). *But see* text accompanying note 100 *infra*.

[94] 526 F.2d at 438.

[95] *Id.* at 439.

[96] *Id.*

[97] 426 U.S. 944 (1976).

[98] 426 U.S. 229 (1976).

particular written personnel test resulted in racial discrimination. The case was brought under 42 U.S.C. § 1981 (1970) and the due process clause of the fifth amendment.[99] The Court held that the constitutional standard for adjudicating claims of racial discrimination is *not* identical to standards applicable under Title VII.[100] The decision emphasized that when Title VII is not involved,[101] challenges to facially neutral practices which have a discriminatory impact will not succeed absent some showing of intent to discriminate.[102]

C. *Promotions—Sex Discrimination:* Olson v. Philco-Ford[103]

This case involved a charge of sex discrimination in promotion procedures in violation of Title VII.[104] Olson, a female employee, applied along with three male employees for a position at a higher job classification within her company. One of the male applicants was selected, and Olson brought suit. The trial court dismissed at the end of plaintiff's evidence. Appealing to the Tenth Circuit, Olson asserted that she had made out a prima facie case of discrimination and that dismissal was, therefore, error.

The Tenth Circuit found that Olson and the male employees selected for promotion were equally qualified. Backing away from the "prima facie case" standard argued by Olson, the court phrased the question as whether the "selection of a qualified man over a qualified woman, standing alone, makes out a prima facie case of sex discrimination."[105] The court's statement of the issue implied the result—such a selection is not an act of discrimination.

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[99] A claim also was stated under a District of Columbia Code provision. *Id.* at 233.

[100] *Id.* at 239. *But see* Castaneda v. Partida, 97 S. Ct. 1272 (1977).

[101] The Court noted that in Title VII litigation discriminatory purpose need not be proven. 426 U.S. at 246-47. The Court declared that "[w]e are not disposed to adopt this more rigorous standard [of Title VII] for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this." *Id.* at 247-48.

[102] *Id.* at 239-40, 246.

[103] 531 F.2d 474 (10th Cir. 1976).

[104] The section relied upon was 42 U.S.C. § 2000e-2(a)(1) (1964), which provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or to otherwise 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 . . . .

[105] 531 F.2d at 478.

Important in the above quote are the words "standing alone." Olson had presented certain statistical evidence, but the court found that it did not bear on promotions. While the court noted that statistics can be useful in uncovering discrimination, they must be "closely related to the specific issues presented."[106] Olson's statistics went solely to the issue of the number of women holding positions at a grade equivalent to, or higher than, the one for which she had applied. Given these circumstances, the court limited the language of its recent decision in *Rich v. Martin Marietta,*[107] under which Olson theoretically could have stated a case.[108] In *Rich* there had been a substantial showing of the differences in promotions between minority and non-minority employees, whereas Olson had failed in this regard.

D. *Firing*

1. *Taylor v. Safeway Stores, Inc.*[109]

Taylor, a black, was hired in 1968 to work at Safeway's frozen food warehouse in Denver. Three weeks later he was fired, ostensibly because of inadequate job performance. Taylor subsequently brought a class action[110] on behalf of virtually all black Safeway employees in Colorado, alleging discriminatory employment practices in violation of both section 1981 and 42 U.S.C. § 2000e (1970). After narrowing the class and dismissing the section 1981 action for failure to exhaust Title VII remedies, the trial court ruled on the merits that Taylor had stated an actionable charge of discrimination based on his firing. Taylor was awarded back pay and attorney's fees on his individual claim, but the court found no merit in the class action. On appeal, Taylor argued *inter alia* that (1) his class claim had stated a prima facie case of discrimination; (2) that trial court had abused its discre-

[106] *Id.* at 477 (quoting Taylor v. Safeway Stores, Inc., 524 F.2d 263, 272 (10th Cir. 1975)).

[107] 522 F.2d 333 (10th Cir. 1975).

[108] *Rich* held that "[o]nce a plaintiff has shown that he is qualified, he need only show a discriminatory impact and that he was among the class of employees who could have been considered for promotion." *Id.* at 348. Therefore, if promotion of a qualified male over a qualified female can be said to possibly establish a "discriminatory impact," Olson would have stated a case. 531 F.2d at 478. The court found, however, that under the facts of the case, Olson had suffered no "discriminatory impact."

[109] 524 F.2d 263 (10th Cir. 1975).

[110] The considerable importance of this case vis-a-vis class action requirements is discussed in the Federal Pratice and Precedure Overview *infra.*

tion in determining the amount of the awards for back pay and attorney's fees; and (3) failure to exhaust Title VII remedies did not bar the section 1981 claim.

a. *Prima facie case*

Taylor had alleged that three of Safeway's practices violated Title VII. The court noted that should any one of these practices either presently discriminate against blacks, or, while neutral on its face, maintain the vestiges of past discrimination, a violation could be found.[111] First, Taylor asserted that an employee referal system used to fill job openings perpetuated past discrimination. The court held that this was true only when an employer both primarily relies on this method, and when the use of such a system results in a pattern of discrimination. Here, the court found that while the referral system accounted for fifty percent of warehouse hirings, there was no statistical evidence of discrimination.[112]

Secondly, Taylor argued that a company rule prohibiting interdepartmental transfers worked to discriminate against blacks by locking them into manual labor jobs. The court reasoned that unless Taylor showed an actual pattern of discrimination resulting from this policy (which applied equally to all employees), no violation could be found. Again, examining the statistics, the court determined that there was no showing of past discrimination.[113]

Finally, Taylor asserted that a company hiring policy which gave preference to applicants with warehouse work experience discriminated against blacks because they were less likely to have such experience. Other jurisdictions have previously held that work-experience requirements may violate Title VII.[114] However, the Tenth Circuit held that when there is no evidence of a discriminatory effect from such a requirement, no violation is estab-

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[111] 524 F.2d at 271.

[112] *Id.* at 272. Blacks make up 4.1% of the Denver metropolitan area population. Of the employees hired at Safeway's Denver warehouse during the relevant time period, blacks accounted for an average of 18% per year. *Id.*

[113] Blacks constituted 4.27% of warehouse employees, whereas they comprised only 2.01% of the total number of employees. The court found the difference statistically insignificant. *Id.*

[114] *E.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

lished.[115] Since no discriminatory effect was shown, no case was proven.

b. *Remedies—back pay and attorney's fees*

The trial court determined that Taylor's own firing was racially motivated and, therefore, awarded $3,256 in back pay and $3,000 for attorney's fees. The back pay period commenced some time after the firing, and ended eight months later when Taylor became a fulltime college student. Taylor contended that entering school should not have rendered him ineligible for back pay. The court, noting that an award of back pay is discretionary,[116] stated that once Taylor returned to school he was not "ready, willing and available for work," and, therefore, he was not entitled to back pay.[117]

As for Taylor's argument that the award for attorney's fees was inadequate, the Tenth Circuit noted that prior awards in Title VII litigation had been as small as $12 per hour. Taylor's award amounted to $17 per hour and was therefore not an abuse of discretion.[118] The court nevertheless pointed out that the award was "modest," and suggested that the trial court reevaluate the amount.[119]

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[115] 524 F.2d at 272.

[116] *Id.* at 267. 42 U.S.C. § 2000e-5(g) (1970). *See* Moody v. Albemarle Paper Co., 422 U.S. 405 (1975). Taylor also asked for reinstatement. However, the court ruled that reinstatement was a discretionary remedy under 42 U.S.C. § 2000e-5(g) (1970), which in the trial court's discretion could be (and was) refused. 524 F.2d at 268.

[117] 524 F.2d at 267. This holding reflects the rule that an act of the discriminatee can sometimes cut off the applicable back pay period. However, it is unclear as to what acts so operate. *See* Jurinko v. Edwin L. Wiegland Co., 477 F.2d 1038 (3d Cir.), *vacated on other grounds*, 414 U.S. 970 (1973); Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971). The case relied on by the Tenth Circuit, United States v. Wood, Wire & Metal Lathers Local 46, 328 F. Supp. 429 (S.D.N.Y. 1971), indicates that if a wrongfully discharged employee later enrolls full time in college, a back pay award should terminate only if the individual cannot show that while in school he was "ready, willing and available" for work. *Id.* at 443-44. Therefore, what was a factual question under *Metal Lathers* has been transformed into a rule of law by the Tenth Circuit.

[118] As authority for its position, the Tenth Circuit cited, *inter alia*, Barela v. United Nuclear Corp., 462 F.2d 149, 155-56 (10th Cir. 1972). 524 F.2d at 268. The court's reliance on *Barela* is misplaced. There, the court upheld a $25 per hour fee, which if applied in *Taylor* would have resulted in an award more than 50% higher.

[119] 524 F.2d at 268. *See also* Carreathers v. Alexander, No. C-5082 (D. Colo., Sept. 29, 1976) (order awarding attorney's fees).

c. *Exhaustion of Title VII remedies and section 1981*

The trial court ruled that no claim could be raised under section 1981 until all Title VII remedies were exhausted. The Tenth Circuit reversed, holding that a claim under section 1981 was completely independent from a Title VII action and could be brought concurrently.[120] The court thus adopted what was, even at the time of the trial court decision, the majority rule.[121] The Supreme Court finally laid to rest what was left of this question with its decision in *Johnson v. Railway Express Agency, Inc.*,[122] holding that an "aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief."[123]

2. *Smith v. Yellow Freight Systems, Inc.*[124]

This case raised the question of whether racial or other class-based "discriminatory animus" must be alleged and proven before an individual may recover under section 1985(2).[125] While plaintiff-appellant Smith had attempted to allege a conspiracy aimed at hindering the enforcement of his rights, he did not allege or prove that such a conspiracy was racially motivated. The Tenth Circuit relied heavily on *Griffin v. Breckenridge*,[126] which

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[120] 524 F.2d at 274.

[121] *Id.*

[122] 421 U.S. 454 (1975).

[123] *Id.* at 459.

[124] 536 F.2d 1320 (10th Cir. 1976).

[125] The section provides:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or *if two or more persons conspire* for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, *with intent* to deny to an citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws . . . .

42 U.S.C. § 1985 (2) (1970) (emphasis supplied).

[126] 403 U.S. 88 (1971).

interpreted section 1985(3)[127] on the same issue.[128] The court followed the rule that a claim under section 1985(2) requires the same "discriminatory animus" as one under section 1985(3).[129] Therefore, the trial court's dismissal was affirmed.

IV. CONSTITUTIONAL RIGHTS OF THE SPECIALLY SITUATED INDIVIDUAL[130]

A. *Military Justice*

1. *Kehrli v. Spinkle*[131]

Colonel Kehrli sought a writ of habeas corpus in the federal district court, challenging his conviction by general court-martial on several charges of marijuana use, transfer, and possession.[132] The petition was denied, and on appeal Kehrli advanced several constitutional claims.[133] First, he argued that Article 134 was im-

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[127] 42 U.S.C. § 1985(3) (1970).

[128] In *Griffin* the Supreme Court held that although section 1985(3) was meant to reach private conspiracies, it was not intended to "apply to all tortious, conspiratorial interferences with the rights of others," but only those motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus . . . ." 403 U.S. at 101-02. "Animus" is distinguished from "scienter," or "specific intent." As Justice Stewart, writing for the Court in *Griffin*, noted: "The motivation aspect of § 1985(3) focuses not on scienter but on invidious discriminatory animus." *Id.* at 102 n.10.

[129] 536 F.2d at 1323.

[130] Prisoners, mental patients, and military personnel are groups generally associated with diminished constitutional protection. *See* N. DORSEN, P. BENDER, and B. NEUBORNE, EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1320-433 (4th ed. 1976). While this survey does not have occasion to examine a decision concerning the constitutional rights of mental patients, the Tenth Circuit did recently decide the case of Strano v. Giron, No. 75-1598 (10th Cir., July 14, 1976) (Not for Routine Publication), which held that neither equal protection nor due process guarantees are violated by different treatment of voluntary, as opposed to involuntary, hospital patients.

Also included in this section is a case involving Indian affairs. While Indians are not traditionally linked with the above groups, they are however accorded special judicial treatment because of their particular status. *See* text accompanying notes 155-57 *infra*.

[131] 524 F.2d 328 (10th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976).

[132] Kehrli had been convicted under Article 134 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 934 (1970). It provides:

> [A]ll disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

[133] In addition to the constitutional issues discussed in the text, Kehrli raised a question as to the proper scope of judicial review in court-martial cases. Relying on Burns v.

permissibly vague and overbroad and, therefore, unconstitutional on its face. However, this argument was fatally undermined when the two circuit court decisions upon which it rested were overruled by the Supreme Court while Kehrli's appeal was pending.[134] Kehrli further contended that the conviction and sentence violated the constitutional guarantee of equal protection, his right of privacy, and the eighth amendment's prohibition against cruel and unusual punishment.

Kehrli's equal protection argument was based on the fact that Article 134 is supplemented by a provision which makes it "a violation of this article [134] wrongfully to possess or use marijuana or a habit forming narcotic drug."[135] Kehrli argued that to place marijuana in the same class as habit-forming narcotics violates equal protection. The Tenth Circuit held that since the maximum penalty for marijuana use or possession differed from that for violations involving habit-forming drugs, the classification did not violate equal protection.

The court summarily dismissed Kehrli's privacy and eighth amendment claims. Kehrli had argued that since marijuana produces only mild, harmless effects, government regulation concerning it violated his constitutional right to privacy. The court held that on balance, the military's interest in regulating marijuana use among service personnel in combat zones, and on or near military installations, outweighed any right to privacy which Kehrli might otherwise possess.[136] In regard to his eighth amendment argument, Kehrli urged that his sentence of three years at

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Wilson, 346 U.S. 137 (1953), the Tenth Circuit stated that the scope of review in military cases was narrower than in civil habeas corpus proceedings, and that the courts' function was to "determine whether the military gave fair consideration to each of the petitioner's constitutional claims." 524 F.2d at 331 (quoting King v. Moseley, 430 F.2d 732 (10th Cir. 1970)). Additionally, Kehrli urged that off-duty marijuana use could not be prosecuted under Article 134. The court, citing no cases, found to the contrary. *Id.* at 332-33. *See* Schlesinger v. Councilman, 420 U.S. 738 (1975); United States v. Rose, 19 C.M.A. 3, 41 C.M.R. 3 (1969). *But see* Cole v. Laird, 468 F.2d 829 (5th Cir. 1972); Redmond v. Warner, 355 F. Supp. 812 (D. Hawaii 1973). Finally, rejecting Kehrli's claim that he had been denied sufficient access to counsel, the court found that his case had been given "full consideration," and that there had been no showing of actual prejudice resulting from any alleged defects. 524 F.2d at 333.

[134] Secretary of the Navy v. Avrech, 418 U.S. 676 (1974), *reversing* 477 F.2d 1237 (D.C. Cir. 1973); Parker v. Levy, 417 U.S. 733 (1974), *reversing* 478 F.2d 772 (3d Cir. 1973).

[135] U.S. DEP'T OF DEFENSE MANUAL FOR COURTS-MARTIAL, 213(b) (rev. ed. 1969).

[136] 524 F.2d at 332.

hard labor plus a $15,000 fine was excessive and constituted cruel and unusual punishment. The court stated that while severe, it was within the "authorized maximum sentence."[137] Thus, the eighth amendment claim was held to have no merit.[138]

2. *Moore v. Schlesinger*[139]

Appellant Moore, an Air Force Captain, was relieved of his teaching duties at the Air Force Academy in 1973 and reassigned to overseas duty. Thereupon, Moore resigned his commission and brought this suit alleging, *inter alia,* that his transfer had been punishment for writing letters to various Congressmen concerning certain Academy policies. Moore contended that the Air Force action in reassigning him violated his first amendment right to freedom of expression. Damages were sought.[140]

The court recognized the principle that "citizens in uniform may not be stripped of basic rights because they have doffed their civilian clothes."[141] However, the court held that military interests had to be balanced against individual interests, and that the court had jurisdiction to review a case like Moore's only when the military action was so restrictive of a serviceman's fundamental rights as to "deny them altogether and thus constitute an abuse of the broad discretion granted to military officers . . . ."[142] Noting the longstanding policy of judicial non-interference in the military duty assignment area,[143] the court found no abuse of discretion. Since there was no jurisdiction, the case was dismissed.

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[137] *Id.*

[138] Cases are legion which hold that, regardless of severity of length, penalties within legislatively set bounds are constitutional. *See, e.g.,* Smith v. United States, 407 F.2d 356 (8th Cir.), *cert. denied,* 395 U.S. 966 (1969); Hedrick v. United States, 357 F.2d 121 (10th Cir. 1966); United States v. Martell, 335 F.2d 764 (4th Cir. 1964); Lindsey v. United States, 332 F.2d 688 (9th Cir. 1964).

[139] No. 74-1882 (10th Cir., Nov. 21, 1975) (Not for Routine Publication).

[140] Originally Moore also sought a declaratory judgment, injunctive relief, mandamus, a writ of habeas corpus, and an order reinstating him at the Academy. However, the court held that only the damage claim survived and that all other claims were mooted by his voluntary act of resignation. *Id.* at 4-5.

[141] *Id.* at 5 (quoting Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L. REV. 181, 188 (1962)).

[142] No. 74-1882 at 6.

[143] *Id.*

B. *Inmate Actions*

1. *Marchesani v. McCune*[144]

Marchesani was a federal prisoner who had been classified in the records of the Bureau of Prisons as a "special offender."[145] On appeal from the dismissal of his habeas corpus petition, Marchesani alleged that classifying him as such, absent a prior hearing, violated his right to procedural due process. The Tenth Circuit affirmed the district court's holding that the prisoner's classification was based upon the nature of his previous *convictions*, whereas in the cases relied upon by Marchesani the classification rested upon "unsupported allegations in presentence reports."[146]

Analyzing the due process claim, the court noted the wide latitude that the government has traditionally been afforded in the conduct of its internal affairs, especially within the context of prison management.[147] Given this principle, the Tenth Circuit held that actions taken by prison officials, affecting what would normally be constituted a right in a non-prison environment, violate due process only when such actions constitute a clear abuse of an official's discretionary powers.[148] Finding no such abuse of discretion, the court dismissed the petition.

2. *Clark v. Leach*[149]

Appellant Clark, a prisoner, originally brought suit in state court alleging that the prison's refusal to provide surgery for a cataract constituted cruel and unusual punishment in violation of the eighth amendment. The New Mexico Supreme Court affirmed a lower court decision which held that while prisoners are entitled to adequate medical care, the operation was "elective

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[144] 531 F.2d 459 (10th Cir.), *cert. denied*, 429 U.S. 846 (1976).

[145] "Special Offenders" require "greater case management supervision" than usual offenders. 531 F.2d at 461. The court interpreted 18 U.S.C. § 4081 (1970) as placing a *duty* upon prison officials to classify inmates. 531 F.2d at 461.

[146] *Id.* at 460. Marchesani had relied on Catalano v. United States, 383 F. Supp. 346 (D. Conn. 1974), and Masiello v. Norton, 364 F. Supp. 1133 (D. Conn. 1973).

[147] 531 F.2d at 461. The court cited with approval Pell v. Procunier, 417 U.S. 817 (1974), where Mr. Justice Stewart wrote for the majority: "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* at 822 (citations omitted).

[148] 531 F.2d at 462.

[149] No. 76-1022 (10th Cir., Aug. 25, 1976) (Not for Routine Publication).

surgery." Failure to provide such surgery did not constitute violation of the eighth amendment.[150]

Clark did not petition for certiorari to the Supreme Court, but instituted this action based on the same facts in federal court.[151] The Tenth Circuit held that the principle of res judicata applied to suits brought under section 1983 where there had already been a prior state court adjudication on the same constitutional claim.[152] The court held that the eighth amendment claim, and a due process claim which the court found was included within the eighth amendment claim, had already been fully litigated at the state level.[153] Hence Clark was barred from reasserting these claims in federal court.

C. *Indian Affairs:*[154] Potts v. Bruce[155]

This case arose when the Bureau of Indian Affairs (BIA) took action to withdraw approval of the Tribal Business Committee of the Prairie Band of the Pottawatomi Indians, and their Tribal Constitution. The BIA acted after the committee, torn by an internal dispute, reached a stalemate and was unable to conduct tribal business. A BIA-sponsored resolution was adopted whereby approval of the constitution and the committee was withdrawn, and a new group was formed to draft another constitution. Members of the defunct committee sued, alleging that their rights under the first and fifth amendments had been violated by the BIA.

The Tenth Circuit held that an individual tribal member had a vested right "in any particular law or in the Tribal Constitution."[156] Thus such laws could always be changed, providing that the means used were permissible. Finding that the controversy was completely intratribal, the Tenth Circuit applied the

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[150] *Id.* at 2. *Cf.* Prins v. Bennett, No. 75-1616 (10th Cir., March 8, 1976) (Not for Routine Publication) (failure of unlicensed prison physician to examine inmate held neither abuse of discretion nor violation of prisoner's eighth amendment rights).

[151] The federal action was brought under 42 U.S.C. § 1983 (1970).

[152] No. 76-1022 at 3.

[153] *Id.* at 3-4.

[154] *See* the case comment following this overview for a discussion of Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976) (interpreting the Indian Civil Rights Act).

[155] 533 F.2d 527 (10th Cir.), *cert. denied*, 429 U.S. 1002 (1976).

[156] 533 F.2d at 529.

general rule that federal courts do not have jurisdiction to decide such disputes.[157]

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SEX-BASED CLASSIFICATIONS IN TRIBAL ORDINANCES AND THE INDIAN CIVIL RIGHTS ACT

Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976)

BY RUTH CASAREZ-ANDERSEN,* LESLIE M. LAWSON** AND DAVID H. MILLER***

INTRODUCTION

Martinez v. Santa Clara Pueblo[1] is one of the few decisions to date which has set out to define the substantive limits of a right guaranteed by the Indian Civil Rights Act[2] (ICRA). At issue was

[157] *Id.* at 530 (collecting cases). This rule, however, is not absolute, and when intratribal disputes act to deprive tribal members of certain enumerated rights guaranteed by either federal law or the Constitution, an action will lie. *See* the case comment following this overview.

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[1] 540 F.2d 1039 (10th Cir. 1976), *cert. granted*, 429 U.S. 1070 (1977).

[2] In 1924 Congress passed the Indian Citizenship Act which extended United States citizenship to all American-born Indians. 8 U.S.C. § 1401(a)(2) (1970). Since that time Indians have been invested by law with all of the constitutional rights enjoyed by other citizens in their dealings with state and federal governments. Until 1968, however, the relationship between individual Indians and their *tribal* governments was generally held to be outside of federal judicial cognizance. *See* note 16 *infra* and accompanying text. The Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1303 (1970)), was the first piece of legislation by which Congress interjected substantive constitutional principles into intratribal relationships. *See* note 15 *infra* and accompanying text. Section 202 of the Act conferred specific constitutional rights on Indians in their dealings with tribal governments. The equal protection clause of the Act appears in subsection (8):

> No Indian tribe in exercising powers of self-government shall—
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people

whether the equal protection clause of the Act was violated by a tribal ordinance[3] which denied Pueblo membership to children born of marriages between female Pueblo members and male nonmembers, but granted membership to children born of marriages between male Pueblo members and female nonmembers.[4]

In answering this question, the Tenth Circuit struck down the ordinance and articulated a novel test which may be broadly

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peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) *deny to any person within its jurisdiction the equal protection of its laws* or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302 (1970) (emphasis added) [the ICRA equal protection clause is hereinafter referred to in text and footnotes as § 1302(8)].

[3] Appellants also alleged that the ordinance violated their due process rights under the ICRA. 540 F.2d at 1040. However, the court did not address this issue.

[4] The ordinance, enacted December 15, 1939 by the Council of Pueblo of Santa Clara, New Mexico, reads:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1041 n.2 (10th Cir. 1976), *cert. granted,* 429 U.S. 1070 (1977). Appellants challenged subparagraphs 2 and 3.

applicable to similar issues that may arise under the Act.[5] This comment will define and analyze the parameters of that test in part II, and in part III will take a critical look at its application to the present case. Initially, however, it is necessary to examine some important jurisdictional issues raised by the case.

I. IMMUNITY AND JURISDICTION UNDER THE ICRA

The *Martinez* litigation was initiated when female members of the Pueblo brought a class action[6] challenging the Pueblo's 1939 membership ordinance on the ground that it discriminated against them. These women had married men who were not members of the Pueblo. In particular, appellant Martinez had married a full-blooded Navajo in 1941, and since that time the couple had lived continuously on the Santa Clara Pueblo with their children. Beginning in 1946, Mrs. Martinez attempted to enroll her children in the Pueblo. She continued in this effort until the time of the suit. Despite her use of all available tribal procedures, her children were consistently denied enrollment.[7]

The Pueblo advanced two grounds as to why the court lacked jurisdiction. First, the tribe argued that the ICRA did not provide a jurisdictional basis for the action. Second, it urged that sovereign immunity barred the suit. The court dealt briefly with these objections, dismissing both within a single paragraph. Relying heavily on one of its earlier decisions, *Dry Creek Lodge, Inc. v. United States*,[8] the court held that a statute which gives district courts jurisdiction over actions brought to protect civil rights granted by Congress[9] provided a jurisdictional basis for suits brought under the ICRA.[10] Noting further that the ICRA was designed by Congress to protect individual Indians from tribal

[5] *See* note 28 *infra* and accompanying text.

[6] Appellants' children, who were disenfranchised, were also members of the class.

[7] The courts have generally required plaintiffs to exhaust their tribal remedies before beginning litigation. Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973).

[8] 515 F.2d 926 (10th Cir. 1975).

[9] 28 U.S.C. § 1343(4) (1970) gives federal district courts original jurisdiction in civil suits brought "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

[10] 540 F.2d at 1042. For the trial court's resolution of the jurisdictional issue raised in *Martinez*, see Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 (D.N.M. 1975) (decided without benefit of the Tenth Circuit's holding in *Dry Creek Lodge*).

abuses, the court found clear Congressional intent to allow "civil rights" suits against a tribe.[11]

While this jurisdictional analysis represents the current trend,[12] it is of rather recent vintage.[13] Before enactment of the ICRA, Congress traditionally took a cautious approach when dealing with Indian civil rights. There are, of course, many treaties and statutes relating to Indians,[14] but the ICRA stands virtually alone in affecting fundamental intratribal relationships.[15] Prior to the passage of the ICRA, the courts likewise exercised restraint. Courts were reluctant to impose traditional constitutional standards on social structure they knew little about.[16]

When federal courts were asked to assume jurisdiction under the newly enacted ICRA, their response was mixed. Some courts refrained from taking jurisdiction,[17] while others were not so reti-

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[11] 540 F.2d at 1042.

[12] *See* notes 22-23 *infra* and accompanying text.

[13] For a discussion of pre-ICRA aspects of tribal sovereign immunity, see Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1346-53 (1969) [hereinafter cited as *Indian Bill of Rights*].

[14] *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 485-608 (1971) for a list of all federal statutes and treaties relating to Indian affairs from 1789-1938.

[15] There are limited exceptions to this principle. For example, The Major Crimes Act, 23 Stat. 385 (1885), *as amended*, 18 U.S.C. § 1153 (1970), gave jurisdiction to United States territorial courts to hear serious criminal cases involving Indian victims and defendants. The Act and its amendments, however, are not so much intrusions into intratribal relationships as definitions of tribal authority.

The Wheeler-Howard Act of June 18, 1934, ch. 576, § 16, 48 Stat. 987 (codified at 25 U.S.C. § 476 (1970)) might, on its face, be interpreted as affecting intratribal political rights. The Act set out procedures by which tribes could organize and adopt constitutions. Cases interpreting this Act emphasize, however, that its purpose was to restore self-control to the tribes and not to define individual political rights. Pyramid Lake Paiute Tribe v. Morton, 499 F.2d 1095, 1097 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973).

[16] The landmark case of Talton v. Mayes, 163 U.S. 376 (1896), firmly established at an early date the principle that Indian tribes were not subject to the same constitutional restrictions as were federal and state governments. Starting with *Mayes*, this concept of tribal sovereignty—that Indian tribes could do what they pleased, as they pleased, unless Congress had expressly indicated otherwise—continued to be observed by the overwhelming majority of courts until passage of the ICRA. *See* Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. LEGIS. 557, 559-74 (1972).

[17] The much-cited case of Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971), provides a typical example of early judicial self-restraint under the ICRA. In *Groundhog* plaintiffs sought a declaration that the original appointment and subsequent election of a tribal chief violated section 1302(8). The court held that the allegations merely evidenced an internal dispute over which the court did not have jurisdiction. *Id.* at 682-83. In Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971), the court applied

cent. In *Dodge v. Nakai,*[18] decided less than a year after enactment of the ICRA, it was held that when a plaintiff asserts a right "purportedly guaranteed" by the ICRA a federal court has jurisdiction to hear the case.[19] The first court of appeals case to adopt this expansive view was *Luxon v. Rosebud Sioux Tribe.*[20] There, the sole question was whether the district court had jurisdiction to decide if a provision of a tribal constitution conflicted with the ICRA and the United States Constitution. The court stated: "To hold there to be a lack of jurisdiction . . . would, in effect, destroy the efficacy of the Indian Bill of Rights [ICRA]."[21]

In *Dry Creek Lodge, Inc. v. United States,*[22] the Tenth Circuit adopted the broad rule of *Nakai* and *Luxon,*[23] supporting its decision with an impressive array of cases.[24] The court's exclusive reliance on *Dry Creek* reaffirms its acceptance of the broadest statement of the jurisdictional rule. In essence, the court has held that there is federal jurisdiction whenever a plaintiff alleges that his rights under the ICRA have been infringed.[25]

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the methodology of *Groundhog* and held the allegations "insufficient to bring into play the Indian Bill of Rights." *Id.* at 282. And in Lohnes v. Cloud, 366 F. Supp. 619 (D.N.D. 1973), the district court dismissed for lack of jurisdiction a claim that plaintiff Indian had been denied due process when his tribal court refused his request for a jury trial. Citing *Groundhog,* the court held that the ICRA was not meant to substitute a federal forum for tribal courts. *Id.* at 622.

[18] 298 F. Supp. 17 (D. Ariz. 1968).

[19] *Id.* at 25. For further discussion of this case see *Tenth Circuit Survey,* 53 DEN. L.J. 158-61 (1976).

[20] 455 F.2d 698 (8th Cir. 1972).

[21] *Id.* at 700.

[22] 515 F.2d 926 (10th Cir. 1975).

[23] *Id.* at 933. Several other cases had already employed this logic. *See, e.g.,* Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231, 1234 (4th Cir. 1974); Johnson v. Lower Elwha Tribal Community, 484 F.2d 200, 203 (9th Cir. 1973).

[24] In stating its rule, the court cited over 15 cases. 515 F.2d at 933 n.6. However, almost half of the court of appeals' decisions relied on were tribal election cases which had been decided under a narrower rule than the one stated in either *Nakai* or *Luxon.* In the election cases, the courts articulated a special rule for situations in which tribes had adopted procedures analogous to those found in Anglo-American culture. For example, in Daly v. United States, 483 F.2d 700 (8th Cir. 1973), the court held that it had jurisdiction solely because plaintiffs alleged that a tribal apportionment scheme violated the one-man, one-vote principle incorporated into tribal practices. *See also* Brown v. United States, 486 F.2d 658 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973). The rationale behind these cases seems to be that to accept jurisdiction where tribes have adopted Anglo-American practices would not force an alien culture upon the Indians. *See* Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238-39 (9th Cir. 1976). Yet in neither *Dry Creek* nor *Martinez* had the tribe incorporated any Anglo-American practices.

[25] However, allegations must be sufficient to state a claim under the relevant law. *See*

II. ICRA EQUAL PROTECTION

The Tenth Circuit began its analysis in *Martinez* by examining the legislative history of the ICRA. The court noted that Congress had been presented with conflicting testimony as to how the Act would affect tribal sovereignty.[26] While acknowledging that Congress had intended to recognize the cultural autonomy and integrity of the Indian tribes, the court also emphasized Congressional "intent to extend broad constitutional protections to individual Indians."[27] Faced with this conflict the Tenth Circuit concluded that the legislative history dictated the use of a balancing test:

> About the only way to resolve this conflict is to recognize the necessity to evaluate and weigh both of these interests. Thus the scope, extent and importance of the tribal interest is to be taken into account. The individual right to fair treatment under the law is likewise to be weighed against the tribal interest by considering the clearness of the guarantee together with the magnitude of the interest generally and as applied to the particular facts.[28]

The court then proceeded to examine prior cases which had presented related questions involving section 1302(8). First, the court distinguished a well-established line of cases holding that tribes may set a minimum blood quantum requirement for tribal membership without violating the equal protection clause of the

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Potts v. Bruce, 533 F.2d 527 (10th Cir.), *cert. denied,* 429 U.S. 1002 (1976) (allegations insufficient to confer jurisdiction).

[26] 540 F.2d at 1044.

[27] *Id. See generally* Burnett, *supra* note 16, at 577-89. The court noted that the Act, as originally drafted, "would have made tribal governments fully subject to all constitutional restraints and requirements." 540 F.2d at 1044. Congress rejected that version, however, because of the difficulties which would have resulted from attempting to reconcile certain culturally based tribal practices with basic constitutional principles, *e.g.*, blood quantum requirements for tribal membership and voting, and the existence of tribal theocracies. *Id.* The version which Congress ultimately adopted selectively incorporated specific constitutional guarantees. *Id. See* Burnett, *supra* note 16, at 589-92.

[28] 540 F.2d at 1045 (footnote omitted). This standard is similar to the "sliding scale" approach to equal protection articulated by Justice Marshall in Dandridge v. Williams, 397 U.S. 471 (1970): "[C]oncentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Id.* at 520-21 (dissenting opinion). *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting). *See also* Note, *Equal Protection: Modes of Analysis in the Burger Court,* 53 DEN. L.J. 687 (1976).

ICRA.[29] These cases were found to be inapposite:

> The fact that the blood quantum requirement has been sustained furnishes little basis for upholding the discrimination in the case at bar because [in the blood quantum cases] there is some semblance of [a] basis for the classification. This is in terms of ancestral lines and in maintaining the integrity of the membership.[30]

Turning to other cases wherein plaintiffs had relied upon section 1302(8), the Tenth Circuit found that "[i]nvariably the courts look to the Fourteenth Amendment . . . as a guide."[31] The court ended its discussion of the precedents by acknowledging decisions which had stressed the importance of recognizing tribal traditions and cultural values.[32] Thus, by the court's analysis, both the legislative and the case history of the ICRA indicated that a court should adopt a balancing test, administered in the context of constitutional equal protection,[33] to determine the validity of tribal laws challenged under section 1302(8).[34]

The court was undoubtedly correct in refusing to apply a

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[29] *See, e.g.*, Daly v. United States, 483 F.2d 700 (8th Cir. 1973); Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971).

[30] 540 F.2d at 1046.

[31] *Id.*

[32] *Id. See* Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976).

[33] The court characterized the fourteenth amendment equal protection standard as a "persuasive guide." 540 F.2d at 1047. The Tenth Circuit's standard is thus a combination of two tests—a balancing test intermingled with traditional fourteenth amendment analysis. Application of this standard would seem to require that the court first define what individual interests were at stake in the litigation. Next the court would look to the established mode of fourteenth amendment equal protection analysis which would normally apply when such an interest was involved. If, for example, the traditional approach when dealing with a particular interest would require a mere "rational relationship" between the tribal interest and the tribal action at issue, the court would consider the factors to be balanced and determine whether the tribal interest merely outweighed the private interest, since any preponderance of tribal interest over individual interest would provide a rational basis for upholding the tribal action.

However, if under traditional fourteenth amendment analysis the private interest at stake required strict judicial scrutiny of the challenged tribal action, a tribe would have to show, on balance, that its interests so outweighed the individual interest as to satisfy this stricter application of the balancing test. Seen in this light, the Tenth Circuit's statement that it will use fourteenth amendment standards as a "persuasive guide" in the application of its balancing test relates to the degree to which tribal interests will have to predominate over individual interests on application of the court's balancing test. *See* Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976).

[34] In the remaining discussion, the phrase "tribal law" will be used to denote any tribal action subject to scrutiny under section 1302(8).

purely constitutional standard of equal protection. The language of the Act—prohibiting a tribe from denying "the equal protection of *its* laws"[35]—contrasts with the fourteenth amendment guarantee of the protection of *the* laws. This in itself seems to support the application of a different standard in cases arising under the ICRA.[36] Further, earlier cases interpreting section 1302(8) pointed out persuasive legislative history which indicated that "in some respects the equal protection requirement of the Fourteenth Amendment should not be embraced in the Indian Bill of Rights."[37]

While it is true that many cases have looked to the fourteenth amendment as a guide in interpreting the ICRA, it is not true that the courts "invariably" do so.[38] In fact, courts have been singularly unsuccessful in formulating anything approaching a broadly acceptable model of equal protection under the Act.[39] Typically, judicial theories as to the meaning of ICRA equal protection have varied with the type of classification made, or nature of the rights affected, by tribal laws.[40] *Martinez* is thus unusual in its statement of a general approach that may be applicable to a broad variety of factual settings.[41]

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[35] 25 U.S.C. § 1302(8) (emphasis added).

[36] *See* Comment, *Equal Protection Under the Indian Civil Rights Act*, 90 HARV. L. REV. 627, 632 (1977) [hereinafter cited as *Equal Protection*].

[37] Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971). *See also* Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).

[38] *See, e.g.*, Janis v. Wilson, 385 F. Supp. 1143, 1150 (D.S.D. 1974), *rev'd on other grounds*, 521 F.2d 724 (8th Cir. 1975).

[39] *E.g.*, in Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976), the court applied a balancing test in light of strict scrutiny equal protection because a tribal residency requirement affected fundamental rights. Yet in Daly v. United States, 483 F.2d 700 (9th Cir. 1973), the court held that a blood quantum requirement, affecting what could be characterized as fundamental rights, would be valid if uniformly applied.

[40] Should tribes adopt Anglo-American practices they will generally find their laws subject to *constitutional* equal protection analysis. *See* Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).

[41] Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976), employed a balancing test much like the one used in *Martinez*. In *Howlett*, however, the court specifically held that it was *not* formulating a general rule. *Id.* at 238-39.

One author has suggested a bifurcated model. Under this analysis a court would merely require equal application of tribal laws which were found to be culturally based and consistent with tribal standards of equality. Conversely, if a law had no cultural basis, fourteenth amendment equal protection standards would apply. *Equal Protection, supra*

The Supreme Court has declined to adopt a single model of *constitutional* equal protection[42] —a position which is consistent with the approach suggested by the Tenth Circuit in *Martinez.*[43] The legislative history of the ICRA, and specifically section 1302(8), seems to mandate a flexible judicial response.[44] Use of a balancing test superimposed upon traditional constitutional analysis would enable the courts to weigh more sensitively the competing interests which will generally be present in these cases.[45] Yet, while the Tenth Circuit purported to engage in this technique, an examination of the decision demonstrates that the court did not adhere very strictly to its own formula.

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note 36, at 633-34. This scheme, however, might allow a tribe to go to extreme lengths in effectuating culturally based classifications. The courts' inability to reach certain tribal action under this model could easily frustrate Congress' intent in enacting section 1302(8). *See Indian Bill of Rights, supra* note 13, at 1362. While the author observes that British courts have applied a standard similar to the one suggested in dealing with certain African tribal cultures, *Equal Protection, supra* note 36, at 634, the analogy is inappropriate, for British courts have no equivalent to the ICRA to influence their decisions. Further, the legislative history of section 1302(8), and its incorporation of constitutional terms of art, evidence congressional intent to extend greater protection to American Indians than is contemplated by British statutes which give courts the power to invalidate African tribal laws that are "repugnant to natural justice, equity and good conscience." *Id.* at 634 n.54. *See* Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1044-45 (10th Cir. 1976).

[42] "Old equal protection" and "new equal protection" have been joined in recent years by "newer equal protection." *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). The "sliding-scale" approach suggested by Justice Marshall, see note 28 *supra,* has never been supported by a majority of the Court. *See* Note, *Equal Protection: Modes of Analysis in the Burger Court,* 53 DEN. L.J. 687, 715-19 (1976).

[43] The approach suggested in *Martinez* would not result in the application of one identifiable "test" in all ICRA equal protection cases. Rather the courts would utilize a flexible balancing test applied in the light of constitutional principles. *See* notes 28 and 31 *supra* and accompanying text.

[44] *Cf. Indian Bill of Rights, supra* note 13, at 1360-68 (outlining the different types of problems to which courts will have to respond).

[45] While such an elastic standard might arguably be subject to judicial abuse, cases decided under the ICRA strongly suggest that the courts will zealously safeguard tribal prerogatives and will refrain from intervention in intratribal matters unless absolutely necessary. Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976) (upholding a tribal residency requirement in the face of a balancing test requiring a compelling tribal interest). *Cf., e.g.,* Potts v. Bruce, 533 F.2d 527 (10th Cir.), *cert. denied,* 429 U.S. 1002 (1976) (no jurisdiction although plaintiffs alleged constitutional violations); *but see Equal Protection, supra* note 36, at 629 (suggesting that the Tenth Circuit decision in *Martinez* did not give enough weight to tribal interests).

III. MEASURING THE ORDINANCE AGAINST THE ICRA

In defining the elements in *Martinez* which were to go into its balancing test, the Tenth Circuit minimized the importance of tribal interests in the ordinance. In brief, the court found that the ordinance was not logically related to the cultural survival of the Pueblo.[46] Nor did tribal history support the Pueblo's argument that the ordinance embodied traditional patrilineal, patrilocal, or patricultural tribal values.[47] Rather the court concluded that the ordinance was adopted in 1939 merely as an economic and pragmatic response to an unprecedented increase in mixed marriages which threatened to swell the Pueblo population and deplete per capita resources.[48] While acknowledging the importance of tribal power to define its own membership, the Tenth Circuit characterized this particular ordinance as an arbitrary solution to what was essentially a tribal economic problem and not a matter of tribal integrity.[49] In contrast, the court emphasized the individual's interest in tribal membership. This interest was found to include "living in a particular cultural setting in close relationship with fellow members, inheriting tribal rights, and enjoying federal and other incidental benefits."[50] Moreover,

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[46] The court is correct in the sense that the ordinance is not related to maintaining a tribal blood quantum requirement. 540 F.2d at 1046. A hypothetical dramatically demonstrates this: If a full-blooded Santa Claran female member (F^1) married a male nonmember (M^1) whose mother had been full-blooded Santa Claran but whose father was only half-blood Santa Claran, all on his mother's side, the offspring of F^1 and M^1, although of more than 3/4 Santa Clara blood, would not be eligible for Pueblo membership under the challenged ordinance. On the other hand, if a female nonmember with no Santa Clara blood (F^2) married a male Pueblo member (M^2) whose mother had no Santa Clara blood but whose father was half-blooded Santa Claran, all on his father's side, all of their offspring, although of only 1/4 Santa Clara blood, would qualify for Pueblo membership. Repeating the above pattern through nine generations, the descendents of F^1 and M^1 would still possess more than 3/4 Santa Clara blood yet would be ineligible for membership; while descendants of F^2 and M^2, possessing less than 1/2000 Santa Clara blood, would qualify for membership.

[47] 540 F.2d at 1047. The court noted that, before enactment of the ordinance, problems such as the one raised in *Martinez* were dealt with on a case-by-case basis. *Id.*

[48] *Id.* The district court accorded more weight to the Pueblo's "economic" interest in the ordinance, noting that "[t]he ability of the Pueblo to control the use and distribution of its resources enhances its ability to maintain its cultural autonomy." Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 16 (D.N.M. 1975) (upholding the ordinance).

[49] 540 F.2d at 1048.

[50] *Id.* at 1047 (footnote omitted). The district court specified three types of tribal rights associated with membership: (1) political rights—to vote, to hold office, and to raise matters before the Pueblo Council; (2) rights to Pueblo resources—land, water, hunting, and fishing rights; and (3) residential rights—to live on the Pueblo. 402 F. Supp. at 14.

those who faced exclusion under the terms of the ordinance were not cultural outsiders to the Pueblo. They were "culturally, for all practical purposes, Santa Clara Indians."[51]

Having indentified the interests at stake, the court applied its balancing test in light of an equal protection standard calling for *strict scrutiny* of the classification involved. The court clearly adopted as its "persuasive guide"[52] the essentials of an equal protection analysis based on strict scrutiny. First, the court placed upon the tribe the burden of justifying the ordinance;[53] this burden was not met.[54] Second, the court noted that the tribe could have solved its problem in a manner less restrictive to the rights of the affected individuals.[55] Finally, the court used the familiar rhetoric of strict scrutiny analysis, holding that the tribal interest in the ordinance was not "compelling."[56]

The Tenth Circuit is not the first court to approach section 1302(8) in this manner. In *Howlett v. Salish and Kootenai Tribes*[57] the Ninth Circuit considered whether a tribal residency requirement violated ICRA equal protection. The court first assumed that the challenged provision abridged certain fundamental rights protected by the Act.[58] The Ninth Circuit concluded that the trial court had been correct in subjecting the provision to the compelling interest test.[59] Balancing the tribal interest at stake against the plaintiffs' interest, the court upheld the provision, noting that "compelling interests justify the imposition of [the] . . . residency requirement . . . ."[60]

[51] 540 F.2d at 1048 (quoting Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 18 (D.N.M. 1975)). This finding related only to the Martinez children. The ties of the other class members to the Pueblo were not discussed.

[52] *See* note 33 *supra*.

[53] 540 F.2d at 1047. Once a court decides that governmental action should be subject to strict judicial scrutiny, the Government has the burden of justifying its classifications. *In re* Griffiths, 413 U.S. 717, 721-22 (1973). *See* Dunn v. Blumstein, 405 U.S. 330 (1972); McLaughlin v. Florida, 379 U.S. 184 (1964).

[54] 540 F.2d at 1047.

[55] *Id. See* Sugarman v. Dougall, 413 U.S. 634 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969); Shelton v. Tucker, 364 U.S. 479 (1960).

[56] 540 F.2d at 1047. *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

[57] 529 F.2d 233 (9th Cir. 1976).

[58] At issue were the right to travel and the right to seek office. *Id.* at 235.

[59] *Id.* at 242.

[60] *Id.* at 244. Application of strict scrutiny has usually signalled doom for the challenged governmental action. *See* Note, *The Mandate for a New Equal Protection Model,*

In *Howlett* the court used strict scrutiny as its guide where facts indicated that plaintiffs had been deprived of a basic constitutional right traditionally associated with such a standard. In *Martinez* the court preferred to look primarily at the classification involved (sex) and not the rights affected.[61] By viewing sex as a classification which invoked strict scrutiny-based analysis the Tenth Circuit went farther than the Supreme Court had yet gone, or indicated that it is likely to go.[62] Moreover, a case arising under the ICRA would seem to be a particularly inappropriate place to extend the rule concerning sex-based classifications.[63]

In light of the conflicting goals of the ICRA—to protect the civil rights of individual Indians while preserving the quasi-sovereign nature of the Indian tribes—it seems appropriate that a court would engage in a balancing test when measuring a tribal law against section 1302(8). However, to apply such a test in the context of strict scrutiny is ill-considered when dealing with a classification never before accorded such treatment. The better course would be for the courts to adopt the approach suggested, but not followed, by the Tenth Circuit in *Martinez*. That is, when a challenged law is rooted in tribal tradition and cultural values, a court would apply a balancing test in light of *established* fourteenth amendment equal protection analysis.[64] However, when no tribal cultural interest is involved, engaging in a balancing process would be superfluous. This is essentially the reasoning underlying those cases wherein tribes had adopted Anglo-American practices.[65]

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24 CATH. U. L. REV. 558, 559 (1975). However, *Howlett* is joined by a small number of Supreme Court cases which have also upheld governmental action in the face of strict scrutiny. *See* American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Korematsu v. United States, 323 U.S. 214 (1944).

[61] 540 F.2d at 1046-47. While the court approached the case as a classification problem, in the balancing process it became clear that the court was also deeply concerned with the nature and extent of the rights affected. *Id.* at 1047.

[62] None of the sex discrimination cases cited by the Tenth Circuit support application of the strict scrutiny standard. 540 F.2d at 1047. Indeed, recent decisions emphasize that the Supreme Court has no intention of requiring that sex-based classifications satisfy a compelling interest test. *See, e.g.*, Califano v. Webster, 97 S. Ct. 1192 (1977); Craig v. Boren, 429 U.S. 190 (1976); General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976).

[63] *See Equal Protection, supra* note 36, at 629-30.

[64] *See* Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1047 (10th Cir. 1976), *cert. granted*, 97 S. Ct. 2172 (1977). *See also* note 33 *supra*.

[65] *E.g.*, Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238-39 (9th Cir. 1976).

Thus, a bifurcated standard is proposed.[66] In each case the court should first look to see whether a tribal law would violate constitutional equal protection. If no tribal cultural interst is involved, the court will apply the appropriate constitutional standard and end its analysis there. But if a tribal law is found to be rooted in the tribal culture, and the tribal law would normally be violative of constitutional equal protection, the court will proceed to apply a balancing test in light of established equal protection analysis.[67]

CONCLUSION

Having accepted a broad interpretation of federal jurisdiction under the ICRA, the court in *Martinez* was faced with the difficult task of giving substantive meaning to the Act's equal protection clause. The Tenth Circuit purported to balance tribal interests and cultural values against the individual interests affected in light of established constitutional standards. Adopting strict scrutiny analysis as the applicable constitutional model,[68] the court overturned the ordinance, minimizing tribal arguments that the sex-based distinction was culturally rooted. While the Tenth Circuit was arguably correct in its result,[69] utilization of the hallmarks of strict scrutiny was inappropriate given the nature of the classification involved.

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[66] *See Equal Protection, supra* note 36, at 633-34 (suggesting the different bifurcated model set out *supra* note 41).

[67] This bifurcated approach was implicitly adopted by the court in its treatment of the case. Initially, the ordinance was measured against constitutional requirements. 540 F.2d at 1046-47. Only after it was found lacking under fourteenth amendment standards did the court proceed to balance the interests according to its newly articulated test. *Id.* at 1047. *See* note 33 *supra*.

[68] *See* note 33 *supra*.

[69] Had the Tenth Circuit applied its balancing test using established equal protection principles as a guide, the same result might have been reached. In Reed v. Reed, 404 U.S. 71 (1971) (sex discrimination), the Supreme Court held: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated are treated alike.'" *Id.* at 76 (citation omitted). In *Martinez* the court concluded that the ordinance was arbitrary, 540 F.2d at 1048, and unrelated to the tribal objective. 540 F.2d at 1046 (by implication).

RIGHTS OF GOVERNMENT EMPLOYEES ON TERMINATION: RECENT TENTH CIRCUIT CASES

INTRODUCTION

When a government assumes the role of an employer, questions inevitably arise concerning an employee's rights when the decision is made not to renew his employment contract or to fire him. The employee may be entitled to procedural or substantive protection under the due process clause of the fourteenth amendment.[1] Last term the Tenth Circuit faced the issue of a governmental employee's rights upon termination in several cases.[2]

In 1972, the Supreme Court decided two cases, *Board of Regents v. Roth*[3] and *Perry v. Sindermann*,[4] which set out a framework for defining the liberty and property interests of government employees that are protected by the fourteenth amendment.[5] *Roth* concerned a professor who was hired for a one-year term to teach at a state college; he had neither tenure nor a contractual right to continued employment. Following the Board of Regents' decision not to renew his contract for the following school year, Roth brought a section 1983[6] action alleging infringement of liberty and property interests. The Supreme Court held that to have a property interest protected by the fourteenth amendment a "legitimate claim of entitlement" to the teaching position must exist.[7] Regarding liberty interests, the Supreme Court noted that the failure to renew a contract was not, alone, a deprivation of liberty within the scope of the amendment. The Court added that a showing of serious damage to an individual's standing or asso-

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[1] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

[2] In addition to the cases commented upon herein, *see* Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976); Sluder v. Dyson, No. 75-1589 (10th Cir., Aug. 9, 1976) (Not for Routine Publication).

[3] 408 U.S. 564 (1972).

[4] 408 U.S. 593 (1972). *See* Shulman, *Employment of Non-Tenured Faculty: Some Implications of* Roth *and* Sindermann, 51 DEN. L.J. 215 (1974).

[5] Conceptually, these two cases have a basis in Goldberg v. Kelly, 397 U.S. 254 (1970), where the Court held that the requirements of procedural due process prohibited termination of welfare payments without a prior evidentiary hearing. *See generally* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[6] 42 U.S.C. § 1983 (1970). *See* note 16 *infra*.

[7] 408 U.S. at 577.

ciations in the community, or to an individual's opportunity to gain further employment was required to prove the violation of a liberty interest.[8]

In *Sindermann*, a companion case, the Court attempted to define further the parameters of protected property interests. *Sindermann* arose out of a Board of Regents' decision not to renew the contract of Robert Sindermann, who had taught at various state colleges for ten years, the last four of which had been at a junior college under a series of one-year contracts. The college had no formal provision for tenure; however it had established a policy concerning the hiring of professors.[9] The Supreme Court made it clear that the mere lack of a contractual or tenurial right does not defeat an individual's property interest in his employment. The Court held that if a legitimate claim of entitlement to continued employment existed then a proper due process hearing must be held.[10] Additionally, the Court noted that a teacher, even if not tenured, could not have the nonrenewal of his contract based on exercise of first amendment freedoms.[11]

Since 1972, courts have attempted to establish more precisely the type of liberty and property interests protected and the manner in which that protection should be provided. When analyzing this complex problem it is important to note that courts are generally reluctant to enter into the arena of government personnel problems. While there is strong policy to afford a hearing,[12] the general consensus of the federal judiciary is that "the

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[8] *Id.* at 573.

[9] The official publication for teachers provided:

> *Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

408 U.S. at 600. Furthermore, guidelines issued by the Coordinating Board of the Texas College and University System provided some form of job tenure for teachers who had been employed in the state school system for seven years or more. 408 U.S. at 600 & n.6.

[10] *Id.* at 601-03.

[11] *Id.* at 598. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

[12] Weathers v. West Yuma County School Dist. R-J-1, 530 F.2d 1335, 1341 (10th Cir. 1976) (quoting Jefferies v. Turkey Run Consol. School Dist., 492 F.2d 1, 4 (7th Cir. 1974); Adams v. Walker, 492 F.2d 1003, 1007 (7th Cir. 1974)).

federal court is not the appropriate forum to review the multitude of personnel decisions that are made daily by public agencies."[13]

I. THE FACTS AND FINDINGS

A. Mitchell v. King, 537 F.2d 385 (10th Cir. 1976)

In August, 1974, Governor Bruce King of New Mexico removed John Mitchell from the Board of Regents of the Museum of New Mexico. Mitchell had held this position since his appointment by King for a six-year term in 1971. King claimed that Mitchell was removed for "neglect of duty and malfeasance."[14] Mitchell alleged that the removal stemmed from an exercise of his right of free speech.[15]

Mitchell filed an action under section 1983[16] claiming that he had served "faithfully, competently and with integrity" and that the defendants had acted "willfully, maliciously, and intentionally" to deprive him of rights guaranteed by the first, fifth, and fourteenth amendments.[17] The federal district court granted a motion to dismiss, finding that Mitchell had no protected property interest in the office, that no liberty interest had been infringed, and that Mitchell's first amendment right had to be balanced against "the state executive's interest in effectuating his policy decisions."[18] Mitchell appealed.[19]

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[13] Bishop v. Wood, 426 U.S. 341, 349 (1976). *Accord*, Sullivan v. Brown, 544 F.2d 279, 282 (6th Cir. 1976); Megill v. Board of Regents, 541 F.2d 1073, 1077 (5th Cir. 1976); Kalme v. West Va. Bd. of Regents, 539 F.2d 1346, 1349 (4th Cir. 1976); Powers v. Mancos School Dist. RE-6, 539 F.2d 38, 44 (10th Cir. 1976).

[14] King was acting under authority of N.M. CONST. art. 5, § 5, which provides that the Governor "may remove any officer appointed by him for incompetency, neglect of duty or malfeasance in office . . . ."

[15] The removal was related to a disagreement Mitchell had with King concerning who should be elected president of the board. The removal came after Mitchell refused King's request for his resignation. 537 F.2d at 387.

[16] 42 U.S.C. § 1983 (1970) provides:

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

[17] 537 F.2d at 387. *See* note 15 *supra*.

[18] 537 F.2d at 388.

[19] On appeal, Mitchell alleged that removal violated his right to free speech, and deprived him of liberty and property without due process of law. Since the trial court had granted defendant's motion to dismiss, on appeal the factual allegations of the complaint

Judge Barrett wrote the opinion for the Tenth Circuit and both Judges Breitenstein and Doyle concurred in separate opinions.[20] To determine the existence of a property interest, Judge Barrett looked to New Mexico law. Analyzing the New Mexico Supreme Court's construction of state law, the court determined that no property interest had been created.[21] The court went on to hold that injury to reputation was not a sufficient deprivation of a protected liberty interest so as to invoke due process protection.[22] Finally, the court held that Mitchell's first amendment claim was without merit since limitations on speech are permissible to protect a substantial governmental interest.[23]

B. Weathers v. West Yuma County School District R-J-1, 530 F.2d 1335 (10th Cir. 1976)

Donald Weathers brought action under sections 1983 and 1985[24] seeking reversal of a federal district court decision[25] that he was not denied due process by the nonrenewal of his teacher's contract. After a school board meeting in February, 1972,

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had to be taken as true and all reasonable inferences had to be drawn in favor of the complainant. *Id.* at 386.

[20] Judge Breitenstein concurred in the result, but could not concur in "much of the supportive reasoning." *Id.* at 391. He took special exception to the court's reliance on Paul v. Davis, 424 U.S. 693 (1976), arguing that the court overstated that case's import. For a discussion of *Davis,* see text accompanying notes 80-84 *infra.* In his concurring opinion, Judge Doyle expressed similar concern about the court's reliance on *Paul v. Davis* and "the apparent tendency of the [court's] opinion to expand and exalt the state's role in defining federally protected rights." 537 F.2d at 392.

[21] 537 F.2d at 390. The court relied upon the Governor's power under the New Mexico Constitution to remove individuals from public office. *Id.*

[22] *Id.* The court also held that injury to reputation was not deprivation of a protected property interest. *Id.*

[23] *Id.* at 391. The court held that the Governor could remove policymaking appointees for political reasons, which include expressions made by the appointee in contravention of the Governor's policy goals. *Id.*

[24] 530 F.2d at 1336. 42 U.S.C. § 1985 (1970) provides:

> [I]f one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. 42 U.S.C. § 1983 (1976) is quoted in note 16 *supra.*

[25] Weathers v. West Yuma County School Dist. R-J-1, 387 F. Supp. 552 (D. Colo. 1974). After a court trial, the district judge held that Weathers had shown neither the objective expectancy required for a property interest nor the infringement of a liberty interest. *Id.* at 559-60.

Weathers was informed by the principal that his contract might not be renewed. At this time Weathers was given a copy of notes taken at the meeting by the principal which stated several reasons for not renewing Weathers' contract.[26] At a meeting the next day, the school board president refused to disclose the complainants' identities to Weathers. In March the board voted unanimously not to renew Weathers' contract; no reasons were given for nonrenewal.[27] In his complaint, Weathers alleged that he was deprived of liberty and property without due process of law and that the board's action was arbitrary and unreasonable.[28] Weathers did not allege that nonrenewal of his contract resulted from the exercise of free speech or another constitutional right.

Judge Hill, writing for the Tenth Circuit, found that a school board procedure concerning the manner in which citizen complaints were to be handled by the board was not connected with employment procedures in such a way as to give rise to the legitimate expectancy necessary for a property interest.[29] The court also held that evidence presented to establish foreclosure of opportunities for other employment was not sufficient to show the violation of a protected liberty interest.[30] Regarding the question of arbitrary and capricious state action, the Tenth Circuit held that substantive due process protection was not greater than the protection provided by procedural due process.[31] Since no liberty or property interest was found to exist, no substantive due process protection was afforded.[32]

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[26] The copy of the note that was given to Weathers read as follows:

Swore or called a boy a bad name after the Brush game

Has too much busy work in class that doesn't figure into grade

Student prepared a 3-page assignment, handed it in and wasn't look[ed] at

In group contest discussion, total group gets the same grade, regardless of degree of participation by individuals.

530 F.2d at 1336 (footnote omitted).

[27] *Id.*

[28] *Id.* at 1337-40.

[29] *Id.* at 1338. Parental complaints regarding Weathers were not referred to the superintendent of schools as required by the policy. Weathers argued that the policy created "an objective expectancy that he would not be denied renewal because of parental complaints without a prior administrative effort to adjust such complaints." *Id.* The procedure in question is set out in note 63 *infra*. Additionally, the board had a policy that it could terminate nontenured teachers "without cause." 530 F.2d at 1338.

[30] 530 F.2d at 1339-40.

[31] *Id.* at 1340.

[32] *Id.* at 1340-42.

C. Powers v. Mancos School District RE-6, 539 F.2d 38 (10th Cir. 1976)

Ronald Powers was a nontenured teacher employed by the Mancos School District in Colorado.[33] In his third year of teaching, Powers' principal did not recommend that his contract be renewed and advised the school board that a better teacher could be hired. The school board voted unanimously not to renew Powers' contract. No reasons for nonrenewal were given, nor were any reasons ever publicly stated.[34] After trial, the district court held that Powers had not sustained the burden of showing that his contract was not renewed for a constitutionally impermissible reason, nor had he proven the existence of a protected liberty interest.[35]

Powers alleged on appeal that nonrenewal of his contract violated his "academic freedom" as protected by the first amendment, that he was deprived of liberty without due process of law, and that he was dismissed, in part, for a constitutionally impermissible reason.[36] No property interest, as such, was alleged.

Judge Barrett wrote the Tenth Circuit opinion, with Chief Judge Lewis and Judge Seth concurring.[37] Judge Barrett, relying

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[33] Absent agreement to the contrary, a teacher in Colorado does not acquire tenure until his fourth year. COLO. REV. STAT. § 22-63-112(1) (1973). In his second year of teaching, Powers became President of the Mancos Education Association. The following year he was a candidate for mayor of Mancos. 539 F.2d at 40.

[34] 539 F.2d at 41.

[35] The lower court decisions are Powers v. Mancos School Dist. RE-6, 391 F. Supp. 322 (D. Colo. 1975) and Powers v. Mancos School Dist. RE-6, 369 F. Supp. 648 (D. Colo. 1973). The first cite is the trial court's decision to dismiss with prejudice Powers' case since he has not sustained his burden in showing that a liberty interest had been infringed or that his contract had not been renewed for exercise of his first amendment rights. 391 F. Supp. at 326. The latter cite refers to the trial court's determination, upon defendant's motion to dismiss, that Powers' claim that his first and fourteenth amendment rights had been infringed stated a claim for which relief could be granted. 369 F. Supp. at 649.

[36] Powers felt that the decision not to renew his contract was based on criticisms he had aimed at the board, his actions while president of the local teachers' association and his use of "Jesus Christ Superstar" as a teaching device. 539 F.2d at 43.

[37] Chief Judge Lewis felt that the case presented "no new nor novel question of law" and therefore no long dissertation was necessary. *Id.* at 44. Judge Seth agreed that there was neither a liberty interest nor dismissal for a constitutionally impermissible reason, but disagreed with Judge Barrett's analysis of the case. Judge Seth felt that since no liberty or property interest was found, the case was well within *Roth* and *Sindermann*. Additionally, he found the trial court's decision that the nonrenewal of Powers' contract was not in response to exercise of Powers' first amendment rights was supported by the record. *Id.* at 45.

on *Weathers*, decided that no protected liberty interest existed, and upheld the trial court's determination that Powers had failed to prove he was dismissed for exercising first amendment rights.[38]

D. Prebble v. Brodrick, 535 F.2d 605 (10th Cir. 1976)

Billy Prebble was informed during his third year as a professor at the University of Wyoming that he had not been awarded tenure, and therefore, according to university policy, had a final year in which to seek other employment. Prebble apparently missed some eight days of teaching during the fall semester of his final year, and in January, 1973, he was conditionally relieved of all teaching duties for the spring semester. At that time the dean of the college where Prebble taught recommended to the president of the university that Prebble be terminated. A hearing was held before the Tenure and Promotion Committee in February, 1973. There was some dispute concerning the procedures followed at this hearing, but Prebble was afforded an opportunity to explain his absences on the days in question. Prebble asserted that he "taught every class, although he was physically absent"[39] at times due either to job interviewing or to elk hunting.

At trial Prebble contended that he was discharged for exercising his first amendment rights of free speech and association.[40] Additionally, he alleged that the procedures used at the hearing did not meet the requirements of procedural due process.[41] A jury returned a general verdict in favor of the defendants. On appeal, Prebble claimed that certain procedures at the trial level were handled incorrectly[42] and that the proof clearly demonstrated that he was denied due process at the hearing. Further, he argued that he was terminated for the exercise of first amendment rights.

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[38] *Id.* at 42-43.

[39] 535 F.2d at 608.

[40] Prebble alleged that his support of a department head who was about to be replaced, his outspokenness at faculty meetings, and his different teaching philosophies were the reason for his dismissal. *Id.* at 609.

[41] Prebble objected to the fact that at the hearing he was neither given the names of students whose statements were used as a basis for his dismissal nor permitted to cross-examine them. *Id.* at 616.

[42] Prebble argued that the trial court erred in dismissing the case against the university, in directing a verdict for the trustees, in submitting an interrogatory on "neglect of duty," in placing the burden of showing malice and lack of good faith on him, and in selecting the verdict form. *Id.* at 609.

Assuming the existence of a property interest,[43] the Tenth Circuit, in an opinion authored by Judge Holloway, looked to the issue of what process was due. The court found that Prebble had been given notice of the charges and an opportunity to be heard.[44] Possible objections to the hearing procedures were not persuasive because Prebble personally had admitted the absences which formed the basis for the discharge.[45] Further, the court held that Prebble had not carried the burden of proving that he was discharged for exercising first amendment rights.[46]

II. PROPERTY INTERESTS

A. *Existence of Property Interests*

Property interests arise not only from the traditional concepts of property but also from legitimate claims of entitlement.[47] An entitlement may take the form, for example, of a lawyer's license or a social security pension.[48] To be protected by procedural due process, an entitlement must be more than a mere subjective expectancy in the mind of the claiming party; instead, there must be a reasonable expectation to the entitlement.[49] When a claimed property interest is outside the scope of "traditional property," the inquiry focuses upon the existence of "rules or understandings that secure certain benefits and that

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[43] The court assumed this point because it was not briefed. *Id.* at 614. The theory is that since the teacher is hired for the school year, he thus has a legitimate expectancy that he would complete the year. *See* Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972); Connell v. Higginbotham, 403 U.S. 207, 208 (1971); Wieman v. Updegraff, 344 U.S. 183 (1952); Jefferies v. Turkey Run Consol. School Dist., 492 F.2d 1, 4 (7th Cir. 1974).

[44] 535 F.2d at 616.

[45] *Id.*

[46] *Id.* at 617.

[47] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[48] *See* Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[49] Perry v. Sindermann, 408 U.S. 593, 603 (1972); Kota v. Little, 473 F.2d 1, 3 (4th Cir. 1973). In determining the presence of an expectancy, no distinction may be drawn between a right and a privilege. Goldberg v. Kelly, 397 U.S. 254, 262 (1970). *Accord* Elrod v. Burns, 427 U.S. 347, 361 (1976); Sugarman v. Dougall, 413 U.S. 634, 644 (1973); Graham v. Richardson, 403 U.S. 365, 374 (1971). *But see* Bishop v. Wood, 426 U.S. 341, 353 n.4 (1976) (Brennan, J., dissenting) where the dissent notes: "[T]he Court's approach is a resurrection of the discredited rights/privileges distinction, for a State may now avoid all due process safeguards attendant upon the loss of even the necessities of life . . . merely by labelling them as not constituting property." *Id.*

support claims of entitlement to those benefits."[50] These rules or understandings must find a basis in some source independent of the Constitution, such as state law.[51]

To determine if a property interest existed in *Mitchell,* the Tenth Circuit looked to the applicable state law as construed by the New Mexico Supreme Court. The Tenth Circuit relied heavily upon *State ex rel. Ulrick v. Sanchez*[52] which held that the Governor had the power to remove government officials appointed for a term of years.[53] The Tenth Circuit used this case as the basis for deciding that under New Mexico law Mitchell, like the government employees in *Ulrick,* could be removed at the discretion of the Governor.[54]

In interpreting *Ulrick,* the New Mexico Supreme Court had said that when the Governor, as head of the executive branch, assigns a reason for his action which is within the purview of the New Mexico Constitution, that statement of reasons is conclusive upon the courts.[55] Essentially, the New Mexico court saw the issue as one of separation of powers. Although action by the executive branch of a state government may be binding on that state's judicial branch, that action is not binding on a federal court.[56]

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[50] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[51] *Id. Accord,* Bishop v. Wood, 426 U.S. 341, 344 (1976); Gotkin v. Miller, 514 F.2d 125, 128 (2d Cir. 1975). *Bishop v. Wood* involved a police officer who was dismissed for cause. In the ordinance providing for dismissal for cause, certain procedures were outlined which the city manager had to follow. The majority of the Court held that these procedures determined the extent of the property interest involved. 426 U.S. at 344-45. In dissent, Justice White argued that this view was incompatible with *Roth,* and having granted a petitioner a right to his job unless there is cause to fire him, "it is the Federal Constitution, not state law, which determines the process to be applied in connection with any state decision to deprive him of it." *Id.* at 360-61. Further, he noted that the Court had rejected the majority view in Arnett v. Kennedy, 416 U.S. 134 (1974). In a separate dissent, Justice Brennan asserted that there was a federal dimension to a property right. Bishop v. Wood, 426 U.S. at 353. He also read *Roth* as not limiting the "independent source" of property rights to state laws. *Id.*

[52] 32 N.M. 265, 255 P. 1077 (1927).

[53] *Id.* at 291, 255 P. at 1087.

[54] In a subsequent case, *Ulrick* was cited for the proposition that the right to hold public office is not a property right. Montoya v. McManus, 68 N.M. 381, 385, 362 P.2d 771, 774 (1961). It is unlikely after *Roth* and *Sindermann* whether such a proposition, without more, could suffice to explain whether a reasonable expectation to entitlement existed. Perry v. Sindermann, 408 U.S. 593, 597-98 (1972).

[55] Hutchens v. Jackson, 37 N.M. 325, 336-37, 23 P.2d 355, 365-66 (1933) (interpreting N.M. CONST. art. 3, § 1).

[56] Elrod v. Burns, 427 U.S. 347, 352 (1976); Baker v. Carr, 369 U.S. 186, 210, 217 (1962).

The executive department of a state is not a coequal of the federal judiciary and the federal judiciary is not bound by state executive action. Since the ascription of reasons by the Governor is not binding upon a federal court, in theory such a court is not precluded from finding a property interest in this situation.[57]

In a federal court, not bound by state executive action, the determination of what construction of state law to apply might focus upon whether a New Mexico court, without the limitations imposed by separation of powers, would find a property interest. In this context *Eyring v. Board of Regents*[58] may limit *Ulrick*. In *Eyring*, the New Mexico Supreme Court construed a state statute providing that a university president could only be removed "for cause." The court held that the statute required formal charges to be made and opportunity to be heard afforded. Failure to follow these procedures voided an attempted removal.[59] *Mitchell* also concerned the dismissal of a public official "for cause." Therefore, in theory, under *Eyring* Mitchell should have been formally charged and given an opportunity to be heard.

B. *Effect of Policymaking Official Status*

In *Mitchell*, the Tenth Circuit drew a distinction between employees in policymaking positions and employees mainly involved in day-to-day administrative activities of a government agency.[60] The fact that an individual occupies a policymaking position does not necessarily preclude a finding that he has a protected property interest in continued employment.[61] However, an executive, at least arguably, should have more power to remove employees in policymaking positions than he has with respect to general employees, because making policy is one of the functions and responsibilities of the executive.[62] The Tenth Cir-

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[57] However, the argument could be made that because the federal court must define the property interest in terms of state law, the federal court should bind itself as would the state court. It seems more likely that a federal court would not find itself so precluded. *See* Elrod v. Burns, 427 U.S. 347 (1976); Baker v. Carr, 369 U.S. 186 (1962).

[58] 59 N.M. 3, 277 P.2d 550 (1954).

[59] *Id.* at 8, 277 P.2d at 552-53.

[60] 537 F.2d at 391.

[61] Elrod v. Burns, 427 U.S. 347, 367 (1976).

[62] The theory is that the Governor is responsible for the executive function and so those who exercise similar functions should be responsible to the executive. Conversely, the six-year term of museum regents theoretically might operate as a limit on the exercise of executive power. Similarly, a "for cause" provision may have the same purpose.

cuit did not make an in-depth analysis of this issue; rather, it merely stated that policymaking appointees could be removed by the Governor for political reasons, and that notice or a hearing was not required.[63] The court failed to discuss whether the term-of-years provision or the "for cause" provision created a restriction on the Governor's powers sufficient to create a reasonable expectancy amounting to a protected property interest.

C. *The Effect of Additional Procedures*

A government may be able to dismiss an employee without affording him procedural safeguards, but once such procedures are established, they must be followed.[64] In *Weathers* it was argued that a school board policy concerning the handling of complaints[65] gave Weathers the expectancy that those procedures would be followed. Weathers argued that this expectancy rose to the level of a protected property interest and the failure of the

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[63] 537 F.2d at 391. The Governor's power to remove for political reasons "encompasses removal for expressions made by the appointee in contravention of the policy goals of the governor." *Id.*

[64] The theory is that once procedures are established, they raise an expectation that the procedures will be followed. This expectation creates a property right that cannot be taken without due process of law. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957).

[65] The procedure reads as follows:

> Individuals or groups often confront a single board member with issues which usually should be handled by the Superintendent of Schools. In those instances of apparent exception, it is suggested that the board member withhold an expression of opinion or commitment until the matter has been presented to the Board of Education. It is often wise for the board member to postpone the formulation of his own opinion until he has had the benefit of hearing the issue discussed by the Board of Education where other aspects of the problem are considered. A board member should not obligate other members of the Board of Education by predicting how they will vote on any issue.
>
> In carrying out the policy for the handling of complaints the Board will, therefore, observe the following procedure. Neither the Board of Education as a unit nor any individual member will entertain or consider communication or complaints from teachers, parents, or patrons, until they have first been referred to the Superintendent of Schools. Only in those instances where satisfactory adjustment cannot be made by the Superintendent and his assistants, shall communications and complaints be referred to the Board. After hearing evidence submitted by the Superintendent, in such event, the Board of Education will, if it deems advisable, grant a hearing to the parties interested. Such a hearing may be held during executive session of the Board.

530 F.2d at 1337-38.

school board to comply with the procedures amounted to a violation of procedural due process.[66] The Tenth Circuit found that the procedure was not related to decisions as to whether an individual would be rehired, nor did it involve in any way the rehiring process.[67] Furthermore, the court stated that a "without cause" clause in Weathers' contract negated any objective expectancy that such procedure would be followed exclusively.[68]

III. LIBERTY INTEREST

Due process also protects against state deprivation of liberty interests. The initial criterion for judging whether a protected liberty interest exists was stated in *Roth*: "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential."[69] The Court in *Roth* made it clear that a government does not infringe upon a liberty interest by the mere failure to rehire an employee.[70] The Court focused on two basic areas for determining the scope of protected liberty interests: the protection of good name, reputation, honor or integrity; and the ability to take advantage of other employment opportunities.[71]

A. *Foreclosure of Employment Opportunities*

It is difficult to ascertain the standard that should be applied to determine whether future employment opportunities have been so impaired as to constitute infringement of a protected liberty interest. In *Roth,* the Court felt that "[m]ere proof, for example, that his [petitioner's] record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' "[72]

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[66] The argument was that since the prescribed procedures were not followed, action by the board in contravention of this policy would be void. *See id.* at 1338.

[67] *Id.*

[68] *Id.* The talisman "without cause" seems to serve the function of negating any procedures established. Although this concept may not be necessary to the analysis in *Weathers,* the court seems to indicate that a governmental agency may negate any procedure established—no matter how essential to the decision involved—by merely ascribing the term "without cause" to a contract. This seems a dangerous and unnecessary extension.

[69] 408 U.S. at 573 (citing Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

[70] 408 U.S. at 573.

[71] *Id.*

[72] *Id.* at 574 n.13.

The concern is with the type of "stigma" which would seriously damage the opportunity to obtain other employment.[73] From this stigma, a tangible loss of liberty may be implied.[74] The Tenth Circuit in *Weathers* adopted a "practical test" to determine whether a stigma of sufficient magnitude resulted from the government's action.[75] This test looks not only to whether the charges are of the type that would likely stigmatize someone but also to whether an individual's opportunity for future employment has, in fact, been foreclosed. In this context, evidence of attempts to obtain other employment becomes important.[76]

While reiterating the principle that mere proof of nonrenewal was insufficient to invoke the protection of procedural due process, the Tenth Circuit in *Weathers* clarified the extent of foreclosure necessary to violate a liberty interest. The court held that more than a "disadvantage in obtaining other employment"[77] must be shown; instead, the plaintiff must show the type of stigma that seriously damages the opportunity for other employment.[78]

The difficulty with a practical test for determining whether opportunities are so foreclosed as to give rise to a protected liberty

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[73] Wisconsin v. Constantineau, 400 U.S. 433 (1971); Cato v. Collins, 539 F.2d 656, 659 (8th Cir. 1976); Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 806 (9th Cir. 1975); Brouillette v. Board of Directors of Merged Area IX, 519 F.2d 126, 127 (8th Cir. 1975); Lake Michigan College Fed'n of Teachers v. Lake Michigan Community College, 518 F.2d 1091, 1096 (6th Cir. 1975), *cert. denied,* 427 U.S. 904 (1976); Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196, 1199 (8th Cir. 1974); Abeyta v. Town of Taos, 499 F.2d 323, 327 (10th Cir. 1974).

[74] *See* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 365 (9th Cir. 1976).

[75] 530 F.2d at 1339. *See also* LaBorde v. Franklin Parish School Bd., 510 F.2d 590 (5th Cir. 1975); Abeyta v. Town of Taos, 499 F.2d 323 (10th Cir. 1974); Blair v. Board of Regents, 496 F.2d 322 (6th Cir. 1974); Wellner v. Minnesota State Junior College Bd., 487 F.2d 153 (8th Cir. 1973); Lipp v. Board of Educ., 470 F.2d 802 (7th Cir. 1972). *But see* Adams v. Walker, 492 F.2d 1003 (7th Cir. 1974).

[76] Theoretically, a demonstration that a significant number of job opportunities had been foreclosed and that this was directly related to the reasons for termination of the employee would give rise to an inference that a protected liberty interest had been infringed.

[77] 530 F.2d at 1339.

[78] *Id. See* Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. 1975). The court in *Weathers* held that the evidence of two unsuccessful attempts to obtain other employment was insufficient to demonstrate an infringement of a liberty interest in theory or in fact. 530 F.2d at 1339. Drawing upon the *Weathers* precedent the court in *Powers* accented the fact that no reasons were given to Powers for his nonrenewal. This arguably made the claim less substantial than the one made in *Weathers* where the reasons were "not substantial" or "denied or explained." 539 F.2d at 42-43.

interest centers upon the fact that the evidence of foreclosure will generally be available only *after*—often a long time after—the nonrenewal of the employment contract. If this evidence is sufficient to require a due process hearing, the fact that the hearing must necessarily be held some time after the nonrenewal could work a hardship for either side of the controversy. Under some circumstances it may become impossible to provide a full due process hearing because a requisite element of due process is that the hearing be held at a meaningful time,[79] and this may be impossible under the circumstances. On the other hand, the practical test more closely reflects actual events, which is in line with the theory that due process must be flexible in order to protect the individual.[80]

B. *Protection for Good Name, Reputation, Honor, and Integrity*

In *Paul v. Davis*[81] the Supreme Court narrowed the area of due process protection against government infringement of a person's good name or reputation. The case concerned the distribution by police of a notice to local merchants identifying Davis as a "known shoplifter."[82] The Court, over a vigorous dissent, held that although a "classic case of defamation" had been established,[83] defamation was not sufficient to invoke the guarantees of procedural due process "absent an accompanying loss of government employment."[84]

Paul v. Davis is the basis of the Tenth Circuit's discussion of liberty interests in *Mitchell.* The court ignores the distinction made in *Davis* between injury to reputation and injury to reputa-

[79] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[80] Matthews v. Eldridge, 424 U.S. 319, 334 (1976); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Cafeteria & Restaurant Workers v. McGrath, 367 U.S. 886, 895 (1961).

[81] 424 U.S. 693 (1976).

[82] Davis was arrested and charged with shoplifting. He pleaded not guilty and the case was filed away with leave to reinstate, which left the charge outstanding. Subsequently, the police distributed the flyer and shortly afterwards the shoplifting charge was dropped. *Id.* at 695-96.

[83] *Id.* at 697.

[84] *Id.* at 706. The case did not deal with the problem of remarks which might cause harm to reputation made in connection with the nonrenewal or firing of an individual. *Id.* at 709. The Supreme Court went on to note that an injury to reputation which is unconnected with government employment or which does not deprive an individual of a right previously held under state law is protected by state tort law and is not a protected interest under the Federal Constitution. *Id.* at 712.

tion when it relates to government employment.[85] Arguably, Mitchell's stature as a nonsalaried policymaking official altered his status as a mere government "employee," and made him more susceptible to an injury to reputation. The court, however, by failing to make the injury-related-to-employment distinction does not reach this question.

The Tenth Circuit relied on *Adams v. Walker*[86] as additional support for its finding that no violation of Mitchell's liberty had occurred. In *Adams* the Seventh Circuit held that "use of the talismanic phrase 'incompetence, neglect of duty and malfeasance in office' in effecting the plaintiff's discharge was plainly to satisfy the state Constitution and did not take liberty without due process of law."[87] The Tenth Circuit applied this idea to Governor King's use of the phrase "neglect of duty and malfeasance." The phrase was the official basis for removing Mitchell from the Board of Regents and served merely as the means by which King satisfied the New Mexico Constitution. By using the phrase King was able to remove Mitchell without infringing upon a protected property interest.[88] Furthermore, no liberty interest was infringed

[85] The Tenth Circuit's interpretation of *Davis* must be read in light of the separate concurring opinions of Judges Breitenstein and Doyle which limit the sweep of the court's opinion, especially since Judge Barrett expressed agreement with Judge Breitenstein's analysis of *Davis*. 537 F.2d at 392. Referring to a footnote in *Davis*, Judge Breitenstein noted that section 1983 protects not only against governmental actions which deprive an individual of rights having a genesis in state law, but also protects those interests guaranteed by the Bill of Rights. *Id.* at 391-92. Judge Doyle expressed similar concern in "the apparent tendency of the opinion to expand and exalt the state's role in defining federally protected rights." *Id.* at 392.

None of the opinions in *Mitchell* refers to the distinction drawn in other circuits between injury to reputation alone and the same injury when connected with employment. Huntley v. Community School Bd., 543 F.2d 979, 985 (2d Cir. 1976); Colaizzi v. Walker, 542 F.2d 969, 973-74 (7th Cir. 1976); Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 365 (9th Cir. 1976).

[86] 492 F.2d 1003 (7th Cir. 1974). In *Adams*, the Governor of Illinois removed a member of the Liquor Control Commission for "cause" and "for incompetence, neglect of duty and malfeasance." *Id.* at 1004.

[87] *Id.* at 1007. The charge made in *Adams* was considered to have less effect upon an individual's freedom to secure other employment than allegations relating to immorality or dishonesty. *Id.* at 1008. Judge, now Justice, Stevens in his concurring opinion counseled that the concept of "malfeasance" depends upon its context. *Id.* at 1010.

[88] If Governor King had removed Mitchell without using this phrase he would have infringed a protected property interest because Mitchell had a legitimate expectancy that he would not be removed from his position absent "neglect of duty and malfeasance." *See* text accompanying notes 47-51 *supra*.

since in that context the words used have no further meaning and no inference can be drawn to reflect upon Mitchell's good name.[89]

As a result of the Tenth Circuit's application of *Adams* in *Mitchell*, words that would normally result in the infringement of a liberty interest (because of their opprobrious meaning to the community at large) do not do so because of the context in which they are used. The words must be used to avoid violation of a property interest.

C. *Disclosure*

An accusation that would injure a person's good name would probably also lessen or foreclose his opportunities to find other employment, especially when these reasons are disclosed to the public or prospective employers. That disclosure is a crucial fact where liberty interests are concerned was illustrated by the recent case of *Bishop v. Wood*,[90] where the Supreme Court held that false reasons can be the basis for discharge or nonrenewal as long as they are not broadcast.[91] Similarly, the Second Circuit has held that the manner in which personnel records were disclosed, coupled with procedures whereby employees were given neither reasons for dismissal nor hearings, encouraged the very harm that *Roth* and *Sindermann* meant to prevent.[92]

Since disclosure problems do not occur until the state has in

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[89] Arrelano v. Lopez, 81 N.M. 389, 391-92, 467 P.2d 715, 717 (1970). *See* Adams v. Walker, 492 F.2d 1003, 1015 (7th Cir. 1974) (dissenting opinion). It should be noted that the New Mexico Supreme Court has determined malfeasance to be something done wholly wrongfully or without authority. Additionally, if an act is discretionary, it needs to be done with an improper or corrupt motive. This definition does not affect the finding of a liberty interest since that is defined by context of federal constitutional law. Goss v. Lopez, 419 U.S. 565 (1975). *Accord* Bishop v. Wood, 426 U.S. 341, 355 (1976) (White, J., dissenting); Thurston v. Deckle, 531 F.2d 1264, 1271 (5th Cir. 1976).

[90] 426 U.S. 341 (1976).

[91] *Id.* at 348.

[92] Velger v. Cawley, 525 F.2d 334, 337 (2d Cir. 1975), *cert. granted*, 427 U.S. 904 (1976). Retired Justice Tom Clark, sitting by designation, wrote for the court:

> The appellees could change their disclosure procedures to prevent the dissemination of derogatory and possibly stigmatizing allegations unless notice of the charges and a hearing are first afforded to the dischargee. Otherwise, rudimentary procedural due process requires that such notice of charges and a hearing be afforded before a dismissal can be effective.

525 F.2d at 337. *See* Cato v. Collins, 539 F.2d 656, 659 (8th Cir. 1976); Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975); Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196, 1199 (8th Cir. 1974).

some way published the reasons for nonrenewal,[93] in theory, a hearing may be required where one would not be absent disclosure. This results from the fact that disclosure might injure the employee's reputation or foreclose other job opportunities. Again, the hearing might not be held for some time after the alleged incidents occurred, harming either or both parties. Even though the disclosed reasons are not of the type which would normally be considered stigmatizing, the fact that these reasons may be false could be sufficient to require a hearing.[94]

There are, however, limitations on the protection afforded after disclosure. If the reasons for nonrenewal of a contract are disclosed after an injury to reputation has allegedly occurred, those reasons cannot serve retroactively to support the claim.[95] Furthermore, the reasons disclosed at a public hearing held on the request of the person cannot serve as a basis for a claim.[96]

In *Powers,* where no reasons had been disclosed for the nonrenewal of the plaintiff's contract, the court had the opportunity to discuss whether some future disclosure of a stigmatizing nature would be grounds for a hearing. The court decided that there was no need for a predisclosure hearing,[97] but did not address the question of whether a hearing should be held on disclosure of the stigmatizing reasons, or in what circumstances a hearing would be appropriate. In *Weathers,* the court looked to the reasons that were given for nonrenewal, and, although they were either explained or denied, held that a due process hearing was not re-

[93] *See* Bishop v. Wood, 426 U.S. 341, 352 (1976) (Brennan, J., dissenting).

[94] This could be likely when specific factual incidents or objective characteristics are the basis for not renewing a contract or firing an employee, rather than some subjective conclusion as to the ability of an individual. *See* Greenhill v. Bailey, 519 F.2d 5, 8 (8th Cir. 1975) (hearing required where denigration of ability and not just performance); Lake Michigan College Fed'n of Teachers v. Lake Michigan Community College, 518 F.2d 1091, 1096 (6th Cir. 1975), *cert. denied,* 427 U.S. 904 (1976) (hearing required where honesty or integrity is at question); Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974) (charge of mental instability grounds for a hearing); McNeill v. Butz, 480 F.2d 314, 319-20 (4th Cir. 1973) (accusation of fraud impinged upon a liberty interest). *But see* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 363 (9th Cir. 1976) (incompetence not sufficient); Blair v. Board of Regents, 496 F.2d 322, 324 (6th Cir. 1974) (failure to meet minimum standards not sufficient).

[95] Bishop v. Wood, 426 U.S. 341, 348 (1976).

[96] Cato v. Collins, 539 F.2d 656, 660 (8th Cir. 1976).

[97] 539 F.2d at 42.

quired since the plaintiff had not demonstrated the stigmatizing nature of the charges.[98]

IV. Substantive Due Process

Due process as embodied in the fourteenth amendment provides not only procedural protection of individual rights against governmental intrusion but substantive protection as well. According to one theory, substantive due process is a specific constitutional protection in itself, provided by the fourteenth amendment, and is invoked when the government acts in an arbitrary and capricious manner.[99] The more predominant theory is that substantive due process protection is conditioned on the infringement of a specific constitutional right.[100] In the latter case, the rights protected are not confined to those enumerated in the Bill of Rights.[101]

A. *Substantive Due Process as a Constitutional Right of Its Own Accord*

In *Weathers* and *Powers*, the Tenth Circuit faced the question of whether substantive due process operates as a constitutional restriction in its own right on arbitrary and capricious state action. In *Weathers*, the court adopted the view that substantive due process does not afford more protection than that provided by procedural due process.[102] The basic rationale behind this view was expressed by Judge, now Justice, Stevens in the following manner: "[C]ertainly the constitutional right to substantive due process is no greater than the right to procedural due process. Accordingly, the absence of any claim by the plaintiff that an

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[98] *Id.*

[99] At one time, substantive due process by itself was thought to be a strong source of protection against the intrusion by the government into economic affairs. Lochner v. New York, 198 U.S. 45 (1905). The Supreme Court, however, later adopted the present view that such regulations are valid if reasonably related to valid legislative purposes. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *See* Drown v. Portsmouth School Dist., 451 F.2d 1106 (1st Cir. 1971).

[100] *See* Paul v. Davis, 424 U.S. 693, 710 n.5 (1976); Mescia v. Berry, 406 F. Supp. 1181, 1194 (D.S.C. 1974).

[101] St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir. 1974). The Supreme Court has extended the scope of specific constitutional rights to include such things as the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), and the right to privacy, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J., concurring).

[102] 530 F.2d at 1342.

interest in liberty or property has been impaired is a fatal defect in her 'substantive' due process argument."[103] Under this view, substantive due process protection is provided against deprivations of life, liberty, or property, and, necessarily, the lack of a liberty or property interest precludes any substantive due process argument. Under this theory, if a state may dismiss an employee for no reason at all and thereby prevent the expectancy required for a property interest from arising,[104] the state may premise its action upon reasons unsupported by facts[105] or in circumstances where discharge of the employee "was a mistake and based on incorrect information."[106] In *Weathers*, the Tenth Circuit found that there was no property or liberty interest,[107] and in *Powers* that there was no protected liberty interest.[108] Consequently, no substantive due process protection was available in either case.[109]

B. *Substantive Due Process Protection Against an Infringement of a Constitutional Right*

Substantive due process may, however, protect against infringement of a right guaranteed by the United States Constitution. Even though no cognizable property or liberty interest exists

[103] Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1, 4 (7th Cir. 1974). *Accord* Sullivan v. Brown, 544 F.2d 279, 282 (6th Cir. 1976); Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196, 1202 (8th Cir. 1974); Miller v. School Dist. No. 167, 495 F.2d 658 (7th Cir. 1974). *Contra*, Drown v. Portsmouth School Dist., 451 F.2d 1106, 1108 (1st Cir. 1971), which expresses the opposing view that an individual should be protected against arbitrary and capricious state action regardless of the property and liberty interest involved.

[104] A property interest, of course, requires that an individual have a reasonable expectancy to an entitlement; if dismissal can be for no reason, it obviates such an expectancy. *See* text accompanying notes 46-50 *supra*.

[105] *Compare* Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1, 4 (7th Cir. 1974) *with* Drown v. Portsmouth School Dist., 451 F.2d 1106, 1108 (1st Cir. 1971).

[106] Bishop v. Wood, 426 U.S. 341, 348 (1976).

[107] 530 F.2d at 1338-40.

[108] 539 F.2d at 42-43. The court found that there was no protected liberty or property interest although there was no allegation of infringement of a property interest. *Id.* at 41-42. The finding that no property interest existed was required because of the way the court analyzed the substantive due process issue. The court determined that if no liberty or property interest exists, no substantive due process protection is afforded. *Id.* at 43.

[109] Essentially substantive due process, as a protection in and of itself, may not be sufficient since a decision need not be based upon reasons supported by the facts. Bishop v. Wood, 426 U.S. 341, 348 (1976). However, where the government discloses these unsupported reasons, substantive due process may be relevant since the scope changes from reasons for dismissal to reasons which may be considered to carry the government's assertion that these facts are true. *See* text accompanying notes 90-94 *supra*.

in the employment relationship, a state may not fire an employee or fail to renew his contract for a constitutionally impermissible reason—especially where first amendment rights are concerned.[110] Where an employee is discharged for exercising a constitutional right—such as a teacher speaking publicly against a school board position[111]—the action is considered arbitrary and capricious and the employee is protected by substantive due process.[112]

Mitchell, Powers and *Prebble* all involved first amendment claims. In *Mitchell,* the court held that the plaintiff's assertion that he was dismissed for exercising his first amendment rights was without merit,[113] and therefore no substantive due process protection was available. The court relied upon the fact that regents occupied policymaking positions, and from this reasoned that expressions made in contravention of a policy goal set by the Governor were within permissible grounds for removal.[114] Thus, the political context and status of the speaker change the nature of the protection. Arguably, then, removal was not for the expression, per se, but rather for the political differences evidenced by those expressions.[115]

C. *Burden of Proof*

In both *Powers*[116] and *Prebble,*[117] the Tenth Circuit stated

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[110] Perry v. Sindermann, 408 U.S. 593, 597 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968); Megill v. Board of Regents, 541 F.2d 1073, 1077 (5th Cir. 1976); Prince v. Bridges, 537 F.2d 1269, 1272 (4th Cir. 1976); Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975); Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 806 (9th Cir. 1975); Abeyta v. Town of Taos, 499 F.2d 323 (10th Cir. 1974); Gieringer v. Center School Dist. No. 58, 477 F.2d 1164 (8th Cir. 1973); Ferguson v. Thomas, 430 F.2d 852, 857 (5th Cir. 1970); Comment, *Teachers' Speech and First Amendment Rights,* 53 DEN. L.J. 95 (1976).

[111] *See* Perry v. Sindermann, 408 U.S. 593 (1972); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

[112] Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1, 4-5 n.12 (7th Cir. 1974); Mescia v. Berry, 406 F. Supp. 1181, 1194 (D.S.C. 1974).

[113] 537 F.2d at 391.

[114] *Id. See* Indiana State Employees Ass'n v. Negley, 501 F.2d 1239 (7th Cir. 1974).

[115] The Circuit Court for the District of Columbia, holding that attitude was inseparably intertwined with protected first amendment expression, reversed a lower court decision upholding the dismissal of probationary employees based not on the statements made, but rather on the attitude evidenced by those statements. Tygrett v. Washington, 543 F.2d 840 (D.C. Cir. 1974), *rev'g* 346 F. Supp. 1247 (D.D.C. 1972).

[116] 539 F.2d at 41.

[117] 535 F.2d at 617.

that the plaintiffs failed to establish the fact that they were dismissed for exercising their first amendment rights. The Tenth Circuit, among others, has determined that the burden of proof is on the plaintiff to show that he was dismissed for a constitutionally impermissible reason.[118] Where no claim is made that termination was due to the exercise of a constitutional right, a presumption of regularity cloaks official action.[119] However, where such a claim is made it must be examined to insure that the termination of employment is not in retaliation for the exercise of rights protected by the Constitution.[120]

The Supreme Court recently indicated that where plausible and valid claims of infringement of a constitutionally protected interest exist, the burden of proving that nonrenewal was not based on an impermissible reason may shift to the Government.[121] In the recent case of *Mt. Healthy City School District Board of Education v. Doyle*,[122] the Court addressed the problem of whether an individual could be dismissed for reasons only some

[118] Prince v. Bridges, 537 F.2d 1269, 1272 (4th Cir. 1976); Adams v. Campbell County School Dist. No. 1, 511 F.2d 1242, 1246 (10th Cir. 1975); Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196, 1203 n.8 (8th Cir. 1974); Callahan v. Price, 505 F.2d 83, 87 (5th Cir. 1974), *rehearing denied,* 513 F.2d 51 (5th Cir.), *cert. denied,* 423 U.S. 927 (1975); Smith v. Losee, 485 F.2d 334, 339 (10th Cir. 1973) (en banc), *cert. denied,* 417 U.S. 908 (1974); Calvin v. Rupp, 471 F.2d 1346, 1350 (8th Cir. 1973); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 205 (5th Cir. 1971).

[119] Bishop v. Wood, 426 U.S. 341, 350 (1976). *See* Miller v. School Dist. No. 167, 495 F.2d 658, 666-68 (7th Cir. 1974) (Stevens, J., concurring); Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1, 3 (7th Cir. 1974). *But see* Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied,* 410 U.S. 928 (1973).

[120] Perry v. Sindermann, 408 U.S. 593, 598 (1972); Board of Regents v. Roth, 408 U.S. 564, 582 (1972) (Douglas, J., dissenting); Bertot v. School Dist. No. 1, 522 F.2d 1171, 1177 (10th Cir. 1975). *See also* Board of Regents v. Roth, 408 U.S. 562, 575 n.14 (1972).

[121] The Court has made it clear that where plausible claims of racial discrimination in the termination of employees have been made, the burden of proof shifts to the Government to prove that the action was not premised on this constitutionally impermissible reason. Keyes v. School Dist. No. 1, 413 U.S. 189, 209-11 (1973). *See also* Roper v. Effingham County Bd. of Educ., 528 F.2d 1024, 1025 (5th Cir. 1976); United States v. Chesterfield County School Dist., 484 F.2d 70, 72 (4th Cir. 1973).

In *Keyes,* the state was required to show that segregative intent was not among the factors that motivated its action "to any degree." 413 U.S. at 210-11. In some cases the clear and convincing standard has been placed on the Government to show that the termination of a teacher was not racially motivated. McCormick v. Attala County Bd. of Educ., 541 F.2d 1094, 1095 (5th Cir. 1976); United States v. Chesterfield County School Dist., 484 F.2d 70, 72 (4th Cir. 1973). Arguably, substantive due process should be applied to the exercise of free speech to the same extent as racial discrimination.

[122] 429 U.S. 274 (1977).

of which were constitutionally impermissible. The Court held that if, without consideration of constitutionally protected actions, the individual would be terminated from employment, then no protection is afforded.[123] The Court stated that the burden was properly placed on the claimant to demonstrate that his conduct was protected and that this conduct was the "motivating factor" in the decision to terminate his employment.[124] Once a prima facie case has been established, the burden shifts to the Government to demonstrate by a preponderance of the evidence that it would have decided without reference to the protected activities that the employee's contract should not be renewed.[125]

The question remains, of course, what establishes the prima facie case that shifts the burden of proof to the government? Inquiry and proof might be quite difficult in cases like *Powers* where the Tenth Circuit asserted that the exercise of Powers' first amendment rights "was not shown to have played a part in the Board's decision" not to renew his contract,[126] while also stating that no reasons have ever been stated publicly for the nonrenewal.[127] By not requiring some reasons to be given for the nonrenewal of a contract, courts place the individual in the difficult position of ascertaining whether they have been dismissed for a constitutionally impermissible reason or not.

CONCLUSION

In determining whether property interests exist, the Tenth Circuit has looked to applicable state law. It is not clear whether separation of powers between branches of state governments will preclude federal courts from findings of property interests. Additionally, the Tenth Circuit has indicated that the existence of property interests may depend upon the policymaking status of the individuals involved. The closer the function of the individual comes to that of the executive, the more leeway the executive will have in removing that individual without infringing a property interest. The court has also found that while property interests may be created by additional procedures, in order to create the

[123] *Id.* at 285.
[124] *Id.* at 287.
[125] *Id.*
[126] 539 F.2d at 43.
[127] *Id.* at 41.

requisite expectancy such procedures must relate in some way to the employment process.

A liberty interest may be infringed if injury is done to an individual's good name or if opportunity for future employment is foreclosed as a result of some stigma that the government has created. Injury to reputation usually must be accompanied by some other deprivaton. In determining whether future employment has been foreclosed, the Tenth Circuit will apply a practical test. This test depends upon an actual showing that opportunities have been significantly lessened by what the government has said about an individual. Additionally, where reasons for termination of an employee are not disclosed until some time after the termination, questions arise as to whether a hearing is then required.

The Tenth Circuit has determined that, absent a finding of a liberty or property interest, substantive due process does not protect the individual from governmental action. Substantive due process does protect the individual from termination for a constitutionally impermissible reason. However, the Tenth Circuit has placed the burden of proof on the employee to demonstrate that he was so removed.

Recent cases indicate that the Tenth Circuit echoes the general feeling that federal courts should be reluctant to step into intragovernmental personnel problems. A finding that some form of due process is to be afforded, whether it be because a liberty or property interest is involved or because of substantive due process, would not dictate the form of the hearing. Some rudimentary form of due process would provide a more appropriate forum than the court's to air personnel grievances, serve as an incentive to employers to more fully analyze their decision, ameliorate any problems that future disclosure might present, and focus and illuminate any problems that will require further court action.

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