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Constitutional Law

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CONSTITUTIONAL LAW

Considerations of constitutional law play a significant role in the organic growth of the law. Those considerations have been primarily responsible for identifying and defining the scope of individual liberties and for delineating the powers and obligations of government.

During the past year, the Tenth Circuit Court of Appeals responded to a number of cases which dealt with personal freedoms. Some involved direct and explicit impingements upon the rights of a few individuals; others involved the evaluation and reconciliation of larger societal values and interests. The court extended constitutional protection to a group of college instructors whose contracts were not renewed because of personality conflicts with the school administration[1] and to five anti-war demonstrators whose freedom of expression had been circumscribed.[2] Another of the continuing assaults on a woman's qualified right to elect to have an abortion was resolved favorably for the three women plaintiffs.[3] And the Tenth Circuit remanded three obscenity decisions[4] to the trial court for reconsideration in light of *Miller v. California*.[5]

Of particular significance are the decisions evaluating relatively recent attempts to redefine the rights of large groups of Americans. The Tenth Circuit's decision requiring a New Mexico school district to provide its Spanish surnamed students with bilingual education[6] is one of the first judicial responses to the opinion of the U.S. Supreme Court of less than a year ago mandating similar action in a California school district.[7] The court also considered one of the growing number of assaults being made against charitable service organizations which restrict membership only to males.[8]

Both the extent and the limitation of governmental powers were scrutinized by the court in other cases. The constitutional

[1] Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974).

[2] United States v. Gourley, 502 F.2d 785 (10th Cir. 1973).

[3] Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974).

[4] United States v. Ewing, 491 F.2d 714 (10th Cir. 1974); United States v. Harding, 491 F.2d 697 (10th Cir. 1974); United States v. Friedman, 488 F.2d 1141 (10th Cir. 1973).

[5] 413 U.S. 15 (1973), *rehearing denied*, 414 U.S. 881.

[6] Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974).

[7] Lau v. Nichols, 414 U.S. 563 (1974).

[8] Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974).

validity of the Denver sign code was resolved to uphold the municipal action, but the court recognized that the exercise of that governmental function and right was not without limitation.[9] The role of judicial review in military actions provided two important decisions for the inservice conscientious objector.[10]

The construction of the Constitution and the resolution of constitutional issues and questions are "always open to discussion when [they are] supposed to have been founded in error."[11] The sophisticated growth of our fundamental law is nurtured and sustained by that discussion.

I. FIRST AMENDMENT—FREEDOM OF EXPRESSION

A. *Rampey v. Allen*, 501 F.2d 1090 (10th Cir. 1974)

This controversy, involving first amendment rights, arose by virtue of the dismissal of 14 employees from the Oklahoma College of Liberal Arts.[1] Prior to these dismissals, the college had undergone serious difficulties including divisions among the faculty, financial troubles, a decline in enrollment, and the placement of the school on probation as an accredited institution.[2] The former president left because of these problems and the new president, Dr. Bruce Carter, was hired to improve a situation which he described as "very bad, very critical."[3]

To accomplish this task, Carter decided to retain only those employees whom he felt the administration could "live with" and not rehire those "who were devisive [sic] . . . who would not cooperate . . . who would not work" with him and the administration.[4] He identified 11 faculty members and 3 administrative officials as being divisive and recommended to the Board of Regents that the contracts of the 14 not be renewed. After the Board accepted this recommendation, the dismissed employees initiated an action in federal district court.[5]

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[9] Art Neon Co. v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973).

[10] Cole v. Clements, 494 F.2d 141 (10th Cir. 1974) and Smith v. Laird, 486 F.2d 307 (10th Cir. 1973).

[11] Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849) (Taney, J., dissenting).

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[1] The college is a state operated institution controlled by OKLA. STAT. ANN. tit. 70, §§ 3601-06 (1972). Located at Chickasha, it was originally accredited in 1920 and, with 913 students, the primary area of study at the college is teacher education. AMERICAN COUNCIL ON EDUCATION, ACCREDITED INSTITUTIONS OF HIGHER EDUCATION 1969-1970, at 86 (1969).

[2] Rampey v. Allen, 501 F.2d 1090, 1109 (10th Cir. 1974) (Seth, J., dissenting).

[3] *Id.* at 1099 (Appendix).

[4] *Id.* at 1100 (Appendix).

[5] The claims were brought pursuant to 28 U.S.C. §§ 2201-02 (1970) which provides

In their complaint, the employees alleged that the terminations were improper in that they resulted from the exercise by the plaintiffs of their first amendment rights of expression and association. The district court ruled against the dismissed employees, holding that the terminations were unconnected with the employees' exercise of first amendment rights.[6]

I. THE COURT'S OPINION

The Court of Appeals for the Tenth Circuit, sitting en banc, reversed the trial court with Chief Judge Lewis and Judges Seth and Barrett dissenting.[7] Judge Doyle, writing for the majority, found that because the district court "adopted the conclusion of President Carter that the plaintiffs were 'divisive' and that this was the cause of the conflict and the firings,"[8] the findings of the trial court "must be considered out of harmony with the evidence and clearly erroneous."[9]

According to the majority, the reason for the dismissal was not the plaintiffs' divisiveness, but rather their refusal to conform to the loyalty and obedience demanded from them by Dr. Carter. The court said:

> Dr. Carter demanded absolute loyalty, required faculty members to come in and visit with him, prohibited their discussing problems of the college among themselves and prohibited their having informal discussions with students, for if they did any of these things they were considered by Carter to be "divisive." . . . Thus, we conclude that, in exercising their right to freely associate with others and to criticize the administration . . . and *in refusing to submit to the exercise of control over them*, the plaintiffs were fired.[10]

Because the classification of the plaintiffs as divisive was so arbitrary,[11] their dismissal on that basis was a violation of their first amendment rights.[12]

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for declaratory relief, and 42 U.S.C. § 1983 (1970) which provides relief for deprivation of civil rights under color of state law.

[6] 501 F.2d at 1092. The dismissal of one of the employees, Professor Rampey, was held by the district court to be improper because he had acquired tenure and was entitled to a hearing. *Id.* at 19 n.5. The other professors did not acquire tenure because it was abolished by the Board of Regents in May 1972. In abolishing tenure, the Board was acting against the intention of the legislature which contemplated that the Board would "[e]stablish and maintain plans for tenure . . . of employees at the Oklahoma College of Liberal Arts." OKLA. STAT. ANN. tit. 70 § 3606(k) (1972).

[7] Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974).

[8] *Id.* at 1097.

[9] *Id.* at 1099. In his dissent, Judge Barrett strongly disagreed with the majority's conclusion that the trial court's findings were clearly erroneous. *See* note 23 *infra*.

[10] *Id.* at 1096 (emphasis added).

[11] *Id.* at 1099.

[12] In Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966), the plaintiff was dis-

The first amendment rights that were infringed upon by the dismissals were not, however, clearly identified by the court. Because the majority believed that the impermissible restrictions on these rights resulted from the attempted domination by Dr. Carter over the fired employees, it ruled that "the right to be free from this kind of personality control is a constitutionally protected right under the First Amendment since it is a species of expression."[13] The firings, which were based on the employees' exercise of their right to be free from personality control, infringed upon their first amendment rights and were, therefore, invalid.[14]

II. FIRST AMENDMENT RIGHTS IN *Rampey*

In *Rampey*, the court identifies freedom from personality control as a constitutionally protected form of expression. In so concluding, has the court created a new first amendment right from freedom of expression? What limitations are placed by the court on freedom from personality control? Has it expanded the protection heretofore afforded nontenured teachers?

A. *Freedom of Expression and Association in Relation to Freedom from Personality Control*

1. Freedom of Expression

Judge Seth, in his dissent, objects to the majority's conclusion that first amendment rights are involved in *Rampey*. His criticism of the majority is based on the court's inability to point to "specific incidents or criticism [or a] specific exercise of free speech."[15] The dismissed employees did allege, however, a link between their termination and a press conference held two days prior to the announcement of the nonrenewal of their contracts.[16]

In respect to this allegation, *Rampey* is similar to other cases

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charged, in part, because of her "disagreements with her Principal." The court said that the dismissal on this basis was improper, but the reason given was not the infringement of first amendment rights, even though the dismissal was caused by her civil rights activities. Instead, the court invalidated the dismissal because it was arbitrary and capricious.

[13] Rampey v. Allen, 501 F.2d 1090, 1098 (10th Cir. 1974).

[14] The court cited Perry v. Sindermann, 408 U.S. 593 (1972), as support for the proposition that a person cannot be fired for reasons that infringe his constitutionally protected rights. Even though there was a showing that first amendment rights were impaired by the dismissals, the court did not consider the possibility that a hearing might be required before the employment of the teachers was terminated. For a discussion of how *Sindermann*, when read with Board of Regents v. Roth, 408 U.S. 564 (1972), might require such a hearing, see Shulman, *Employment of Nontenured Faculty: Some Implications of* Roth *and* Sindermann, 51 DENVER L.J. 215 (1974).

[15] Rampey v. Allen, 501 F.2d 1090, 1107 (10th Cir. 1974) (Seth, J., dissenting).

[16] Brief for Appellant at 14, Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974).

involving dismissed teachers in which there is an attempt to establish an unconstitutional nexus between the dismissals and specific exercises of the right of expression.[17] A failure to establish a link of this nature has been sufficient to sustain the nonrenewal of the contract.[18] In *Moore v. Winfield City Board of Education*,[19] for example, the plaintiff alleged that her termination was the result of a speech she made criticizing the school board; this speech "emerged as the principal issue" in the case.[20] The court concluded in *Moore* that the nonrenewal of her contract was not motivated by this speech and the other reasons advanced for the termination of her employment were sufficient to sustain the school's action.[21]

The plaintiffs in *Rampey* failed to establish a link between their press conference and the nonrenewal of their contracts.[22] Despite this failure, the Tenth Circuit did not sustain the dismissals.[23] Instead the court looked beyond a single incident to a series of incidents involving expression. These incidents, taken individually, would not constitute expression, but by joining these separate incidents of "dissent, criticism or disagreement"

[17] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (public criticisms of Regents' policies and testimony before a legislative hearing); Pickering v. Board of Educ., 391 U.S. 563 (1968) (letter critical of school board written to newspaper); Smith v. Losee, 485 F.2d 334 (10th Cir.), *cert. denied*, 94 S. Ct. 2604 (1973) (teacher involvement in political activities); Gieringer v. Center School Dist., 477 F.2d 1164 (8th Cir.), *cert. denied*, 414 U.S. 832 (1973) (impromptu report critical of administration); Clark v. Holmes, 474 F.2d 928 (7th Cir.), *cert. denied*, 411 U.S. 972 (1972) (criticism of curriculum); Hostrop v. Board of Educ., 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973) (public circulation of confidential memo); Russo v. Center School Dist., 469 F.2d 623 (2d Cir.), *cert. denied*, 411 U.S. 932 (1972) (symbolic protest of the Viet Nam war); Duke v. North Texas State University, 469 F.2d 829 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973) (public criticism of school); Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973) (participation in anti-Viet Nam war rallies).

[18] *See, e.g.*, Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974).

[19] 452 F.2d 726 (5th Cir. 1971).

[20] *Id.* at 727.

[21] *Id.*

[22] Rampey v. Allen, 501 F.2d 1090, 1091 (10th Cir. 1974). It was clear from testimony given at trial that the list of those who would not be rehired was compiled 2 days prior to the day the press conference was held.

[23] It was on this point that Judge Barrett strongly disagreed with the majority. He felt that the only first amendment issue *Rampey* raised was whether the plaintiffs were dismissed because of the press conference. Since it was clear from the evidence that the press conference was not the cause, Judge Barrett thought that the trial court's findings should be sustained in that they were not clearly erroneous. In his opinion, the majority was substituting its conclusion as to how the trial court should have decided the case. To do this, Judge Barrett said, was a clear abuse of the role of an appellate court. *See* Zenith Co. v. Hazeltine, 395 U.S. 100 (1969); United States v. United States Gypsum Co., 333 U.S. 364 (1948).

together, the court found an infringement of first amendment rights.[24] The infringement was not upon the right of expression per se, but rather upon a "species of expression."[25] This species of expression was identified by the court as freedom from personality control.

2. Freedom of Association

The court suggests in *Rampey* that the plaintiffs were fired, in part, for "exercising their right to freely associate with others."[26] The court points out that Carter "considered that the group as a whole was 'divisive' because they associated together" and they refused to join certain teacher organizations which Carter asked them to join.[27]

Freedom of association, which is a form of expression protected by the first amendment,[28] is usually asserted to protect organizations from state interference,[29] individuals who belong to certain organizations,[30] and the right of individuals to organize for political purposes.[31] In *McLaughlin v. Tilendis*,[32] for example, the Eighth Circuit did not sustain the nonrenewal of a teacher's contract because the action, which was based on his association with a union, was found to be an unconstitutional infringement of his first amendment rights.[33]

The rights of association involved in *Rampey* are not so clear. There was no formal organization to which the 14 belonged, but rather there was a vague assertion by Dr. Carter that the fired employees tended to associate only with each other. Similarly, the dismissed employees were classified as divisive not because they joined an organization, but rather because they refused to join the ones Carter wished them to associate with. The court is

[24] Rampey v. Allen, 501 F.2d 1090, 1098 (10th Cir. 1974).

[25] *Id.*

[26] *Id.* at 1096.

[27] *Id.*

[28] Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[29] *See, e.g.*, Schneider v. Smith, 390 U.S. 17 (1968); United States v. Robel, 389 U.S. 258 (1967); NAACP v. Button, 371 U.S. 415 (1963).

[30] *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Shelton v. Tucker, 364 U.S. 479 (1960); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Wieman v. Updegraff, 344 U.S. 183 (1952).

[31] *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51 (1973); Healy v. James, 408 U.S. 169 (1972).

[32] 398 F.2d 287 (7th Cir. 1968). For other cases involving a teacher's right of association, see Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969); Doherty v. Wilson, 356 F. Supp. 35 (M.D. Ga. 1973).

[33] *Id.*

protecting freedom of association, but the form of association protected is a freedom to refuse "to conform to . . . patterns and molds" imposed upon one.[34] Therefore, freedom from personality control seems to contain elements of freedom of association.

B. *Limitations on Freedom from Personality Control*

The majority in *Rampey* recognizes that freedom from personality control is not an absolute right and is subject to the balancing test of *Pickering v. Board of Education*.[35] In *Pickering*, which involved the dismissal of a teacher for writing a letter to a newspaper, the Court balanced the "conflicting claims of First Amendment protection and the need for orderly school administration."[36] In doing so, the following factors were considered by the Court: the need to maintain discipline and harmony among coworkers; the need for confidentiality in a relationship between a teacher and an administrator; the personal loyalty and confidence needed for the proper functioning of the school; the danger that conflict and controversy would embroil the school; and the possibility that the teacher's exercise of first amendment rights would impede his performance in the classroom or interfere with the operation of the school generally.[37]

In *Rampey* the court considered some of the tests identified in *Pickering*. The majority found that there was "no evidence that the appellants constituted any threat to the operation of the college;"[38] there was no "threat to the valid authority of President Carter;"[39] and there was no need for "personal loyalty or devotion" in this case.[40] In balancing the teachers' interest in freedom from personality control against the state's interest in the orderly administration of the school, the *Rampey* court did not consider the need to maintain discipline or harmony among coworkers or the extent of the controversy that was embroiling the campus. The reason why these factors were not considered is not stated;[41]

[34] Rampey v. Allen, 501 F.2d 1090, 1098 (10th Cir. 1974).

[35] 391 U.S. 563 (1968).

[36] *Id.* at 569.

[37] For an application of the balancing test outlined in *Pickering*, see Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); Duke v. North Texas State University, 469 F.2d 829 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973).

[38] Rampey v. Allen, 501 F.2d 1090, 1098 (10th Cir. 1974).

[39] *Id.*

[40] *Id.*

[41] But in Moore v. Winfield City Bd. of Educ., 452 F.2d 726 (5th Cir. 1971), the court held that, even if speech had played a part in the teacher's dismissal, the constitutionally protected right to comment on school activities was limited and was to be balanced against orderly school administration.

but because freedom from personality control by its nature creates controversy and disharmony, it may be the court felt that these factors should not be weighed against the individual's right to be free from control of his personality.

III. CONCLUSION

Freedom from personality control, as defined by the Tenth Circuit in *Rampey v. Allen*, is a first amendment right derived from the constitutional protection afforded to association and expression. The boundaries of this new species of expression are vague, but they appear to encompass the forms of expresssion and association that arise in the ordinary, day-to-day interaction of individuals working together.[42] The protection given by this right is broader than that afforded by expression or association alone. In cases arising before other circuits, a showing of an unconstitutional link between the dismissal and a specific incident involving expression was required before the court would reverse the action of the school.[43] *Rampey* does not require this type of link. Rather than having to show a specific incident that caused the nonrenewal, the plaintiff need show only a series of separate events which, taken together, evidence an atomosphere that repressed the individual's right to be free from personality control.

The security of professors and teachers at public schools is enhanced by the Tenth Circuit's decision in *Rampey* because these members of the academic community need no longer fear that their contracts will not be renewed because of a personality conflict with their superior. This broad protection, however, may not be as salutary as it appears. The *Rampey* decision ignores the interest of the state in operating "a college in a manner in which its elected and appointed officials think will best serve its state interests."[44] The protection given to the employees, moreover, may effectively limit the discretion of school administrators to

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[42] In his dissent, Judge Seth questions whether freedom from personality control should be given constitutional protection:

> The majority is substituting tenure reasons for a constitutional right. This is innovative and would perhaps serve a worthwhile purpose. It could serve as a protection against terminations based on "inability to conform to the image of the president" of the school . . . . This type of protection from "personality control" has a great deal to recommend it, and it would appear that the various state tenure laws have something like this in view. Thus perhaps we should subscribe to such a concept, but I am unable to fit it into the protections afforded by the First Amendment to the Constitution . . . .

Rampey v. Allen, 501 F.2d 1090, 1107 (10th Cir. 1974) (Seth, J., dissenting).

[43] *See* text accompanying notes 17-21 *supra*.

[44] Rampey v. Allen, 501 F.2d 1090, 1110 (10th Cir. 1974) (Lewis, C.J., dissenting).

select what they consider to be the best possible staff if personality conflict can be alleged to frustrate justified nonrenewal of contracts.

B. *United States v. Gourley*, 502 F.2d 785 (10th Cir. 1973)

United States v. Gourley[45] arose from the conviction of five anti-war demonstrators who, after being issued "bar letters" by the commander of the Air Force Academy, reentered the base in violation of 18 U.S.C. § 1382.[46] The crucial question considered by the Tenth Circuit was whether the five defendants could challenge their convictions on the grounds that the issuance of the bar letters infringed their constitutional rights of free speech.

To resolve this issue, the court relied on the Supreme Court's holding in *Flowers v. United States*.[47] In that case a leafleteer was convicted for entering a military base after a letter barring his entry had been issued. In reversing his conviction, the Court said:

> Whatever power the authorities may have to restrict general access to a military facility . . . here the fort commander chose not to exclude the public from the street where petitioner was arrested . . . .
>
> . . . .
>
> Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street . . . .
>
> The First Amendment protects petitioner from the application of § 1382 under conditions like those of this case.[48]

A challenge to a conviction under section 1382 could be based on the validity of the bar letter issued by the commander of the base. To be constitutional, the bar letters restricting entry to the military base can be issued only if the base is one closed to the public and, in cases applying *Flowers*, this is the critical issue.[49]

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[45] 502 F.2d 785 (10th Cir. 1973).

[46] 18 U.S.C. § 1382 (1970) provides in part:

> Whoever reenters or is found within any . . . reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

[47] 407 U.S. 197 (1972).

[48] *Id.* at 198.

[49] *See, e.g.*, Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973); McGaw v. Farrow, 472

In *Gourley* the Tenth Circuit found that even though "the Academy [had been] declared a closed base," the open nature of the areas where the defendants were arrested—the football stadium and the Academy Chapel—outweighed this formal declaration and the Academy was open to the public.[50] Because of this, "the letters [could not] serve as a basis for the charges" and the convictions were reversed.[51]

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II. EQUAL PROTECTION—BILINGUAL EDUCATION

Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974)

In 1972 the Federal District Court for New Mexico found that a school district which failed to teach English to non-English speaking Spanish surnamed students[1] had violated the students' equal protection right and statutory right[2] to be free from discrimination in a program receiving federal financial assistance. As a remedy the court ordered bilingual-bicultural education.[3]

Significantly, plaintiffs in *Serna v. Portales Municipal*

F.2d 952 (4th Cir. 1973); Spock v. David, 469 F.2d 1047 (3d Cir.), *application for stay of judgment denied*, 409 U.S. 971 (1972).

[50] United States v. Gourley, 502 F.2d 785, 787 (10th Cir. 1973).

[51] *Id.* at 788.

[1] As used by the district court and the court of appeals, "Spanish surnamed" refers to Mexican Americans or Chicanos. U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATION STUDY, ETHNIC ISOLATION OF MEXICAN AMERICANS IN THE PUBLIC SCHOOLS OF THE SOUTHWEST, REPORT I at 7 n.1 (1971).

As of 1972 there were 5.3 million Mexican Americans in the United States, 87 percent of whom lived in the 5 Southwestern States of Arizona, California, Colorado, New Mexico, and Texas. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: POPULATION CHARACTERISTICS: PERSONS OF SPANISH ORIGIN IN THE UNITED STATES: MARCH 1972 AND 1971, P-20, No. 250 at 1 (1973).

[2] Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1970):

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[3] T. ANDERSON & M. BOYER, 1 BILINGUAL SCHOOLING IN THE UNITED STATES 12 (1970) (prepared under contract with HEW):

> [W]hat is bilingual schooling? We take as our working definition that . . . "Bilingual education is instruction in *two languages* and the use of those two languages as mediums of instruction for any part or all of the school curriculum. Study of the history and culture associated with a student's mother tongue is considered an integral part of *bilingual education*."

Schools[4] did not allege de jure segregation,[5] and no such finding was made. Prior to this case, no school district had been ordered to implement bilingual-bicultural education absent a finding of de jure segregation.[6]

Spanish surnamed students accounted for 26 percent of the enrollment in the Portales school system.[7] Many of these students spoke Spanish at home and had an English language deficiency when they entered school.[8] Classroom instruction in Portales schools was conducted solely in English.

As a group, Spanish surnamed students scored lower on achievement tests, given solely in English, than did their Anglo classmates. In the elementary school with an 86 percent Spanish surnamed enrollment, these students fell increasingly further behind their Anglo classmates on intelligence quotient tests as they moved from the first to the fifth grades. As these disparities grew, so did disparities in attendance and dropout rates. These were undisputed facts.[9]

Prior to this suit, the defendant school district had not taken any steps to meet the special educational needs of these stu-

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[4] 499 F.2d 1147 (10th Cir. 1974), *aff'g in part* 351 F. Supp. 1279 (D.N.M. 1972).

[5] It is the similarity of these programs which is the crux of plaintiffs' claim of inequality of educational opportunity.

351 F. Supp. at 1281.

[6] As part of a desegregation plan to dismantle de jure segregated schools, bilingual-bicultural education was ordered in United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *modified*, 330 F. Supp. 235 (E.D. Tex. 1971), *aff'd*, 447 F.2d 441 (5th Cir. 1971), *application for stay denied, sub nom.* Edgar v. United States, 404 U.S. 1206 (1971), *cert. denied*, 404 U.S. 1016 (1972); *connected cases*, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972); 356 F. Supp. 469 (E.D. Tex. 1972), *aff'd*, 495 F.2d 1250 (5th Cir. 1974).

[7] At the elementary school level, 34 percent of all students were Spanish surnamed. In one elementary school, 86 percent of the enrollment was Spanish surnamed. In the other 3 elementary schools, 78 to 88 percent of the students were Anglos. Junior high enrollment was 29 percent Spanish surnamed. Only 17 percent of the high school students were Spanish surnamed. 499 F.2d 1147, 1149 (10th Cir. 1974).

[8] The term "limited English-speaking ability", when used with reference to an individual, means—

. . . .

(B) individuals who come from environments where a language other than English is dominant . . . and, by reason thereof, have difficulty speaking and understanding instruction in the English language.

Bilingual Education Act § 703(a)(1), Act of August 21, 1974, Pub. L. No. 93-380, § 105, 88 Stat. 484, *amending* 20 U.S.C. § 880b (1970). [This amendment was enacted subsequent to the decision by the court of appeals in *Serna*. It evidences greater congressional commitment to bilingual education than the 1968 Act. Unless otherwise noted, all references are to the 1968 Act as existing at the time of the decision by the court of appeals.]

[9] 499 F.2d at 1149-50.

dents.[10] The defendant was a recipient of federal financial assistance. Based upon this evidence, the district court found a violation of the equal protection clause and a violation of section 601 of the Civil Rights Act of 1964.[11]

The defendant's appeal in *Serna* was pending when the U.S. Supreme Court decided *Lau v. Nichols*.[12] Chinese speaking students in *Lau* had alleged equal protection and section 601 violations identical to those of plaintiffs in *Serna*. In finding a section 601 violation, the Supreme Court observed that failure to teach the English language to non-English speaking students, while all courses were taught in English, had the "effect" of discrimination "even though no purposeful design [to discriminate] is present."[13] Having found a statutuory right and violation, the Supreme Court declined to consider the alleged equal protection violation.[14]

The Tenth Circuit Court of Appeals in *Serna* adopted the

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[10] The defendant had not accepted state funds for bilingual education nor had it applied for funds under the Bilingual Education Act of 1968, 20 U.S.C. § 880b (1970).

[11] Mexican Americans are an identifiable group for purposes of discrimination prohibited on the basis of race, color, or national origin. *E.g.*, Keyes v. School Dist., 413 U.S. 189, 197 (1973); Cisneros v. Corpus Christi Indep. School Dist., 324 F. Supp. 599, 606 (S.D. Tex. 1970).

[12] 414 U.S. 563 (1974).

[13] *Id.* at 568.

[14] There apparently was some confusion as to whether the constitutional authority for Congress to enact section 601 was founded on the equal protection clause or on the general welfare clause. The amicus curiae brief of the United States argued:

> Title VI, although written in equal protection terms, is neither dependent upon, nor necessarily coincident with the Equal Protection Clause of the Fourteenth Amendment. Rather it is grounded on the general authority of the federal government to place reasonable restrictions upon the use of federal funds by the recipients.
>
> . . . .
>
> Thus, the application of Title VI here does not depend upon the outcome of the equal protection analysis. Pursuant to the power of Congress to "provide (in its expenditures) for the * * * general Welfare of the United States * * *" (U.S. Constitution, Art. I, Sec. 8, Cl. 1), enhanced like all other congressional powers by Article I's "necessary and proper" clause, the statute independently proscribes the conduct challenged by the petitioners and provides a discrete basis for injunctive relief.

Brief for the United States as Amicus Curiae at 14-15, Lau v. Nichols, 414 U.S. 563 (1974) (footnote omitted).

In fact this appears to be the approach adopted by Mr. Justice Douglas' opinion for the Court in *Lau*:

> The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here.

414 U.S. at 569 (citations omitted).

same approach in reviewing the district court's decision.[15] The court of appeals' decision was limited to finding a section 601 violation with no comment being made on the equal protection argument. This limitation had no adverse effect upon the relief granted.

Four primary issues were considered by the court of appeals in *Serna*.[16] First, the defendant argued that its failure to provide compensatory English instruction to Spanish surnamed non-English speaking students did not violate the students' equal protection right. Second, it was argued that such conduct by the defendant did not violate the students' section 601 right. Third, the defendant contended, assuming some right had been violated, that the district court had exceeded its authority in the relief granted. Fourth, as amicus curiae, the New Mexico State Board of Education asked if a decision favorable to the plaintiffs would require bilingual-bicultural education whenever there was one student in a school district who did not understand English.

I. EQUAL PROTECTION

Most of the legal literature examining the rights of non-English speaking students has focused on the equal protection argument. The underlying assumption is that an equal protection right, if recognized, would offer the greatest protection.[17] Notwithstanding the merits of this argument, it would seem that the Supreme Court foreclosed this approach in *Lau*. Equal protection clearly was before the Court, and just as clearly the Court avoided it.

At the present time, it seems that equal protection is not favored by the Supreme Court as a means for exploring or finding "new" fundamental rights protected by the Constitution. In

[15] 499 F.2d at 1153.

[16] The defendant also challenged the plaintiffs' standing and suitability as class action representatives. Both of these issues were resolved in favor of the plaintiffs. 499 F.2d at 1152.

[17] Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 52 (1974); Sugarman & Widess, *Equal Protection for Non-English-Speaking School Children*: Lau v. Nichols, 62 CALIF. L. REV. 157 (1974); Note, *Constitutional Law—Equal Protection—School District's Failure to Teach Chinese Speaking Students the English Language Does Not Constitute a Violation of the Equal Protection Clause*, 2 FORDHAM URBAN L.J. 122 (1974); Note, *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity*, 47 S. CAL. L. REV. 943 (1974); Comment, *Breaking the Language Barrier: New Rights for California's Linguistic Minorities*, 5 PAC. L.J. 648 (1974). *See also* for an overview of English language legislation, Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME LAW. 7 (1969).

DeFunis v. Odegaard[18] the Court avoided a difficult equal protection challenge by an unsuccessful white applicant to a law school's minority admission standards.[19] Since the applicant, after having been conditionally admitted to the law school, was about to graduate when the merits of his case reached the Court, the Court declined to decide the issue on the theory of mootness. As in *Lau*, the Court was avoiding an equal protection problem. Equal protection suffered more serious setbacks in other Court decisions holding education,[20] housing,[21] and welfare[22] not to be fundamental rights. Against this history, it could be argued that the result in *Lau* might have been different had it been considered solely on an equal protection theory.

Keyes v. School District No. 1[23] is the Court's most definitive recent decision on school segregation. On an equal protection theory the Court employed an "intent" or "purpose" to segregate test for de jure segregation.[24] By contrast, the Court utilized an "effect" test for discrimination under a statute in *Lau*.

It is premature to consider whether in fact there is a substantive difference in these tests. The Court may be employing different words to avoid the appearance of using the same standard to determine whether state action "causes" a result. However, if the choice in words reflects different standards, then it would seem less onerous to prove a section 601 violation under the "effect" test. "Motivation" is more difficult to prove than the "result."

The court of appeals in *Serna*, relying on *Lau*, found it unnecessary to consider the equal protection issue since it was able to affirm the section 601 violation.

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[18] 416 U.S. 312 (1974).

[19] Note, *Ameliorative Racial Classifications Under the Equal Protection Clause*: DeFunis v. Odegaard, 1973 DUKE L.J. 1126.

[20] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Two facts distinguish *Rodriguez* from *Serna* and *Lau*. In *Serna* and *Lau* the failure to teach English to non-English speaking students accomplished the "absolute deprivation" which the Court did not find in the state's financing scheme in *Rodriguez*. *Id.* at 20-25. Second, while the Court in *Rodriguez* said that the wealth-poverty dichotomy is not a suspect classification, it is clear that the suspect classification based on race, color, or national origin was present in *Serna* and *Lau*.

[21] Lindsey v. Normet, 405 U.S. 56 (1972).

[22] Dandridge v. Williams, 397 U.S. 471 (1970).

[23] 413 U.S. 189 (1973).

[24] We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* [402 U.S. 1, 17-18 (1971)] is *purpose* or *intent* to segregate.

413 U.S. at 208.

II. SECTION 601 AND THE HEW GUIDELINES

Section 601 contains a general prohibition against discrimination.[25] Under section 602 of the Civil Rights Act of 1964 Congress authorized departments and agencies granting financial assistance to issue rules, regulations, and orders of general application to effectuate section 601.[26]

Pursuant to this authority, the Department of Health, Education, and Welfare issued guidelines for compliance with Title VI which provide:

> A recipient . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.[27]

Specific forms of discrimination are prohibited by these guidelines. The guidelines further provide that "[t]he enumeration of specific forms of prohibited discrimination . . . does not limit the generality of the prohibition . . . ."[28]

Failure to provide compensatory English instruction to non-English speaking minority students clearly has the "effect" of defeating the accomplishment of an educational program. HEW's 1970 *May 25th Memorandum* so informed school districts receiving federal aid.[29]

In *Lau* the Supreme Court specifically relied upon these guidelines and the *May 25th Memorandum* in evaluating the school district's conduct.[30] Courts had previously relied upon the guidelines in de jure school segregation cases.[31] Although such review and approval had not previously included the application

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[25] 42 U.S.C. § 2000d (1970).

[26] *Id.* § 2000d-1.

[27] Nondiscrimination Under Programs Receiving Federal Financial Assistance Through the Department of Health, Education, and Welfare Effectuation of Title VI of the Civil Rights Act of 1964, 45 C.F.R. § 80.3(b)(2) (1973).

[28] *Id.* § 80.3(b)(5).

[29] As part of their compliance, school districts were informed by HEW that they should take remedial steps to overcome English language deficiencies among minority students; discontinue the assignment of these students to classes for the mentally retarded on the basis of tests measuring English language skills; and design tracking and ability grouping, where necessary, to meet language problems as quickly as possible and not to design such programs as permanent tracks. Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11595 (1970).

[30] 414 U.S. 567-69.

[31] United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 386 U.S. 1001 (1967).

of the *May 25th Memorandum* or the guidelines in the context of language discrimination, there is a presumption that such rules and regulations are valid.[32] Recipients of financial assistance give an assurance, moreover, that they will comply with the guidelines and "all requirements imposed by or pursuant to" the guidelines.[33]

Against this background, thc court of appeals considered the defendant's appeal in *Serna*. The defendant had not designed a program to meet the special educational needs of non-English speaking Spanish surnamed students; and these students were not benefiting from the educational program being offered to the same extent as their Anglo classmates. The program had the "effect" of discrimination on the basis of race, color, or national origin. The district court's finding of a section 601 violation was, therefore, affirmed.[34]

III. THE REMEDY: TOO MUCH OR TOO LITTLE?

Although *Lau* recognized the right to some form of relief, it did not articulate what that relief should be. Future litigation will most likely focus on this problem. *Serna* is significant in that it provides a beginning for consideration of this problem.

The remedial plan submitted by the defendant in *Serna* called for bilingual education for some, but not all, non-English speaking students.[35] This plan was found to be inadequate and the district court then fashioned a broader remedy. At the elementary school, with an 86 percent Spanish surnamed enrollment, *all* students in grades 1-3 were to receive 60 minutes of bilingual-bicultural instruction per day, and *all* students in grades 4-6 were to receive 45 minutes of such instruction per day. Spanish surnamed students at the other 3 elementary schools

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[32] The critical question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601. Last Term . . . we held that the validity of a regulation promulgated under a general authorization provision such as § 602 of [Title] VI "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" I think the guidelines here fairly meet that test.

414 U.S. at 571 (Stewart, J., concurring) (footnotes and citations omitted).

[33] 45 C.F.R. § 80.4(a)(1) (1973).

[34] 499 F.2d at 1153-54.

[35] Since the district court had also found that the defendant had discriminated against Mexican American teachers in employment, the defendant promised in this plan to hire "qualified" Spanish surnamed teachers as vacancies permitted. 499 F.2d at 1152. At trial, the plaintiffs failed to meet their burden of proof on employment discrimination against Mexican Americans in non-teaching positions. 351 F. Supp. at 1283.

were to receive 30 minutes of such instruction per day.[36] Junior high students were to be tested for English language deficiencies with bilingual instruction to be made available on the basis of need. Ethnic studies were to be retained and expanded at the high school.[37] The defendant was further ordered to consider these changes as minimum curriculum modifications.[38] Finally, the defendant was ordered to seek funding for these programs from available state and federal sources.[39]

On appeal the defendant argued that the district court's order was an "unwarranted and improper judicial interference in the internal affairs of the Portales school district."[40] In view of the defendant's past neglect of the plaintiffs' special educational needs and evidence received by the trial court that the defendant's proposed remedy was only a "token plan that would not benefit appellees," the court of appeals affirmed the remedy.[41] Under these circumstances, the court of appeals felt that "the trial court had a duty to fashion a program which would provide *adequate relief* . . . ."[42]

A serious question exists, however, as to whether in fact the trial court fully discharged that duty. For 30 to 60 minutes of each day non-English speaking children are admitted to the educational process.[43] But then what? The program reverts to a language these children do not understand. Additionally, which courses are taught during the bilingual-bicultural component of each day's instruction? More important, which courses are not taught during this remedial period?[44] There is a danger that a limited remedy such as this might heighten a non-English speak-

[36] This program was to be open to Anglo students as funding and personnel permitted. 499 F.2d at 1151.

[37] The court's plan called upon the defendant to make a special effort to hire qualified bilingual teachers as vacancies occurred. 499 F.2d at 1151-52.

[38] A recalcitrant defendant is more likely to look upon the court's minimums as its maximums.

[39] *Supra* note 10.

[40] 499 F.2d at 1154.

[41] *Id.*

[42] *Id.* (emphasis added).

[43] Neither the district court nor the court of appeals explains why some non-English speaking children receive more bilingual instruction than others.

[44] "[A] child is not to receive instruction in any substantive courses in a language which prevents his/her effective participation in any such course . . . ." This is part of the consent decree entered, subsequent to *Lau*, in a suit brought by Puerto Ricans against the New York City school system. ASPIRA of N.Y., Inc. v. Board of Educ., Civil No. 72-4002 at 4 (S.D.N.Y. Aug. 29, 1974).

ing child's frustration with the school system. The remedy here afforded would seem only a slight improvement over that which these children previously faced.

In *Lau* the Supreme Court favorably relied upon a 1968 HEW guideline: "[S]tudents of a particular race, color, or national origin are not [to be] denied the opportunity [to] obtain the education generally obtained by other students in the [school] system."[45] Although it is difficult to understand how 30 to 60 minutes of bilingual instruction per day satisfy this requirement, the court of appeals was convinced that the remedy was "just, equitable and feasible."[46] Furthermore, there is a latent danger in providing a remedy in cases of this kind that non-English speaking students will be segregated from their English speaking classmates[47] in violation of *Brown v. Board of Education*.[48] These and other problems remain unresolved.[49]

IV. THE MINIMUM NUMBER OF STUDENTS FOR A SECTION 601 VIOLATION

As amicus curiae, the New Mexico State Board of Education asked if a decision favorable to the plaintiffs would require bilingual education whenever there was one student in a school district who did not speak English. Relying on Mr. Justice Blackmun's concurring opinion in *Lau*,[50] the court of appeals attempted to dispel the spectre of impending financial doom raised by the State: "[O]nly when a substantial group is being deprived of a meaningful education will a Title VI violation exist."[51]

What constitutes a "substantial group"? *Lau* involved 1,800 Chinese students in a school district of approximately 100,000

[45] Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964, § 8, 33 Fed. Reg. 4955, 4956 (1968).

[46] 499 F.2d at 1154.

[47] "[S]tudents receiving instruction will spend maximum time with other children so as to avoid isolation and segregation from their peers." ASPIRA of N.Y., Inc. v. Board of Educ., Civil No. 72-4002 at 4 (S.D.N.Y. Aug. 29, 1974).

[48] Brown v. Board of Educ., 347 U.S. 483 (1954).

[49] Finally, there is the problem of properly defining the group discriminated against. Classification by surname is both over-inclusive and under-inclusive of the disadvantaged group. Some Spanish speaking persons have non-Spanish surnames. And many Spanish surnamed persons are not English language deficient. Classification solely on the basis of surname, as in *Serna*, is not precise. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: POPULATION CHARACTERISTICS: PERSONS OF SPANISH ORIGIN IN THE UNITED STATES: MARCH 1972 AND 1971 at 5-6 (1973).

[50] 414 U.S. at 572.

[51] 499 F.2d at 1154.

students.[52] Plaintiffs in *Serna* accounted for 26 percent of the district's enrollment. Neither case mentions any more on this subject but that these numbers are sufficient for a section 601 violation.

HEW's *May 25th Memorandum* was distributed to school districts with 5 percent or more minority students.[53] Five percent might, then, be one standard for identifying a "substantial group." Plaintiffs would not have prevailed in *Lau*, however, under such a standard.

Alaska and Massachusetts have mandatory bilingual education statutes that appear to offer more useful standards in this respect. In Massachusetts any school district with 20 or more students speaking a *single* language, other than English, must offer bilingual-bicultural education.[54] A similar requirement is imposed by the Alaska statute for any one school with 15 or more such students.[55] The thrust of both statutes is to provide bilingual-bicultural education when there are enough students to justify the cost of hiring a bilingual teacher and the acquisition of bilingual education material.[56]

This standard, or one closely approximating it, should satisfy the "substantial group" threshold. Contrary arguments urging a higher threshold should bear a *very heavy* burden of persuasion.[57]

V. CONCLUSION

In *Lau* the Supreme Court recognized the existence of a statutory right to bilingual education. The appropriate remedy for

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[52] Lau v. Nichols, 483 F.2d 793 (9th Cir. 1973).

[53] U.S. COMM'N ON CIVIL RIGHTS, TOWARD QUALITY EDUCATION FOR MEXICAN AMERICANS: MEXICAN AMERICAN EDUCATION STUDY, REPORT VI at 50 (1974).

[54] Transitional Bilingual Education Act, MASS. GEN. LAWS ANN. ch. 71A, §§ 1-9 (Supp. 1974). *See also* for a model act with comments based on the Massachusetts statute, Kobrick, *A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 HARV. J. LEGIS. 260 (1972).

[55] ALASKA STAT. ANN. §§ 14.08.160 to .170 (Supp. 1974). The Alaska statute is less well suited for most states in that many Alaskan Indians, Eskimos, and Aleuts live in communities with only one school. The Alaska statute meets this need. Both *Serna* and *Lau* consider this problem, however, in terms of the number of such students in a school district.

[56] The added costs of such a program can, in part, be offset by federal aid. Bilingual Education Act, 20 U.S.C. § 880b (1970), *as amended*, Act of August 21, 1974, Pub. L. No. 93-380, § 105, 88 Stat. 484.

[57] A related problem involves the availability of bilingual teachers. If there are not enough such teachers to meet the need in a state, then it might be proper to urge the state teacher certification authority to require bilingual training as an element of teacher certification.

a violation of that right was not there determined. The significance of the *Serna* decision for courts and school districts alike is that it provides a beginning for consideration of that problem.

Michael P. O'Connell

III. EQUAL PROTECTION—ABORTIONS

Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974)

I. THE TENTH CIRCUIT'S OPINION

Paul S. Rose, Executive Director of the Utah State Department of Social Services, established an informal policy which proscribed expenditure of Medicaid funds for abortions unless the abortion was "therapeutic," which he defined as "one necessary to save the life of the expectant mother or to prevent serious and permanent impairment to her physical health, and none other."[1] Although this policy was not reduced to writing, it was strictly followed. Jane Doe, Jane Roe, and Jane Poe each sought an abortion at the University of Utah Hospital. Although all were eligible for categorical assistance under Medicaid and each proposed abortion was approved as medically appropriate by the hospital staff, the staff was aware of Rose's policy, which would have prevented reimbursement. The women brought a class action against Rose, seeking a declaration that his policy was illegal and an injunction preventing its enforcement. At the time suit was brought, two of the women were in their second trimester of pregnancy and one was in her first.

The trial court temporarily enjoined the enforcement of Rose's policy and the women underwent abortions. Subsequently, the parties agreed to a stipulation of the facts, and both moved for summary judgment based upon the stipulation. The plaintiffs' motion was granted and the defendant's denied, the trial court finding that each plaintiff had a constitutionally protected right to an abortion, and that the plaintiffs would be denied equal protection of the laws if the defendant were allowed to discriminate between "therapeutic" and "non-therapeutic" abortions. In addition, the trial court found that the defendant was without statutory authority to deny "non-therapeutic" abortions.[2] Rose

[1] Doe v. Rose, 499 F.2d 1112, 1113 (10th Cir. 1974).

[2] This finding was based primarily upon the provisions of 42 U.S.C.A. §§ 1396a(a)(10), (13) (1974) and 42 U.S.C.A. §§ 1396d(a)(1), (5) (1974).

was permanently enjoined from conditioning payment upon his prior approval and from restricting payment to "therapeutic" abortions.

Rose appealed, arguing that the right to welfare was solely a statutory right and that, since no statute had been violated, no constitutional issue had been raised. He maintained that even if the issue did involve a constitutional question, a state may select the type of medical services for which it desires matching federal funds as long as it does so on a rational basis. A limited state budget and the incentive for proper birth control methods were cited as the state's rationale.[3] Rose considered an abortion to be medically "non-necessary" in the same sense that cosmetic surgery is not medically required.[4]

The Tenth Circuit Court of Appeals disagreed, affirming the trial court's decision. Noting that the U.S. Supreme Court prefers a statutory rather than a constitutional resolution of welfare controversies,[5] the Tenth Circuit nevertheless disposed of the case on constitutional grounds, prefering not to make a strained interpretation of the applicable state and federal statutes which were silent as to abortion. Rather, the court found that the policy was neither mandated nor prohibited by statute.

With respect to the constitutional issue the court noted that, although a state need not choose to participate in a federal welfare program, if it does elect to do so it must act consistently with federal statutes and regulations.[6] Any program, however funded, must conform to the requirements of the Constitution.[7] At the same time, a welfare regulation "which is 'rationally based and free from invidious discrimination' will not offend the Constitution and is to be given effect."[8] The Supreme Court's landmark decision in *Roe v. Wade*[9] and its companion case of *Doe v.*

[3] Brief for Appellant at 12-14, Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974).

[4] *Id.* at 8-9.

[5] Wyman v. Rothstein, 398 U.S. 275 (1970).

[6] Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968).

[7] New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).

[8] 499 F.2d at 1115.

[9] 410 U.S. 113 (1973), *rehearing denied*, 410 U.S. 959. The basic principles of *Roe v. Wade* are that in the first trimester of pregnancy the abortion decision must be left entirely to the pregnant woman and her attending physician. After the first trimester, the state may regulate abortion to the extent that the regulations are reasonably related to maternal health. After viability (24th to 28th week) the state's interest in protecting the fetus becomes compelling and abortion may be regulated or proscribed, except where it is medically necessary to preserve the life or health of the mother. *Id.* at 164-65. The

Bolton[10] established that the constitutional right of privacy includes a qualified right to elect an abortion.[11] Any regulation of this "fundamental right" requires that a "compelling state interest" be demonstrated.[12] In *Doe v. Rose* the state could not claim such an interest because *Memorial Hospital v. Maricopa County*[13] had demonstrated that conservation of the taxpayers' purse is not sufficient to meet the "compelling state interest" standard.[14]

The court found support for its decision in the analagous cases of *Hathaway v. Worcester City Hospital*[15] and *Klein v. Nassau County Medical Center*.[16] In *Hathaway*, the First Circuit Court of Appeals held that consensual sterilization involved a fundamental right and that consequently a city hospital must demonstrate a compelling rationale in order to prohibit that operation while permitting other procedures of no greater risk or demand on staff. In *Klein*, a three-judge court held that a policy limiting the use of Medicaid funds to therapeutic abortions performed within the initial 24 weeks of pregnancy denied indigent women equal protection of the laws. If the state were to pay for

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Supreme Court's decision in this case was greeted with both enthusiasm and criticism. For discussions of the decision, see, *e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Vieira, Roe *and* Doe: *Substantive Due Process and the Right of Abortion*, 25 HASTINGS L.J. 867 (1974); Wheeler & Kovar, Roe v. Wade: *The Right of Privacy Revisited*, 21 KAN. L. REV. 527 (1973); Comment, *In Defense of Liberty: A Look at the Abortion Decisions*, 61 GEO. L.J. 1559 (1973); Note, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974).

[10] 410 U.S. 179 (1973).

[11] The Constitution does not expressly mention the right of privacy. Past decisions, however, have made it clear that personal rights which are "fundamental" or "implicit in the concept of ordered liberty" are protected by the Constitution. Roe v. Wade, 410 U.S. 113, 152 (1973). For the classic development of the right of privacy, see Mr. Justice Douglas' opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), a case involving contraception. The right has also been recognized in the following areas: Contraception— Eisenstadt v. Baird, 405 U.S. 438 (1972); Activities relating to marriage—Loving v. Virginia, 388 U.S. 1 (1967); Procreation—Skinner v. Oklahoma, 316 U.S. 535 (1942); Child rearing and education—Pierce v. Society of Sisters, 268 U.S. 510 (1925). *Roe v. Wade* extends this right to encompass a woman's decision to terminate her pregnancy.

[12] 410 U.S. at 155.

[13] 415 U.S. 250 (1974).

[14] Even if the more lenient "rational basis" test were used, conservation of the taxpayers' purse would not justify the denial of abortions to indigents because the state would then face the more expensive alternative of providing the medical care associated with childbirth. *See, e.g.*, Klein v. Nassau County Medical Center, 347 F. Supp. 496, 501 (E.D.N.Y. 1972).

[15] 475 F.2d 701 (1st Cir. 1973).

[16] 347 F. Supp. 496 (E.D.N.Y. 1972). The Supreme Court vacated the judgment in *Klein* and remanded for reconsideration in light of *Wade* and *Bolton*, 412 U.S. 925 (1973), but the Tenth Circuit Court of Appeals felt that the case was still viable. 499 F.2d at 1116 n.3.

the expenses of full-term delivery, but not for the cost of an abortion, an indigent would have no choice but to bear the child, while someone financially independent would have either alternative. In *Doe v. Rampton*,[17] a Utah statute prohibiting, *inter alia*, the use of state funds for non-therapeutic abortions was invalidated because it would limit the exercise of the right to an abortion in all trimesters, for reasons having no apparent connection with the health of the mother or child. In the instant case, the court reasoned that if such a statute was invalid, an informal policy to the same effect must also be invalid.[18]

II. Other Attempts to Restrict Abortions

Undoubtedly the court's decision will be unpopular with the 70 percent of Utah's population who are of the Mormon faith[19] and oppose abortion on moral grounds.[20] Anti-abortion sentiment is not limited to Utah, however, and efforts have been made throughout the nation to restrict or discourage abortions. For example, family members have interfered with a woman's decision to obtain an abortion. Hospitals have refused to perform the operation, and legislation has been passed in an attempt to make abortions difficult or impossible to obtain.

A. *Family Members—Consent by the Father of Child or by Parents of Minor Mother*

When deciding *Roe v. Wade*, the Supreme Court found it

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[17] 366 F. Supp. 189 (D. Utah 1973).

[18] Although the court did not feel it necessary to deal with Rose's contention that an abortion is a "non-necessary" medical procedure, plaintiffs' attorney relied upon Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y. 1972), to show that the condition of pregnancy does require medical treatment, whether by abortion or by the care associated with childbirth. Brief for Appellees at 12, Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974). In Roe v. Norton, 380 F. Supp. 726 (D. Conn. 1974), the court ruled invalid a state regulation of the Connecticut Welfare Department which conditioned Medicaid payments upon medical certification by the attending physician and the Chief of Obstetrics and Gynecology in accredited hospitals that the "abortion is recommended as medically or psychiatrically necessary . . . ." *Id.* at 727 n.1. The *Norton* court concluded that:

> While the constitutional right to have an abortion does not necessarily carry with it a constitutional right to a free abortion, a statute that provides payment to the needy for medical expenses would encounter constitutional obstacles if it were construed to weight the choice of a pregnant woman against electing the abortion that is her constitutional right to choose. Government is not required by the Constitution to pay for any medical service, but once it decides to provide payments, it must not unduly disadvantage those who exercise a constitutional right.

Id. at 730.

[19] 27 Encyclopedia Americana 833 (Int'l ed. 1972).

[20] *See, e.g.*, 9 The Priesthood Bulletin, no. 1, The Church of Jesus Christ of Latter Day Saints (Feb. 1973).

unnecessary to determine what rights, if any, parents and husbands might have in the abortion decision.[21] Other courts have, therefore, been confronted with that determination. In *Coe v. Gerstein*[22] the court reasoned that because the state cannot interfere, until the compelling point, with the mother's right of privacy even to protect the fetus' right to life, it could not interfere on behalf of the husband's or parents' interest in the fetus. Likewise, since it cannot interfere to protect the mother's health until the second trimester, it cannot do so to protect another's interest in her health. In other words, the state ought not be able to delegate to others a power which it cannot itself exercise. *Coe* did not negate the possibility that a statute might be written which would distinguish a third party's interests from those of maternal health and potential life, but it seems unlikely that third party interests could outweigh the fundamental right of privacy which is the basis of a woman's right to choose abortion. In *Doe. v. Rampton*[23] the District Court for the District of Utah invalidated a section of the Utah statutes which required the pre-abortion consent of the father or parents—depending upon the mother's marital status—on the grounds that such a requirement subjected the exercise of the individual right of privacy to consent of others in all stages of pregnancy. It appears that the Tenth Circuit is in agreement with other circuits when protecting a woman's right of election from infringement by family members.[24]

B. *Hospitals—Public and Private*

It is clear that public hospitals must provide facilities for abortions,[25] and that private or denominational hospitals may refuse to do so.[26] The distinction between a public and private

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[21] 410 U.S. at 165 n.67.

[22] 376 F. Supp. 695 (S.D. Fla. 1973). *See also* Note, *The Right of a Husband or a Minor's Parent to Participate in the Abortion Decision*, 28 U. MIAMI L. REV. 251 (1973).

[23] 366 F. Supp. 189 (D. Utah 1973).

[24] In Doe v. Doe, 314 N.E.2d 128 (Mass. 1974), a mother was allowed to abort without her husband's approval. In Jones v. Smith, 278 So. 2d 339 (Fla. Ct. App. 1973), *cert. denied*, 415 U.S. 958 (1974), an unmarried putative father was unable to enjoin an abortion. *See also* Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974).

[25] Hathaway v. Worcester City Hosp., 475 F.2d 701 (1st Cir. 1973) established that the issue of consensual sterilization involved a fundamental right and could not be prohibited by a hospital when other procedures of similar complication were allowed. On the strength of *Hathaway*, it was ruled in Nyberg v. City of Virginia, 361 F. Supp. 932 (D. Minn. 1973), *aff'd*, 495 F.2d 1342 (8th Cir. 1974), that a municipal hospital was obliged to allow abortions and to provide facilities for those who wished to perform them. *Accord*, Doe v. Hale Hosp., 369 F. Supp. 970 (D. Mass.), *aff'd*, 500 F.2d 144 (1st Cir. 1974).

[26] Doe v. Bolton, 410 U.S. 179, 197-98 (1973).

hospital is not so clear. Factors such as the availability of other hospitals in the area which provide abortion facilities, tax benefits given to hospitals, and the receipt of federal funds such as those provided by the Hill-Burton Act[27] might influence a court in determining whether a given hospital is operating under the color of state law, and therefore subject to the restrictions of the fourteenth amendment.[28] At the same time, no single factor is likely to be controlling, and it appears that courts will continue to decide each case on an individual basis unless more definite guidelines are furnished by the Supreme Court.

C. *Legislation—State and Federal*

State legislatures have attempted to restrict abortions by defining the point at which viability occurs,[29] by limiting the advertisement of abortions,[30] and by placing burdensome reporting or procedural requirements on the operation.[31] Few of these attempts have been successful when tested in court.[32] A Utah statute effective April 4, 1974, requires, *inter alia*, that the physician give prior notice to the mother's husband or parents, if possible.[33] It also requires that the mother be informed of adoption

[27] 42 U.S.C. § 291 (1970).

[28] In Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973), it was ruled that the receipt of Hill-Burton funds does not force a private hospital to permit abortions, but in Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174 (4th Cir. 1974), a case involving a physician's right to hospital privileges, the court ruled that the receipt of such funds did subject the hospital to the restrictions of the fourteenth amendment. Earlier racial segregation cases also demonstrated a willingness to construe a hospital's activities as being under the color of state action. *See, e.g.*, Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963). *But see* Barrett v. United Hosp., 376 F. Supp. 791 (S.D.N.Y. 1974).

[29] Doe v. Israel, 482 F.2d 156 (1st Cir. 1973), *cert. denied*, 94 S. Ct. 2406 (1974); Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974).

[30] Associated Students v. Attorney General, 368 F. Supp. 11 (C.D. Cal. 1973); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); Henrie v. Derryberry, 358 F. Supp. 719 (N.D. Okla. 1973).

[31] Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974); Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); State v. Jacobus, 75 Misc. 2d 840, 348 N.Y.S.2d 907 (Sup. Ct. 1973). *But see* Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 367 F. Supp. 594 (N.D. Ill. 1973).

[32] *See* notes 29-31 *supra*. An interesting exception is Bigelow v. Commonwealth, 213 Va. 191, 191 S.E.2d 173 (1972). Here a physician was convicted for violating a statute prohibiting the advertisement of abortions. The Supreme Court vacated and remanded for reconsideration in light of *Roe v. Wade* and *Doe v. Bolton*, 413 U.S. 909 (1973). Upon reconsideration, the Virginia court found nothing in *Roe* and *Doe* to prohibit the regulation of commercial advertising in the medical-health field and affirmed the conviction. 214 Va. 341, 200 S.E.2d 680 (1973). Recently the Supreme Court has noted probable jurisdiction and may rule on the matter. Bigelow v. Virginia, 43 U.S.L.W. 3068 (U.S. Aug. 13, 1974) (No. 73-1309).

[33] UTAH CODE ANN. § 76-7-304 (Supp. 1973).

services available and of the details of the abortion procedure itself,[34] as well as requiring the doctor to complete a lengthy report.[35] It is not unlikely that some of these provisions will be tested in Tenth Circuit courts.[36]

The U.S. Senate recently amended an appropriations bill to proscribe the use of Department of Health, Education, and Welfare funds for abortions.[37] If this measure becomes law, it could effect a substantial change in abortion law, but would first undoubtedly face a severe constitutional test in light of the Supreme Court's firm position on abortion.[38]

III. CONCLUSION

Since the Supreme Court decided *Roe v. Wade*, there have been many attempts to restrict its application. The Court's ruling was clear, however, and the lower courts have been consistent in upholding the right of a woman and her physician to make the abortion decision without undue state interference. *Doe v. Rose* lends the strength and prestige of a U.S. Court of Appeals decision to the mounting volume of case law supporting that right. In this case the indigent woman's right to choose between bearing a child and obtaining an abortion, without overwhelming financial pressure in favor of the state's preferred choice, was protected.

Dennis E. House

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[34] *Id.* § 76-7-305.

[35] *Id.* § 76-7-315.

[36] Compare these restrictions to those invalidated in Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974).

[37] S. amend. 1859, 120 Cong. Rec. 16832 (1974), *amending* H.R. 15580, 93d Cong., 2d Sess. (1974):

> No part of the funds appropriated under this Act ["Departments of Labor, and Health, Education, and Welfare Appropriation Act, 1975"] shall be used in any manner directly or indirectly to pay for or encourage the performances of abortions except such abortions as are necessary to save the life of a mother.

[38] In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court stated that although Congress may enact legislation which is necessary and appropriate to enforce the equal protection and due process clauses of the fourteenth amendment, it may not dilute those rights. It has been said that equal protection does apply to welfare rights. Hagans v. Lavine, 415 U.S. 528 (1974).

IV. EQUAL PROTECTION—SEX DISCRIMINATION

Duncan v. General Motors Corp., 499 F.2d 835 (10th Cir. 1974)
Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974)

The Tenth Circuit considered two cases involving sex discrimination and the equal protection clause of the Federal Constitution. In one the court found that state law denied to women the same substantive tort rights afforded to men. In the second, the court held that the systematic policy of excluding women from membership in a charitable service organization did not violate the fourteenth amendment.

In *Duncan v. General Motors Corp.*,[1] the husband of the plaintiff was seriously injured and permanently disabled when the car which he was driving collided with a truck tractor on an Oklahoma highway. Suit against the manufacturer of the automobile was instituted to recover damages for an alleged breach of implied warranty of fitness for a defectively manufactured braking system and to recover for loss of the husband's consortium.

Although the wife argued that the married women's rights act of Oklahoma,[2] which had been adopted between the accident and the commencement of the suit and which allowed wives to recover, should govern procedural matters and ought to be applied retroactively,[3] the United States District Court for the Northern District of Oklahoma disagreed and dismissed the action, finding that the pre-act common law which denied wives the right to sue for loss of consortium was conclusive of the plaintiff's substantive rights.[4]

On appeal, the Tenth Circuit reversed, joining a growing number of jurisdictions which have judicially extended to women the right to recover for loss of consortium.[5] Judge Hill, writing for the majority, found that:

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[1] 499 F.2d 835 (10th Cir. 1974).

[2] OKLA. STAT. ANN. tit. 32, § 15 (Supp. 1974).

[3] 499 F.2d at 836-37.

[4] Suit was instituted on April 23, 1973; the amendment to the women's rights act allowing wives to sue for loss of consortium became effective April 27, 1973. Before the amendment, the common law denied a wife the right to recover for loss of consortium. *Id.* at 835-36.

[5] A wife's right to recover for loss of consortium was recognized in Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950). Since then, the right has been acknowledged by court decisions in other jurisdictions. *See, e.g.*, Annot., 36 A.L.R.3d 900 (1971).

> [W]here state law is challenged for federal constitutional reasons, as it is here, federal law governs and not state substantive law . . . . We are therefore not bound to adhere to Oklahoma law if we determine it to be unconstitutional.[6]

The court concluded that the Oklahoma law offended not only the test of "patently arbitrary"[7] and invidious discrimination under decisions like *Reed v. Reed*,[8] but the court also believed that it offended the position taken by four Justices in *Frontiero v. Richardson*[9] that classifications based upon sex ought to be subject to more searching judicial scrutiny.[10]

The second significant decision handed down by the Tenth Circuit during the past year was *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*,[11] an action arising under section 1983 of the Civil Rights Act.[12] The Junior Chamber of Commerce of Rochester, New York, and its individual members were joined by other chapters of the national organization and their individual members in this action against the United States Jaycees and several federal officials. The plaintiffs alleged that the United States Jaycees, in excluding women from membership in any Jaycees organization, had violated the fifth and fourteenth amendments to the United States Constitution in wrongfully depriving plaintiffs of membership.[13] The bylaws of the United States Jaycees restrict membership to males. The Junior Chamber of Commerce of Rochester had previously admitted women as members and was thereupon expelled from the United States Jaycees. Individual members of the Rochester chapter were denied affiliation with the national organization and were thereby denied the opportunity to participate in programs which included utilization of federal funds. The plaintiffs noted that the United States Jaycees and its chapters received tax ben-

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[6] 499 F.2d at 837-38 (citations omitted).

[7] *Id.* at 838.

[8] 404 U.S. 71 (1971).

[9] 411 U.S. 677, 688 (1973).

[10] 499 F.2d at 838.

[11] 495 F.2d 883 (10th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3295 (U.S. Nov. 19, 1974).

[12] 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.

[13] 495 F.2d at 884.

efits and federal grants and contracts,[14] and they noted that in some cases federal funds were awarded to state agencies which in turn made grants to the local Jaycees for use in their projects.[15] Federal officers were named as defendants on the grounds that the granting of tax exemptions and federal funds to a group which discriminates was improper. Judge Doyle, writing for the majority, noted that a "memorandum admitted into evidence showed that government funds distributed by the United States Jaycees amounted to approximately $985,000."[16] This sum accounted "for almost forty per cent of the national budget"[17] of the national organization.

The district court ruled that the federal question was so insubstantial as to fail to state a claim, noting that no direct relationship between the discriminatory membership policy and the distribution of government funds was alleged.[18] On appeal, the Tenth Circuit recognized that the plaintiffs were excluded from membership purely on the basis of sex and that state or federal discrimination on that basis was improper.[19] But the court found no official action under section 1983 to warrant invocation of the fourteenth amendment's protection. In ruling for the defendants, the United States Jaycees, the court held:

> The Constitution applies if the private action complained of is in essence the action of the government . . . . [P]laintiffs say that the state must, consistent with the Constitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action. We disagree.[20]

In failing to find the requisite state action, the court considered the decisions in *Moose Lodge v. Irvis*[21] and in *Burton v. Wilmington Parking Authority*.[22] In *Moose Lodge*, the Supreme Court held that the state's grant of a liquor license and its concomitant regulation were not sufficient to implicate the state in the racially discriminatory guest policies of the Lodge and specifi-

[14] *Id.* The tax benefits are conferred by the Internal Revenue Code of 1954, §§ 170 & 501. Section 170 deals with allowances of deduction for charitable contributions, and section 501 treats exemption from taxation for qualifying organizations.

[15] 495 F.2d at 886-87.

[16] *Id.* at 884.

[17] Brief for Appellants at 18, Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974).

[18] 495 F.2d at 884-85.

[19] *Id.* at 885.

[20] *Id.* at 887.

[21] 407 U.S. 163 (1972).

[22] 365 U.S. 715 (1961).

cally held that "[h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination."[23] The Tenth Circuit concluded, therefore, that "there must be a sufficient *nexus* between the discrimination and the alleged state action in order to render the activity a constitutional violation."[24] In *Burton* a private restaurant which practiced racial discrimination was leased from a municipal parking authority and was operated adjacent to a public parking lot for the convenience of the public. There the Supreme Court found the requisite state action, but the Court cautioned that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[25]

Two important Tenth Circuit precedents upon which the court relied were *Ward v. St. Anthony Hospital*[26] and *Browns v. Mitchell*[27] in which the "court [had] adopted a more restricted view of what is state action."[28] In *Ward* the Tenth Circuit held that a small percentage of governmental funding for a hospital did not subject the hospital to a civil rights action since "the facts failed to establish that the State of Colorado had any part in the alleged deprivation."[29] The court held in *Browns* that policies of private organizations do not furnish the requisite state action even though such organizations receive tax benefits. While the granting of government funds or the granting of tax exemptions alone in these cases fails to transform the acts of a private organization into acts under color of state law, similar situations have been dealt with differently in other circuits.[30]

In the *Jaycees* case, the Tenth Circuit was concerned with the lack of nexus, *i.e.*, the absence of a connection between the state action and the alleged deprivation. The fact of exemption

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[23] 407 U.S. at 176-77.

[24] 495 F.2d at 888.

[25] 365 U.S. at 722.

[26] 476 F.2d 671 (10th Cir. 1973).

[27] 409 F.2d 593 (10th Cir. 1969).

[28] 495 F.2d at 887.

[29] *Id.*

[30] In McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971), the court found that eviction from a housing facility on land purchased from a city redevelopment authority was state action because the government retained the right to oversee administration of the property. However, in Weigand v. Afton View Apartments, 473 F.2d 545 (8th Cir. 1973), an attempt at summary eviction from a privately owned and operated apartment house was held not to be state action although the house was federally financed and was consequently taxed at a lesser rate than similar buildings not so funded.

from federal taxation did not furnish the requisite nexus. Similarly, a landowner in *Walz v. Tax Commission*[31] sought to enjoin the New York City Tax Commission from granting exemptions to religious organizations on the ground that such exemptions violated the establishment clause of the first amendment. Chief Justice Burger declared:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . . There is no genuine nexus between tax exemption and the establishment of religion.[32]

However, the increasing importance of tax exemptions in an overall scheme of governmental involvement in private activity is becoming more pronounced.[33] More recent attitudes toward tax exemptions bode ill for a summary treatment of the issue and suggest that the explanation that "we're not giving, we're simply not taking away" has fewer adherents than it has enjoyed in the past.[34]

Governmental grants-in-aid and governmental contracts have, at times, been found to furnish the appropriate nexus:

> The allocation of government aid to a private activity is another type of state involvement which invariably constitutes state support of the challenged activity. However, aid is distinct from a power-grant in that it merely supports private parties in the exercise of rights they would possess absent the aid; powers behind such activities do not derive solely from government. Such state involvement is, therefore, somewhat less efficaciously supportive of a putative infringement than are power grants. Nonetheless, private parties should not be allowed to use government resources in ways that would be unconstitutional for the state itself.[35]

The very real question is whether the government should be the insurer of the "goodness" of its beneficiaries. In the *Jaycees*

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[31] 397 U.S. 664 (1970).

[32] *Id.* at 676.

[33] *See* Falkenstein v. Department of Revenue, 350 F. Supp. 887 (D. Ore. 1972); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971); Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970) (preliminary injunction), on final injunction *sub nom.* Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd per curiam sub nom.* Coit v. Green, 404 U.S. 997 (1971). *But see* McCoy v. Schultz, 31 Am. Fed. Tax R.2d 858 (D.D.C. 1973).

[34] Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972). *See generally* Comment, *Tax Incentives As State Action*, 122 U. PA. L. REV. 414 (1973).

[35] Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 672 (1974).

case, the court disagreed with the plaintiffs' contention that the state must refrain from dealing with discriminators whether or not the discrimination relates to the alleged state action.[36]

> In our case . . . the question is whether the United States is obligated to see to it that the United States Jaycees' conduct shall be exemplary quite apart from its administering of programs and governmental funds. No case has been cited which extends to this length.[37]

The plaintiffs argued that it should not be unreasonable to ask the government to require that the very structure of an aspiring governmental beneficiary not include discrimination:

> An incidental financial contribution to a private institution may not necessarily approve of a specific procedure or policy in a particular situation of which the government was not even aware at the time assistance was given. To hold that the state is responsible for every such improper procedure would require daily supervision of each institution receiving funds. This is not the case where there is an established policy of discrimination which is a well known characteristic of the institution.[38]

Notwithstanding the large percentage of federal money in the organization's budget[39] and the favorable tax treatment received by the Jaycees, the Tenth Circuit found an absence of nexus between the governmental action and the declared national policy of the Junior Chamber of Commerce to admit only males to membership. The facts and circumstances of each similar case are of critical importance and the balance may shift as the facts and the circumstances seem different to the courts.

Laura Vogelgesang

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[36] *See* text accompanying note 20, *supra*.

[37] 495 F.2d at 888.

[38] Brief for Appellants at 36, Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974) (emphasis added).

[39] Brief for Federal Appellees at 9, Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974): "Applicants for sponsorship of the federal projects must demonstrate that they are truly nonprofit, and that they are capable of successfully developing the program; the membership policies of sponsoring groups are not the object of inquiry." There is no nexus here, but the result of Pitts v. Department of Revenue, 333 F. Supp. 662, 670 (E.D. Wis. 1971) was an order to "impose upon the defendants the duty of questioning organizations claiming an exemption about whether their constitutions, by-laws or actual practices require discrimination in membership . . . ."

V. ZONING—NONCONFORMING USES

A. *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973)

In 1971, the City and County of Denver amended its zoning ordinance to restrict the types of advertising and display signs that could be located in certain zoning districts. Nonconforming signs, presently located in those areas, were to be eliminated over a period of from 2 to 5 years, depending upon the replacement cost of the sign. Those with higher replacement costs were given a longer period of time.[1] In addition, flashing, fluctuating, animated, or portable signs were allowed 30 days to comply with the ordinance irrespective of their cost.[2]

The constitutional validity of that amendment to the zoning ordinance was challenged in *Art Neon Co. v. City and County of Denver*.[3] The action was brought by companies engaged in the installation, sale, and lease of signs and advertising displays and by retail businesses who owned or leased signs. Plaintiffs contended that the "Permitted Signs" section violated article I, section 10 of the United States Constitution (an impairment of contracts); the fifth amendment (a taking of private property without just compensation); the first amendment (a restriction on freedom of expression); and the fourteenth amendment (a denial of equal protection and of due process).[4]

The district court considered whether the termination procedures prescribed by the ordinance were a valid exercise of the police power or whether they were a taking of private property without just compensation. The trial court held that the sign ordinance "[d]id not provide for the payment of just compensa-

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[1] DENVER, COLO., REV. MUNICIPAL CODE § 613 (1971).

§ 613.5-5(4) [Termination of Non-Conforming Signs] BY Amortization.
The right to maintain a non-conforming sign shall terminate in accordance with the following schedule:

Any sign which on the date the sign became non-conforming would cost the following amount to replace:	Shall be terminated within the following period after the sign became non-conforming:
$0 to $3,000	2 years
3,001 to 6,000	3 years
6,001 to 15,000	4 years
15,001 or more	5 years

[2] *Id.* § 613.5-5(4)(a).

[3] 488 F.2d 118 (10th Cir.) *rev'g* 357 F. Supp. 466 (D. Colo. 1973).

[4] 488 F.2d at 120.

tion"[5] and that, therefore, the ordinance violated the fifth amendment.

On appeal, the Tenth Circuit reversed and found the sign ordinance to be a proper exercise of the police power. However, the court concluded that the so-called "amortization" periods based on the replacement cost of the signs were unreasonable and held valid only the 5-year period for elimination of the nonconforming signs.

The problem of the nonconforming use has been characterized as one of the fundamental problems facing zoning decisions.[6] "A nonconforming use is a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance."[7] Nonconforming uses generally are not allowed to be enlarged, expanded, or altered; neither may the use be resumed after abandonment or destruction. Methods most commonly employed to terminate uses include: exercising the power of eminent domain; allowing the use to wither away; restricting expansion, repair, and resumption of use; monetary inducements to move; and amortization.[8] All but the last have been accepted by the courts, and all but the last are generally ineffective.[9]

Amortization is a technical term used to describe a period over which an owner may depreciate his investment.[10] The Den-

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[5] 357 F. Supp. at 481.

[6] In Wasinger v. Miller, 154 Colo. 61, 66, 388 P.2d 250, 253 (1964), the court stated: "In fact, non-conforming uses represent conditions which should be reduced to conformity as speedily as is compatible with justice." And in Grant v. Mayor & City Council, 212 Md. 301, 302, 129 A.2d 363, 365 (1957) the court found that:

> Nonconforming uses have not disappeared . . . because the general regulation of future uses and changes . . . have put the latter in an intrenched position often with a value that is great—and grows—because of the artificial monopoly given it by the law. Indeed, there is general agreement that the fundamental problem facing zoning is the inability to eliminate the nonconforming use.

[7] City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 453, 274 P.2d 34, 40 (1954).

[8] Annot., 22 A.L.R.3d 1134 (1968); Note, *Zoning: Amortization of Nonconforming Uses for Aesthetic Purposes*, 39 U.M.K.C.L. REV. 179 (1971).

[9] Note, *supra* note 8.

[10] Four cases involving amortization ordinances have been appealed to the Supreme Court, but all have been denied: Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950); National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577, *appeal dismissed*, 398 U.S. 946 (1970); State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, *cert. denied*, 280 U.S. 556 (1929); City of University Park v. Benners, 485 S.W.2d 773 (Tex. 1972), *appeal dismissed*, 411 U.S. 901 (1973).

ver sign ordinance referred to the graduated periods for termination dependent upon sign cost as a method of amortization.

> [B]ut in reality it is no more than notice to the owner and user of the sign that they have a period of time to make whatever adjustments or other arrangements they can. This is probably not a proper use of the word "amortization," and so used it contains no connotation of compensation or a requirement therefor.[11]

In determining the constitutionality of amortization ordinances, courts look to the reasonableness of the ordinance and of the period for termination which are generally ascertained by balancing the public gain against the private harm. For example, in *Harbison v. City of Buffalo*[12] the New York Court of Appeals held that these factors were to be considered in terminating nonconforming uses: the nature of the surrounding neighborhood, the value and the condition of any improvements, the nearest relocation area, the cost of relocation, and any other costs which would place a burden on the property owner. In *City of Los Angeles v. Gage*[13] the court said:

> The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss.[14]

The factors to which the *Gage* court looked in considering the reasonableness of the ordinance included: was the owner allowed time to make plans to offset at least partially his losses, was the loss extended over a period of years, and did the owner enjoy a monopolistic position as long as he was allowed to remain?

In *Naegele Outdoor Advertising Co. v. Village of Minnetonka*[15] the court looked to the value of the property interest at the end of the period or, in the alternative, to the value of the freedom from new competition for the statutory period to determine if it equalled the value of the property interest then remaining at the end of the period.[16]

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[11] 488 F.2d at 121.

[12] 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958).

[13] 127 Cal. App. 2d 538, 274 P.2d 34 (1954).

[14] *Id.* at 460, 274 P.2d at 44.

[15] 281 Minn. 492, 162 N.W.2d 206 (1968).

[16] Where the issue is decided by balancing the public good and the private harm, it is common for the court to grant the ordinance a presumption of validity, place the burden on the other party to show that it is not reasonable, and resolve whether that burden was met by looking to the particular facts and circumstances of the case. Standard Oil Co. v.

In *Art Neon Co.* the court observed that the legislative determination to terminate nonconforming uses is reached by balancing the burden placed on the individual against the public good to be gained.[17] Such a determination has a presumption of validity and "must only meet the test of 'reasonableness,' that is, the plan for termination must be 'reasonable.' "[18] The factors to which the court looked to verify the reasonableness of the ordinance included: the nature of the nonconforming use, the character of the structure, the location, the part of the individual's total business affected, salvage value, depreciation for income tax and other purposes, and any monopolistic advantage resulting from similar new structures being prohibited in the same area.[19] Applying these factors to the Denver ordinance, the court concluded that it was "basically reasonable."[20] Unlike the ordinance in *Naegele v. Minnetonka*, the Tenth Circuit held it not necessary that "the nonconforming property concerned have no value at the termination date."[21]

The period for termination of flashing signs was found to be reasonable. The fact that their effectiveness was greatly reduced was balanced by the extreme character of the signs and their relation to the public safety. But the Tenth Circuit concluded that the different "amortization" categories for other signs having different replacement costs were unreasonable:

> The replacement cost of the signs is not related to any of the relevant factors in the reasonableness tests, and presents no valid basis for different treatment of different signs ranging from three to five years. It has no bearing on the landowner's problems, nor on the sign owner's situation nor on the city's position. The most that can be said for replacement cost is that it could indicate, as of the date used, the size or complexity of the sign, but this is no real help. When the categories so constructed are removed, we are left with the

City of Tallahassee, 183 F.2d 410 (5th Cir. 1950); National Advertising Co. v. County of Monterey, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1962); Board of Supervisors v. Miller, 170 N.W.2d 358 (Iowa 1969); City of University Park v. Benners, 485 S.W.2d 773 (Tex. 1972); City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959). Other cases have taken into account the size of the investment involved, Village of Larchmont v. Sutton, 30 Misc. 2d 245, 217 N.Y.S.2d 929 (Sup. Ct. 1961), and have looked to the Internal Revenue Service amortization rules to gauge the reasonableness of the time period, National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577 (1970).

[17] 488 F.2d at 121.

[18] *Id.*

[19] *Id.* at 122.

[20] *Id.*

[21] *Id.* at 121.

> five-year maximum period for removal of all nonconforming signs in the ordinance, and this period . . . is a valid one.[22]

The Tenth Circuit found that the sign ordinance did not constitute a taking of private property without just compensation. In *Pennsylvania Coal Co. v. Mahon*,[23] Mr. Justice Holmes observed "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[24] The difference between a valid regulation and a taking is one of degree and not of kind, and is decided by balancing the loss to the individual property owner against the value of the regulation to the public.[25]

In his dissent to *Pennsylvania Coal*, Mr. Justice Brandeis argued that the difference should be one of kind and not of degree. For the police power to be valid, it must be grounded upon a rational basis for a valid public purpose and it must be an appropriate means to achieve a public goal. In Brandeis' view, the validity of the regulation under the due process clause should be based on the nature of the public purposes to be served and on the existence of a reasonable basis for the regulation. In contrast, Holmes based the validity on the amount of injury done to the individual.[26] In *Hadacheck v. Sebastian*[27] the Court said that while the police power may "seem harsh in its exercise . . . the

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[22] *Id.* at 122.

[23] 260 U.S. 393 (1922).

[24] *Id.* at 415.

[25] Justice Holmes' opinion has been strongly criticized. *See* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Stever, *Land Use Controls, Takings, and the Police Power—A Discussion of the Myth*, 15 N.H.B.J. 149 (1974). However, one of the leading cases finding an amortization ordinance unreasonable, Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. 1965), relied on language from *Pennsylvania Coal* in support of its decision. In this case the ordinance required all land used for open storage to be discontinued within 6 years. The court followed the dissent in Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958), holding that the ordinance constituted a taking without just compensation and quoted from *Pennsylvania Coal*:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. at 416. The *Hoffman* decision has been criticized for its narrow view of the police power. *See, e.g.*, LaChapelle v. Town of Goffstown, 107 N.H. 485, 225 A.2d 624 (1967); Note, *Municipal Corporations—Zoning—Termination of Nonconforming Uses*, 45 NEB. L. REV. 636 (1966); Note, *Zoning—Amortization Technique for Eliminating Nonconforming Uses Constitutes Taking of Private Property for Public Use Without Just Compensation*, 44 TEXAS L. REV. 368 (1965); Note, *Zoning—Nonconforming Uses—Amortization Theory of Abatement of Nonconforming Uses Violates Missouri Constitution*, 11 VILL. L. REV. 189 (1965).

[26] *See* Stever, *supra* note 25.

[27] 239 U.S. 394 (1915).

imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining."[28]

The Tenth Circuit noted that the sign restrictions were an integral part of the "aim or purpose of zoning,"[29] which in itself has been recognized as a valid exercise of the police power.[30] Of particular importance to the court was the fact that the sign ordinance "[d]id not prohibit the use of signs, but require[d] conformance to specified types in specified places."[31] Since the regulation did not absolutely prohibit advertising displays, it was not a taking without just compensation. "It [was] of general application under a plan adjusted to different conditions in each zone, and not directed to particular tracts or signs. It [was] a bona fide use restriction."[32]

Lawrence R. Kueter

B. *C.F. Lytle Co. v. Clark*, 491 F.2d 834 (10th Cir. 1974)

In 1965, plaintiff-appellant was issued a building permit for the construction of condominium units. A short time thereafter, the intended use was made nonconforming by an amendment to the zoning regulations of Pitkin County, Colorado. With less than a fifth of the proposed units completed, financial difficulties arose which required appellant to cease construction in 1966. The building inspector denied appellant's application for a new building permit to resume construction in 1971 because the original permit had expired and the condominium units were nonconforming. On appeal the board of adjustment affirmed the denial. Appellant sought a declaratory judgment and damages or an injunction in the federal district court. The trial court rendered judgment for appellee finding that appellant had abandoned the project.

In affirming,[33] the Tenth Circuit Court of Appeals held that the doctrine of relation back effecting a revalidation of the original building permit was not within the contemplation of section

[28] *Id.* at 410.
[29] 488 F.2d at 123.
[30] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
[31] 488 F.2d at 123.
[32] *Id.*
[33] C.F. Lytle Co. v. Clark, 491 F.2d 834 (10th Cir. 1974).

302(d) of the Uniform Building Code dealing with expired building permits.[34] The court found that any new building permit necessitated by expiration of the old permit was subject to current zoning regulations.[35]

In answer to appellant's argument that there must exist intent to abandon, the court distinguished between ordinances such as the Pitkin County zoning regulation which predicated abandonment of a nonconforming use on the discontinuance of a use for a stated period of time, and those which failed to specify a time limit. In the former, the finding of intent is unnecessary; in the latter, intent is an essential element.[36]

Even though appellant was deprived of all reasonable use of his undeveloped land because he had originally and voluntarily recorded a condominium declaration, this did not constitute a taking under the due process and just compensation clauses of the state and federal constitutions.[37] The court reiterated the general principle that a "landowner cannot create his own hardship and then require that zoning regulations be changed to meet that hardship."[38] Similarly, the court found that equitable estoppel did not arise when appellant's acts contributed to his adverse condition.[39]

VI. CONSCIENTIOUS OBJECTORS

Smith v. Laird, 486 F.2d 307 (10th Cir. 1973)
Cole v. Clements, 494 F.2d 141 (10th Cir. 1974)

In recent years the courts have been called upon to review an increasing number of conscientious objector cases which arise in the military.[1] With the termination of the draft and the move to a volunteer army, conscientious objection is now limited to a class of persons who are presently serving in the armed services. To qualify as an inservice conscientious objector, one must prove that his beliefs surfaced due to some known or unknown incident

[34] *Id.* at 837.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 838.
[38] *Id.*
[39] *Id.*

[1] Zillman, *In-Service Conscientious Objection: Courts, Boards and the Basis in Fact*, 10 SAN DIEGO L. REV. 108, 110 n.7 (1972).

while he was in the military, *i.e.*, his views must have "crystallized."[2]

The Tenth Circuit reviewed two Air Force conscientious objector cases, *Smith v. Laird*[3] and *Cole v. Clements*[4] during the past year. These inservice claims, as are all other inservice conscientious objector claims, were processed pursuant to Department of Defense Directive No. 1300.6[5] and its implementing service regulations. Since these cases arose in the Air Force, the procedures for conscientious objector discharge were provided by Air Force Regulation 35-24.[6] Pursuant to these regulations, both Captain (Doctor) Smith and Airman Cole applied to their respective commanders and alleged the required "crystallization" for discharge.[7] After application, each serviceman was interviewed by a

[2] See Polsky v. Wetherill, 455 F.2d 960, 962 (10th Cir. 1972) for what has been described as a classic example of "crystallization" after entering military service.

[3] 486 F.2d 307 (10th Cir. 1973).

[4] 494 F.2d 141 (10th Cir. 1974).

[5] 32 C.F.R. § 75 (1974). *See* Annot., 10 A.L.R. FED. 15, 31 (1972).

[6] 32 C.F.R. § 888e (1974). Pursuant to this regulation, an applicant must meet three tests to establish a prima facie case of conscientious objection. He must: (1) be opposed to war in any form; (2) ground his objection on religious principles as enunciated in Welsh v. United States, 398 U.S. 333 (1970) and United States v. Seeger, 380 U.S. 163 (1965); and (3) be sincere in his beliefs. This test is mandated by the regulations. 32 C.F.R. § 888e.10 (1974). *See also* Clay v. United States, 403 U.S. 698, 700 (1971).

[7] In his application, Airman Cole asserted that the incident which caused his change of heart was his realization that he was learning to equip aircraft with conventional weapons and not just nuclear weapons. Cole stated that he had not objected to equipping aircraft with nuclear bombs because in his own mind he doubted that nuclear warheads would ever be employed, but that he could not bring himself to place conventional weapons on aircraft knowing that some day they might be put into actual use. 494 F.2d at 145. Initially, these views seem contradictory or at least difficult to attribute to a conscientious objector. Apparently these statements were Cole's description of the "incident" which crystallized his views, after which Cole would work with neither kind of bomb—nuclear nor conventional.

Captain Smith's crystallization occurred under different circumstances. His medical education had been financed by the Air Force and he was engaged in a government-sponsored internship in pediatrics when he was notified in April 1971 that he was to be assigned to a normal Air Force active duty station and not pediatrics. Captain Smith asserted that:

> [T]he motivating force behind my application for Conscientious Objector status was a direct result of my belief in the sacredness of the Human Spirit . . . [because] . . . I had to a great degree dealt with my beliefs and their consequences by denying their meaning, rationalizing that as a pediatrician . . . I would not really be fulfilling a military role . . . and would thus be able to serve out my obligation . . . . [Upon notification of my new position], I fully realized that . . . I would clearly be performing a military function. . . . [T]hus I would be playing a definite part in supporting the violation of the Human Spirit.

486 F.2d at 312 (footnote omitted).

psychiatrist,[8] a chaplain,[9] and a hearing or investigating officer.[10] In Cole's case, all interviewers agreed that he was sincere in his beliefs about conscientious objection.[11] Smith's interviewers were likewise impressed with his sincerity; however, the hearing officer recommended approval of the application in *Smith* but recommended denial in *Cole*.[12] After the interview reports were completed, each applicant was allowed 15 days by regulation in which to submit a rebuttal.[13] Smith filed a comprehensive rebuttal[14] but Cole did not.[15] Each applicant's file was then forwarded to the local staff judge advocate for legal review. The judge advocate recommended that both applications be denied.[16] The files then proceeded upward within their respective chains of command, being denied at every level.[17] The applications were finally and formally denied at the highest level.[18] Petitions for writ of habeas corpus relief followed the final military decision.

The federal courts, including the Tenth Circuit, apply the "basis in fact" test to review military decisions.[19] This scope of review, described as "the narrowest known to law,"[20] means that a military decision will be upheld if there is any factual basis to support it.

Cole's writ was denied by the District Court for the District

[8] The psychiatrist examines for the presence of any psychiatric disorder which would warrant treatment or disposition through medical channels. 32 C.F.R. § 888e.20 (1974).

[9] A chaplain critiques and comments on the nature and basis of the applicant's sincerity and depth of convictions. *Id.*

[10] The investigating officer conducts a hearing and ascertains and assembles all relevant facts and creates a comprehensive record to facilitate an informed decision by higher authority. *Id.* § 888e.22(b).

[11] 494 F.2d at 142.

[12] 486 F.2d at 310-11.

[13] 32 C.F.R. § 888e.24(f) (1974).

[14] 486 F.2d at 311.

[15] There was no need for Cole to file a rebuttal since there was no adverse information to rebut. All interviewers had found him to be sincere.

[16] Cole v. Clements, 494 F.2d 141, 142 (10th Cir. 1974); Smith v. Laird, 486 F.2d 307, 309 (10th Cir. 1973).

[17] 494 F.2d at 143; 486 F.2d at 309.

[18] Cole's application was finally denied by Headquarters—United States Air Force. 494 F.2d at 143. Since Smith was an officer, his application was finally denied by the Secretary of the Air Force. *See* 32 C.F.R. § 888e.28 (1974).

[19] This test was first applied in Gilliam v. Reaves, 263 F. Supp. 378, 384 (W.D. La. 1966) to inservice conscientious objector cases as an outgrowth of the test used in selective service cases announced in Estep v. United States, 327 U.S. 114, 122 (1946). For a comprehensive list of courts applying this test, see Annot., 10 A.L.R. FED. 15, 92-93 (1972).

[20] Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957). *See also* Bishop v. United States, 412 F.2d 1064, 1067 (9th Cir. 1969).

of Colorado[21] and Smith's writ was granted by the District Court for the District of New Mexico with the proviso that he serve the remainder of his active duty commitment by performing civilian alternative service.[22]

On appeal, the "basis in fact" issue was reviewed in both cases.[23] Captain Smith appealed from the portion of the district court's order making his discharge conditional upon completion of alternative service.[24] Cole raised a procedural due process question based upon Air Force Regulation 35-24.[25]

I. BASIS IN FACT

In *Smith* the Tenth Circuit found that there was no basis in fact to deny Captain Smith's claim.[26] The court reviewed the hearing officer's report which had recommended disapproval of the application on two grounds: first, Captain Smith took his oath of office on the same day that he notified the Air Force of his intention to seek classification as a conscientious objector; and second, Captain Smith delayed in applying for discharge when he was informed that he would not be assigned to practice in pediatrics. Smith entered active duty and enrolled in medical school in the fall of 1967; in the spring of 1971, he was informed that he was ineligible for a sponsored residency in pediatrics; in the fall of 1971 he took his oath as a member of the Air Force Medical Corps in which he was to be assigned as a Flight Surgeon or a General Medical Officer.[27]

The court found that both the oath and the delay were insuf-

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[21] 494 F.2d at 142.

[22] 486 F.2d at 309.

[23] The government raised the issue in *Smith*, 486 F.2d at 309-14, and Cole raised it in his case, 494 F.2d at 145.

[24] The United States District Court for the District of New Mexico, in treating the alternative service issue in *Smith*, attempted to balance the equities: Captain Smith's sincere desire to leave the Air Force was weighed against the Air Force's desire to see that its investment in Smith's medical education not be wasted. The Tenth Circuit found that there was no statutory authority for imposing a condition upon release of an inservice conscientious objector who has served more than 180 days. The court held:

> [T]he decision to impose conditions, if any, on the discharge of in-service conscientious objectors, including those who have had a portion or all of their education paid for by the armed forces, is a question which should be resolved in the Congress . . . .

486 F.2d at 314. Accordingly, the alternative service requirement ordered by the district court was reversed. *Id.* at 315.

[25] 494 F.2d at 142-44.

[26] 486 F.2d at 313.

[27] *Id.* at 308-09.

ficient grounds upon which to base a finding of insincerity; and although the oath and application were "superficially inconsistent action," both grounds were adequately explained in Smith's rebuttal letter.[28]

The government argued that due weight must be given to the fact that eight Air Force command-level officers had reviewed Smith's application and recommended denial. The court responded:

> We deem of more importance, however, the reports of those who actually interviewed Captain Smith and had an opportunity to observe his demeanor.[29]

The treatment in *Cole* of the reviewing officer's comments appears to be inconsistent with the treatment in *Smith*. In *Cole*, Judge McWilliams, writing for the court, relied upon the reasoning of the judge advocate's report which had questioned Cole's sincerity.[30] He did not rely on the reports of the interviewers which had been considered determinative of sincerity in *Smith*. This is surprising since only two of three interviewers found Captain Smith to be sincere while all three found Airman Cole to be sincere.[31] The judge advocate's report, which Cole had no opportunity to rebut, was similar to the command-level reports disregarded in *Smith*; it was based upon the record and not on a personal interview with Cole. Judge McWilliams, in denying Cole's writ of habeas corpus, concluded that Cole's aversion to war was more a passing result of his wife's influence than a permanent change in Cole's beliefs.[32]

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[28] *Id.* at 311.

[29] *Id.* at 313 (footnote omitted). The court added:

> The review was conducted by career officers who had no personal contact with Captain Smith. Their recommendations that Doctor Smith's application be denied were based upon inferences drawn from an inanimate record, and all such recommendations were based not upon hard, reliable provable facts but rather upon disbelief as to his sincerity, or the alleged inconsistencies pointed out by the investigating officer . . . .

Id. at 313 n.13.

[30] 494 F.2d at 145. *Cf.* Dickinson v. United States, 346 U.S. 389, 397 (1953); United States v. Owen, 415 F.2d 383, 387 (8th Cir. 1969).

[31] The hearing officer recommended Cole for discharge. 494 F.2d at 142.

[32] *Id.* at 145. Generally, the influence of a wife has not been sufficient to support a "basis in fact" finding. In Cohen v. Laird, 315 F. Supp. 1265 (D.S.C. 1970), *aff'd* 439 F.2d 866 (4th Cir. 1971), five inservice conscientious objector cases were joined. In the only habeas corpus petition granted, serviceman Green asserted "that, with his marriage, his religious impulse quickened and his unalterable opposition to participation in war crystallized." *Id.* at 1276. The court, despite this pronouncement by the serviceman, noted that "petitioner was influenced by and was expressing the opinions of his wife. [However, the] Board completely disregarded, and took no note of, the reports of the chaplain, the psychi-

Since the issue in both cases was the determination of sincerity and since it has been recognized that those having personal contact with the applicant are in the best position to judge sincerity, as suggested in *Smith*, the *Smith* decision seems to be consistent while the *Cole* decision seems to be inconsistent with controlling precedent.[33]

II. DUE PROCESS REQUIREMENTS

The second issue which the court reviewed in *Cole* was the due process question. Cole based his claim on Air Force Regulation 35-24, paragraph 13:

> Any additional information other than the official service record of the applicant considered by [Headquarters—United States Air Force] which is adverse to the applicant, and which the applicant has not had an opportunity to comment upon or refute, will be made a part of the record and the applicant will be given a 15-day opportunity from date of receipt of the additional information to comment upon or refute the material before a final decision is made. The reasons for an adverse decision will be made a part of the record and will be provided to the individual.[34]

Cole argued that he was entitled to examine the negative recommendations of the command-level reviewers since these reports contributed new information to the file which he had not had an opportunity to rebut before the final decision was made by Headquarters—United States Air Force. He alleged, therefore, that the failure to provide this opportunity was a denial of procedural due process.[35]

Judge McWilliams responded to this argument by adopting the district court's analysis of the regulation:

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atrist and the . . . hearing officer . . . ." *Id.* at 1278. The court held that there was no basis in fact to deny serviceman Green's conscientious objection claim. The similarity of facts between *Cohen* and *Cole* is striking. In both cases command-level reviewers ignored the positive recommendations of the interviewers and mistakenly attached significance to the influence of petitioners' wives. *Cf.* Emerson v. McKean, 322 F. Supp. 251, 256 (N.D. Ala. 1971) (petitioner's family concerns were questioned).

[33] *See, e.g.*, Ferrand v. Seamans, 488 F.2d 1386, 1390 (2d Cir. 1973); Rastin v. Laird, 445 F.2d 645, 649 (9th Cir. 1971); United States *ex rel.* Donham v. Resor, 436 F.2d 751, 755 (2d Cir. 1971); United States *ex rel.* Tobias v. Laird, 413 F.2d 936, 937-38 (4th Cir. 1969); Chamoy v. Schlesinger, 371 F. Supp. 685, 687 (D. Hawaii 1974); Taylor v. Chaffee, 327 F. Supp. 1131, 1136 (C.D. Cal. 1971); Talford v. Seaman, 306 F. Supp. 941, 945 (D. Md. 1969); Reitemeyer v. McCrea, 302 F. Supp. 1210, 1221 (D. Md. 1969), *aff'd sub nom.* Quaglia v. Boswell, 423 F.2d 1229 (4th Cir. 1970).

[34] 32 C.F.R. § 888e.28 (1974).

[35] Brief for Appellant at 6, Cole v. Clements, 494 F.2d 141 (10th Cir. 1974).

> This difference in semantics [between information and reasons] demonstrates that the choice of terms is not accidental. *Information* is certainly different from *reasons*, and therefore . . . [Cole] should be and was afforded an opportunity to rebut any *factual matter* in the file but does not have the right to comment on and rebut the reasoning giving rise to each conclusion made at various levels of command.[36]

The court distinguished on their facts the two cases relied upon by the appellant, *Gonzales v. United States*[37] and *Crotty v. Kelly*.[38] The *Cole* court observed that *Gonzales* dealt with a recommendation which became the factual basis for the final decision denying a selective service applicant conscientious objector status, but the disputed recommendation in *Cole* was one made only in the chain of command decisional process and contained no new factual matter.[39] Judge McWilliams concluded that the command decision had complied with Air Force regulations and that due process requirements had been fulfilled.[40]

In focusing on the factual differences, however, the court misconceived the significance and import of *Gonzales*. *Gonzales* recognized, as implicit in the selective service regulations, the applicant's right to be aware of *any* adverse information which might be considered by the final decisionmaker.[41] Although *Gonzales* involved a selective service applicant, its holding has been applied not only to different military regulations in both

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[36] 494 F.2d at 144.

[37] 348 U.S. 407 (1955). *Gonzales* involved a registrant who had sought a conscientious objector exemption from his local draft board. After his draft board denied his claim, the registrant appealed. Under the procedure then applicable, the appeal board consulted the Department of Justice which conducted an investigation and recommended denial of the conscientious objector classification. The appeal board accepted and relied upon the recommendation. The registrant never saw the adverse Department of Justice report. He then appealed to the courts on due process grounds. *See also* Simmons v. United States, 348 U.S. 397 (1955); United States v. Nugent, 346 U.S. 1 (1953).

[38] 443 F.2d 214 (1st Cir. 1971).

[39] 494 F.2d at 144.

[40] *Id.*

[41] Mr. Justice Clark observed it is

> [i]mplicit in the Act and Regulations—viewed against our underlying concepts of procedural regularity and basic fair play—that a copy of the recommendation of the Department [of Justice] be furnished the registrant at the time it is forwarded to the Appeal Board, and that he be afforded an opportunity to reply.

348 U.S. 407, 412 (1955) (footnote omitted). He then concluded:

> [T]he right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered.

Id. at 415.

selective service[42] and inservice conscientious objector cases,[43] but also to hearings under the Federal Food and Cosmetic Act,[44] to discharge from the Michigan State Civil Service,[45] to motions for preliminary injunction for violations of the Sherman Act,[46] and to a motion for review of construction subsidy awards by the Maritime Subsidy Board of the Maritime Administration.[47]

Judge McWilliams indicated that *Crotty* did not apply because the inservice conscientious objector applicant in *Crotty* had not been given a copy of the interviewing officers' reports, which had been supplied to Cole.[48] However, by focusing on these factual differences, the court overlooked several facets of the *Crotty* decision. Judge Coffin in *Crotty* emphasized the final nature of the Conscientious Objector Review Board. This Board was the final decisionmaker (as the appeal board in *Gonzales* and Headquarters—United States Air Force in *Cole*) which should have access to *all* available information, including the applicant's responses to unfavorable recommendations.[49] Judge Coffin also acknowledged the policy of fundamental fairness implicit in the *Gonzales* decision:

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[42] *E.g.*, United States v. Thompson, 431 F.2d 1265 (3d Cir. 1970); United States v. Cabbage, 430 F.2d 1037 (6th Cir. 1970); United States v. Owen, 415 F.2d 383 (8th Cir. 1969); United States v. Purvis, 403 F.2d 555 (2d Cir. 1968).

[43] Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971); Violi v. Reese, 343 F. Supp. 462 (E.D. Pa. 1972); Finley v. Drew, 337 F. Supp. 76 (E.D. Pa.), *aff'd* 455 F.2d 515 (3d Cir. 1972); *cf.* Rohe v. Froehlke, 500 F.2d 113 (2d Cir. 1974) (reservist called to active duty for accumulation of unexcused absences from unit training assemblies successfully relied upon *Gonzales*). *But see* O'Mara v. Zebrowski, 447 F.2d 1085 (3d Cir. 1971); Caruso v. Toothaker, 331 F. Supp. 294 (M.D. Pa. 1971) (reservists' reliance upon *Gonzales* was unsuccessful).

[44] Hoffmann-La Roche, Inc. v. Kleindienst, 464 F.2d 1068, 1072 n.6 (3d Cir. 1972).

[45] Viculin v. Department of Civil Service, 386 Mich. 375, 192 N.W.2d 449, 462 (1971).

[46] Marshall Durbin Farms, Inc. v. National Farmers Org., Inc., 446 F.2d 353, 356 (5th Cir. 1971).

[47] Moore-McCormack Lines, Inc. v. United States, 413 F.2d 568, 585 (Ct. Cl. 1969). *But see* O'Dwyer v. Commissioner, 266 F.2d 575, 582 (4th Cir.), *cert. denied*, 361 U.S. 862 (1959) (unsuccessful effort to inspect revenue agent's reports) and Pearce v. United States, 262 F.2d 662, 664 (9th Cir. 1958) (unsuccessful effort to inspect probation report).

[48] 494 F.2d at 144.

[49] Crotty v. Kelly, 443 F.2d 214, 216 (1st Cir. 1971). Judge Coffin in *Crotty* suggested that:

> The Army procedure is more final than the Appeal Board procedure in *Gonzales*. There, at least, there was some provision for "rehearing" because the registrant could examine his file, including the Department's recommendation, after the Board's disapproval and could seek a re-opening if he found erroneous information. No similar provision exists in the military procedures
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> . . . .

Id. at 216 n.1.

> The reasoning of that opinion [*Gonzales*] was not based upon the intricacies of the particular regulations under scrutiny but was based upon "underlying concepts of procedural regularity and basic fair play."[50]

The *Crotty* court not only adopted the rationale of *Gonzales* but extended it, recognizing a trend for broader availability of adverse information.[51] *Crotty*, decided under Department of Defense Directive No. 1300.6, obliged the military to provide a copy of the interviewing officers' reports where there had been no duty before.[52] The court in *Crotty* found "implicit in the regulation" the due process requirement that applicants be given an opportunity to rebut adverse interview reports. *Cole*, decided under the revised directive of 1971 in which the military was compelled to disclose these adverse interview reports to the applicant, provided an opportunity to find "implicit in the regulation" the right of the applicant to review command level recommendations as well.

Another view of the *Cole* fact pattern and of Air Force Regulation 35-24 paragraph 13 is suggested by a recent Eighth Circuit decision, *Chilgren v. Schlesinger*.[53] In *Chilgren* the due process and basis in fact issues were juxtaposed to raise this question: If the command-level reviewers did not provide adverse factual information, as was argued by the government in the due process portion of its brief,[54] and if all interview reports were favorable, what basis in fact was there to deny the conscientious objector claim? All of the information prior to the command-level review

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[50] *Id.* at 217.

[51] United States v. Fisher, 442 F.2d 109, 116 (7th Cir. 1971); United States v. Cummins, 425 F.2d 646, 649 (8th Cir. 1970); United States v. Noyd, 18 U.S.C.M.A. 483, 489 (1969).

[52] *Crotty* was decided under Department of Defense Directive No. 1300.6 (1969) where there was no duty to disclose interviewing officers' reports. The applicable section in the revised directive is found at 32 C.F.R. § 888e.24(f) (1974).

[53] 499 F.2d 204, 208 (8th Cir. 1974):

> It is argued, on the one hand, that the Air Force was not required to furnish the record to [Chilgren] because it contained no adverse information; yet, on the other hand, [the government] argue[s] that there was a basis in fact in that same record which justified reversal of hearing officers' recommendations in [Chilgren's] favor. We fail to see how such a basis in fact could be found in a record containing no adverse information.

[54] Brief for Appellee at 13-14, Cole v. Clements, 494 F.2d 141 (10th Cir. 1974). The government argued that:

> [A]ll the recommendations of the entire chain of command were merely comments of the file as the applicant had prepared it. . . . They contained no new information and consisted solely in critical evaluation of matters *known* to the applicant.

was favorable to Airman Cole. Since there was no adverse factual information in Cole's file, there could be no adverse decision.

III. CONCLUSION

The *Cole* decision appears to be inconsistent with current precedent. The court's review of the "basis in fact" for denial of the application in *Cole* is in conflict with the review in *Smith* where the application was granted. Additionally, the decision in *Cole* seems to be inconsistent with the due process policy of fundamental fairness in *Gonzales* and *Crotty*.

E. Stephen Temko

VII. AMERICAN INDIANS

Choctaw Nation v. Oklahoma, 490 F.2d 521 (10th Cir. 1974)

In *Choctaw Nation v. Oklahoma*[1] the Tenth Circuit Court of Appeals considered the third and final stage of a dispute which had involved 6 years of litigation.

Initially, the Cherokees, and the Choctaws and Chickasaws as intervenors, brought suit against the State of Oklahoma and holders of various leases on mineral rights to the bed of the Arkansas River.[2] Because of the shift in the flow of the river, valuable sand, gravel, oil, and gas deposits were exposed. The Indian tribes claimed that the riverbed lands had been conveyed to them by the United States; they sought both an accounting of lease monies and an injunction.[3] The State counterclaimed for a decree to quiet title in Oklahoma.[4] The trial court and the Tenth Circuit rendered judgment for the State. On appeal, the U.S. Supreme Court reversed.[5]

The second phase arose on remand to the trial court. The parties disagreed over whether the Supreme Court had decided present title to the riverbed or only past title.[6] The trial court held that the Supreme Court had determined present title. The parties also disagreed over the amount of damages to be paid, some con-

[1] 490 F.2d 521 (10th Cir. 1974).
[2] Cherokee Nation v. Oklahoma, 402 F.2d 739 (10th Cir. 1968).
[3] *Id.* at 742.
[4] *Id.*
[5] Choctaw Nation v. Oklahoma, 397 U.S. 620, *rehearing denied*, 398 U.S. 945 (1970).
[6] Cherokee Nation v. Oklahoma, 461 F.2d 674, 677 (10th Cir. 1972).

tending that they were entitled to the value of the minerals taken and others contending that they were entitled to the amount of the lease payments. Total receipts in lease payments collected by the State totalled $786,541.67. The trial court held that Oklahoma should account for all of the lease, rental, and royalty payments received.[7] These findings were affirmed by the Tenth Circuit.[8]

The last phase involved a dispute over the payment of interest on these funds. Pursuant to the Oklahoma constitution,[9] the lease payments had been placed in the permanent school trust fund. The principal could not be invaded, but the interest or income could be and was paid periodically to school districts throughout the State.[10] The amount of interest claimed to have been earned and to be due to the Indian tribes was $212,423.83.[11] The trial court disallowed the claim for interest. On appeal, the Tenth Circuit recognized the issue implicit in the dispute: "The problem faced by the trial court . . . is . . . [that] the monies for which an accounting was sought were no longer in existence, having been expended by the State pursuant to constitutional mandate."[12] The Tenth Circuit concluded, based upon the applicable Oklahoma law, that "the trial court's action disallowing interest under all the circumstances was equitable, and not clearly erroneous" in this "difficult situation."[13]

VIII. DUE PROCESS-MUNICIPAL EMPLOYEES

Abeyta v. Town of Taos, 499 F.2d 323 (10th Cir. 1974)

Several employees of the Taos, New Mexico police department were dismissed in 1972 when the department was reorganized. Each dismissal was based upon specific allegations of misfeasance. In *Abeyta v. Town of Taos*,[1] the discharged employees

[7] *Id.* at 677.

[8] Cherokee Nation v. Oklahoma, 461 F.2d 674 (10th Cir.), *cert. denied*, 409 U.S. 1039 (1972).

[9] OKLA. CONST. art. XI, §§ 2, 3.

[10] Choctaw Nation v. Oklahoma, 490 F.2d 521, 523-24 (10th Cir. 1974).

[11] *Id.* at 524.

[12] *Id.* at 526.

[13] *Id.* at 527.

[1] 499 F.2d 323 (10th Cir. 1974).

sought reinstatements and back wages. The District Court for the District of New Mexico denied relief to all but one of the employees.[2]

On appeal, the first issue raised by the plaintiffs challenged the procedure followed by the town council in approving the dismissals. Taos had a mayor-council form of government with four council positions. The mayor had no statutory authority to vote in council deliberations except in the event of a tie vote by the council.[3] A New Mexico statute provided that a municipal employee could be discharged only by a majority vote of all council members.[4] In the case of one plaintiff, two council members and the mayor voted for his dismissal, one council member voted against, and the fourth council member was absent at the time of the vote. Since not all of the council members had participated in the vote which did not result in a tie, the vote of the mayor was improper.[5] Notwithstanding this defect, the district court refused to order reinstatement and the court of appeals affirmed. The Tenth Circuit reasoned that the town council could properly discharge the plaintiff regardless of the vote of the absent councilman. If, at the next meeting, that councilman were to vote for dismissal, the statutory majority for dismissal would be realized. If he were to vote for retention, a tie vote would result and the mayor could then properly exercise his right to break the tie in favor of dismissal. Therefore, the court observed that the prayed-for relief "would be ephemeral at best."[6]

Plaintiffs' second and major contention on appeal was that their employment was a "property" interest protected by the fourteenth amendment's due process clause which required a hearing on their dismissals. The court responded with the general rule that public employees do not have a property interest in their employment.[7] Exceptions to this general rule exist in cases where

[2] By order of the district court, affirmed on appeal, a woman clerical employee was reinstated with back wages. She had received a termination letter from the police chief which stated that there was no place in the department for a woman. In a letter to the police commission, the police chief cited the following reasons for her dismissal: job related incompetence, sexual misconduct with male members of the department, and failure to turn over traffic fines received by her to the police magistrate. Since these allegations injured her reputation, it was held that failure to hold a hearing on her dismissal was a violation of due process under the fourteenth amendment. *Id.* at 325-26.

[3] N.M. STAT. ANN. § 14-10-3 (1953).

[4] *Id.* § 14-10-6(D)(1).

[5] 499 F.2d at 328.

[6] *Id.*

[7] *Id.* at 327. *See generally* Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Lontine v. VanCleave, 483 F.2d 966 (10th Cir. 1973).

the employees hold contracts for continuing employment, for example, tenured teachers.[8] In this case, however, the court noted that the plaintiffs had no contract with the town and no agreement as to any term of employment. Consequently, their employment was "terminable at will."[9] Since due process did not attach to such employment as a property interest, the town had not violated any constitutional right in failing to hold a hearing on the dismissals.[10]

Plaintiffs also argued that the town's allegations of misfeasance as grounds for dismissal had damaged their reputations and chances for obtaining new employment. Although some of the charges involved gross and possibly criminal misconduct,[11] the court of appeals dismissed this argument on the theory that the charges did not allege dishonesty or immorality.[12] The court stated that the plaintiffs had produced "no evidence whatsoever to support this argument."[13]

As their fourth and final point of appeal, plaintiffs alleged that they were dismissed for exercising their right of free speech in sending a grievance letter to the police chief. Inasmuch as specific grounds of misfeasance had been set forth in terminating each plaintiff's employment, the court of appeals found this argument to be without merit.[14]

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[8] Perry v. Sindermann, 408 U.S. 593, 601 (1972):

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

[9] 499 F.2d at 327. *Accord*, 1 A. CORBIN, CORBIN ON CONTRACTS 292-93 (Supp. 1971).

[10] Due process rights affecting public employees may arise by virtue of other circumstances. *Supra* note 2.

[11] Among the charges were the following: shooting at a police car, shooting out windows in town, lack of judgment in confidential matters, mistreatment of persons arrested for traffic violations, and disobeying orders. 499 F.2d at 326 nn. 1 & 2.

[12] Compare the allegations *supra* note 2 with those *supra* note 11.

[13] In support of this conclusion, the court noted that some plaintiffs had already found new employment. Those who had not, the court further noted, were unwilling to seek employment away from Taos. 499 F.2d at 327-28.

[14] *Id.* at 328. Specifically excepted from this finding was the plaintiff referred to in note 2 *supra*.