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# Constitutional Law Survey

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## I. INTRODUCTION

During the survey period, the Tenth Circuit attempted to give constitutional definition to individual rights where the Supreme Court had left the contours of those rights subject to specific factual circumstances. A majority of the decisions addressed constitutional issues in the context of Civil Rights litigation due to the increasing use of Civil Rights laws to determine the existence of duties arising when government action affects individual rights. Cases selected for this Survey, involving the First Amendment right of government employees to speak on issues of public concern and the Fourteenth Amendment right to personal safety and security while in custody of the state, evidence doctrine subject to shifting when dependent on different factual circumstances. Cases involving sovereign immunity and a pretextual prosecution to suppress speech are indicative of: (1) the need for a constant watchful eye of the judiciary to protect individual rights from ever-changing political objectives; (2) the fact that concepts of federalism are alive and well and require revisiting our constitutional roots. Each case is analyzed to provide the practitioner with its jurisprudential foundation and to indicate the impact that these decisions may have in the future.

## II. FIRST AMENDMENT — FREEDOM OF EXPRESSION

### A. *Matters of Public Concern*

The United States Supreme Court first addressed a public employee's First Amendment right to speak on issues of public concern in *Pickering v. Board of Education*.[1] The two-prong analysis set forth in *Pickering* requires: (1) that the speech was on a matter of public concern;[2] and (2) on balance, the speaker's right to speak as a citizen on matters of public concern outweighs the state employer's interest in promoting the efficiency of the public services it performs through its employees.[3] Matters of "public concern" relate to "any matter of political, social, or other concern to the community."[4] When the speech concerns a matter "only of personal interest, absent the most unusual circumstances" the actions of the employer are not subject to a First Amendment challenge. The Tenth Circuit Court of Appeals was faced with applying *Pickering* and its progeny in three different areas: racial discrimination, government corruption, and sexual harassment.

1. 391 U.S. 563 (1968).

2. *Id.* at 569. The analytical framework for determining what is of concern to the public was not specifically developed as this issue in *Pickering* was determined on the facts of the case. *See infra* note 4 and accompanying text for a standard used to determine what is of "public concern".

3. Connick v. Myers, 461 U.S. 138 (1983).

4. *Id.*

1. Tenth Circuit Cases

a. *Racial Discrimination and Government Corruption*: Patrick v. Miller[5]

*Patrick* involved a city finance director speaking on behalf of a co-employee. The appeal arose out of a suit filed by Fred L. Patrick, former Finance Director and City Controller of the City of Norman, Oklahoma. Patrick alleged that his employment was terminated because of statements made in his capacity as Chairman of the City of Norman Retirement Board and as supervisor of the city print shop.[6] Patrick assisted a print shop employee in preparing the employee's racial discrimination case against the city and questioned the city's use of retirement funds to balance the budget.[7] One month later, the city terminated Patrick's employment.

Patrick filed suit under 42 U.S.C. §§ 1981 and 1983 alleging violations of his statutory rights under § 1981 and his constitutional rights under the First and Fourteenth Amendments.[8] The defendants[9] moved for summary judgment based on the doctrine of qualified immunity. The district court denied the defendants' motion with respect to the § 1983 claim but granted their motion with respect to the § 1981 claim.

The defendants appealed and Patrick cross-appealed. The court of appeals affirmed the district court with respect to the § 1983 claim but reversed and remanded with respect to the § 1981 claim.[10] The single issue before the court was whether those defendants named individually were to be protected by qualified immunity.[11] The court's analysis of this issue required a determination using the test created in *Harlow v. Fitzgerald*.[12] Under *Harlow*, Patrick was required to show that his First

5. 953 F.2d 1240 (10th Cir. 1992) (Before McKay, Barrett and Brorby, J.) (Opinion by Brorby, J.).

6. *Id.* at 1242. These positions were part of Patrick's official responsibilities as Finance Director and City Controller. *Id.*

7. *Id.* Both incidents occurred during June of 1988. Shirley Franklin, a print shop employee, initiated a racial discrimination complaint against the city on May 18, 1988. Patrick intended to help Franklin with her complaint and met with the City Attorney on June 23 to discuss his possible involvement. On June 21, Patrick expressed his concerns regarding the retirement funds during a meeting of the City of Norman Retirement Board. During this meeting, the Retirement Board voted to seek the City Attorney's opinion as to the propriety of the use of retirement funds.

8. 42 U.S.C. § 1983 provides in relevant part:

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

42 U.S.C. § 1983 (1988).

9. The original defendants included Eugene Miller, the City Manager, John Bloomberg, the Director of Administrative Services as well as the city of Norman. On appeal, "defendants" includes only Miller and Bloomberg.

10. *Patrick*, 953 F.2d at 1251-52.

11. *Id.* at 1243.

12. 457 U.S. 800 (1982). This test required a determination of whether a defendant had violated "clearly established statutory or constitutional rights of which a reasonable person would have known" at the time the challenged conduct occurred. *Id.* at 818.

Amendment rights in speaking out were established at the time of his firing.[13] In the government employer/employee context, Patrick would make a sufficient showing of established rights under *Harlow* by meeting the *Pickering* test.[14] Satisfying the *Pickering* test in this case required a showing that Patrick had a clearly established constitutional right to speak on behalf of his co-employee on the issue of racial discrimination, or to speak out against perceived governmental misconduct as a matter of public concern.

The court initially focused on Patrick's action with regard to the co-employee's racial discrimination claim.[15] The court determined the first prong of the *Pickering* test was met based on Patrick's statements regarding employer practices that affected a co-employee rather than himself.[16] Defendants asserted that the statements should be regarded as a personal grievance or an internal personnel matter, and as such, were not protected by the First Amendment.[17] The court disagreed. Although the precise content of Patrick's statements were not evidenced by the record, the fact that the statements were in opposition to racially discriminatory practices and were made in the presence of numerous individuals was sufficient to characterize them as matters of social concern to the community.[18] Furthermore, the subject matter of the statements was of public concern regardless of the fact that the statements were directed to city officials.[19]

Patrick's statements regarding potential illegalities in the city budget process were made pursuant to the duty imposed by his position as trustee of the retirement fund.[20] The court viewed his statements in context. Patrick spoke during a public meeting addressing matters of political and social concern. Furthermore, the court found that Patrick's statements were unmotivated by personal interest or hostility. He merely asked if proper budgetary procedures had been followed. Under these circumstances, Patrick's statements regarding the city budget were "clearly established" protected speech.[21] After concluding that the statements on racial discrimination and budgetary improprieties were matters of "public concern", the court proceeded to the second prong of the *Pickering* test; balancing the speaker's right to speak as a citizen against the city's interest in promoting the efficiency of its employees.

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13. Patrick's other constitutional claim, that the Defendants deprived him of his property interest in continued employment without due process of law in violation of the fourteenth amendment, required him to show he had a property interest in continued employment with the City of Norman. *See* Graham v. City of Okla. City, 859 F.2d 142 (10th Cir. 1988). A property interest in continued employment is a question of state law and therefore that portion of this case is omitted from this survey.

14. *Patrick*, 953 F.2d at 1246-47.

15. *Id.*

16. *Id.*

17. *Id.* at 1247.

18. *Id.*

19. *Id. See also* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979) (employee's private communication with employer protected by first amendment).

20. *Patrick*, 953 F.2d at 1242.

21. *Id.* at 1248.

The court found Patrick's interest in speaking out against racial discrimination and budgetary impropriety as "self-evident."[22] In evaluating the defendants' interest in effective functioning of government, the court noted the lack of support in the record for the defendants' assertions that Patrick's statements regarding budgetary improprieties were false, interfered with the budget process or discredited their integrity.[23] The defendants also failed to demonstrate any governmental interest justifying the suppression of statements regarding racial discrimination.[24] The court affirmed the district court since Patrick, having met the *Pickering* test, satisfied the *Harlow* requirement.[25] Therefore, the defendants were not entitled to qualified immunity.

b. *Sexual Harassment*: Woodward v. City of Worland[26]

The Tenth Circuit Court of Appeals was faced again with applying the *Harlow* and *Pickering* tests in the context of § 1983[27] in *Woodward v. City of Worland*. The plaintiffs, former employees of the city of Worland, Wyoming, filed suit alleging they were subjected to sexual harassment by two of the defendants, Williams and Sackett (Officers).[28] The plaintiffs further alleged that the remaining defendants, Tolley and Seghetti (Supervisors) knew about the harassment and failed to curb it.[29] Furthermore, the plaintiffs alleged that, after complaining of the harassment, the defendants retaliated against them.[30] After the plaintiffs left the employ of the city, they filed suit under § 1983 asserting violations of their Fourteenth Amendment rights to equal protection and due process, as well as a violation of their First Amendment right of free speech.[31] The defendants moved for summary judgment of all claims based on qualified immunity under *Harlow*. Under qualified immunity, government officials generally are shielded from liability for civil damages for violating constitutional rights if their conduct does not violate "clearly established" constitutional rights of which a reasonable person

22. *Id.*

23. *Id.* This refers to the second prong of *Pickering* which requires a weighing of the speaker's interest in speaking against the government's interest in suppressing that speech to promote effective functioning of the public employer's enterprise.

24. *Patrick*, 953 F.2d at 1248.

25. *Id.* at 1249. (According to plaintiff's attorney, the case was settled prior to retrial.)

26. 977 F.2d 1392 (10th Cir. 1992)(Before Ebel, C.J. and McWilliams, Senior C.J. and Hunter, Senior District Judge. Opinion by Ebel, C.J.).

27. *See supra* note 8 for relevant text of 42 U.S.C. § 1983.

28. *Woodward*, 977 F.2d at 1394. Williams and Sackett were not co-employees or supervisors of the plaintiffs, however, the plaintiffs performed dispatch services and were required to interact directly with the officers. *Id.* at n.1.

29. *Id.* Tolley and Seghetti, were the officers' supervisors and were technically not employers of the plaintiffs'. As Police Chief and Sheriff, respectively, Tolley and Seghetti exercised authority over the plaintiffs and their working conditions as ex officio voting members of the JPB. *Id.* at n.2.

30. *Id.* Plaintiffs alleged that the harassment and retaliation that followed after reporting it to their supervisors was so intolerable that it amounted to a constructive discharge. Plaintiff Butler resigned in May 1987, plaintiffs Molina and DeSomber resigned in May 1990.

31. *Id.* at 1396. Due to the focus of this portion of the survey, the due process and equal protection claims will not be discussed.

would have known.[32] The district court denied the motion and defendants appealed.

The court of appeals reversed. The court applied the *Pickering* test to the statements made by the employees, first by determining whether the statements were of public concern.[33] If the statements did not regard matters of public concern, the plaintiffs would not have a "clearly established" right to First Amendment protections. How the court classifies particular speech under the public concern/personal concern distinction set forth by the Supreme Court in *Connick v. Myers*[34] focuses "on the motive of the speaker and attempt[s] to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose."[35] The court found that the thrust of the plaintiffs' complaint was to stop the sexual harassment of them, personally and individually.[36] Although the complaint was personal, the court went on to determine whether the dispute addressed important constitutional rights in which society at large has an interest in protecting. If so, the speakers would therefore be afforded constitutional protection.[37]

Noting that no prior case has held that speech similar to the complaints of sexual harassment made by the plaintiffs pertained to a matter of public concern, the court declined to hold that plaintiffs' complaints were of public concern.[38] Additionally, the court cited the fact that the Officers, not acting as supervisors or co-employees of the plaintiffs, would not be liable under § 1983 for responding critically to the plaintiffs' speech.[39]

2. Analysis of Patrick and Woodward

The Tenth Circuit Court of Appeals has created a bright line distinction through its decisions in *Patrick* and *Woodward.* Government employees who speak on behalf of a racial minority or on behalf of the electorate are afforded the protection of the First Amendment when speaking on issues of racial discrimination or fiscal impropriety. Employees who speak for themselves, such as women on issues of sexual harassment in the workplace, are not. The different outcomes of *Patrick* and *Woodward* indicate a tediously slow recognition of constitutional protections where the alleged violation is based on sex.

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32. *Id.*
33. *Id.* at 1403-04.
34. 461 U.S. 138 (1983).
35. *Woodward*, 977 F.2d at 1403. The court cited an earlier Tenth Circuit decision, Conaway v. Smith, 853 F.2d 789 (10th Cir. 1988), which analyzed *Connick*. However, the specific analysis created in *Connick* determined whether speech was calculated to disclose misconduct or dealt with only personal disputes and grievances with *no relevance to the public interests*. This analysis has been construed as requiring a "motive of the speaker" determination. The difficulty in applying a motive requirement occurs when the speaker may have a mixed motive, as in the case of Patrick speaking on behalf of a subordinate because she worked for him, as well as because he suspected racial discrimination.
36. *Woodward*, 977 F.2d at 1403-04.
37. *Id.* at 1404.
38. *Id.*
39. *Id.*

The court in *Patrick* easily characterized the plaintiffs' statements regarding racial discrimination as a matter of social concern to the community while, at the same time, distinguishing these statements from internal grievances based on the fact that the statements were made on behalf of someone else. While this may be a simple resolution of the public concern/private concern problem addressed in *Connick*, it creates a distinction that is inconsistent with an individual's right to seek vindication of her or his own constitutional rights. Based on this distinction, if a government employee's constitutional rights are violated, they must rely on someone else to voice their defense. Luckily, in *Patrick*, the plaintiff's right to speak on the particular issues of racial discrimination and budgetary impropriety were "self-evident." Although the Supreme Court and the Tenth Circuit Court of Appeals have failed to provide specific guidance as to what is a "public concern," the issues of racial discrimination and malfeasance of government officials have historically been regarded as matters of social concern. Regardless of the events of recent past,[40] speaking out against the sexual harassment of an individual is not considered an issue of "public concern" in the Tenth Circuit.

In 1951 only one in three women participated in the labor force.[41] By 1986, half of all women in the United States worked outside the home or were looking for work.[42] The dramatic increase of women in the labor force has affected child care, elder care, and employee benefits, and has restructured the relationships between men and women in the workplace.[43] Incidents of sexual harassment have increased as well. Surveys conducted as early as 1963 characterized behavior by male coworkers, that would today be classified as sexual harassment, as acting "fresh" and dismissed such behavior as inconsequential.[44] By 1988, when the plaintiffs were allegedly harassed, such behavior was not considered inconsequential, costing federal taxpayers $267 million over a two year period because of lowered morale, loss of productivity, absences, job turnover and escalating litigation costs.[45] Sexual harass-

40. *See Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1283 (1992) (selected essays and articles regarding the Senate Judiciary Committee hearings on alleged sexual harassment of Anita Hill by Supreme Court nominee Clarence Thomas). The hearings occurred pursuant to the "advice and consent" proceeding for Presidential appointment of Supreme Court justices "by and with the advice and consent of the Senate." U.S. CONST. art II, § 2, cl. 2.

41. *Women in the Work Force: Supreme Court Issues: Hearing Before the Subcommittee on Employment Opportunities of the Committee on Education and Labor*, 99th Cong., 2d Sess. 5 (Sept. 30, 1986) (statement of Jill Houghton Emery, Acting Director, Women's Bureau, Department of Labor).

42. *Id.*

43. *Id.* at 5-6.

44. LIN FARLEY, SEXUAL SHAKEDOWN, THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 19-20 (1978). The author refers to a study conducted by the Hogg Foundation for Mental Health published in WOMEN VIEW THEIR WORKING WORLD (1963).

45. U. S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 40 (1988) [hereinafter AN UPDATE]. The time period surveyed was May 1985 to May 1987. This study updated the U.S. Merit System's Protection Board's 1981 report on sexual harassment in the federal government. *Id.* at 12. The 1981 cost estimate was $189 million for the survey period May 1978 to May 1980. U. S. MERIT SYSTEMS PROTECTION BOARD, REPORT ON SEXUAL HARASSMENT IN THE FEDERAL WORK-

ment in the workplace has been and continues to be a matter of public concern.

The *Woodward* court's analysis of the plaintiffs' speech regarding sexual harassment focused on the "content, form and context" of their speech as revealed by the whole record.[46] Upon a review of the record, the court noted general references by the plaintiffs to the possibility that other women were subjected to the harassment.[47] Yet both parties stated that one of the plaintiffs, Beverly DeSomber, supported one of the other plaintiffs in her sexual harassment complaint.[48] The court also reasoned that the purpose or substance of the complaint did not assert that the sexual harassment prevented the Wyoming Joint Powers Board (JPB) from properly discharging its official responsibilities.[49] Yet the plaintiffs, as employees of the JBP responsible for discharging its official responsibilities, may have been subject to a hostile work environment which prevented them from performing their duties.[50] Finally, the alleged harassers were police and sheriff's officers sworn to uphold the law. They were charged with a duty that is comparable to, if not exactly the same as, the duty assumed by city officials for the management of public funds. If the officers were participating in behavior allegedly in violation of federal civil rights laws, the standard employed in *Patrick* for analyzing governmental corruption is applicable. Allegations that law enforcement officials are violating the law is a matter of political and social concern to the community.

Instead, the *Woodward* decision was premised on the personal nature of the allegations. The court failed to examine whether the allegations contained in the record would constitute a hostile work environment. All of the plaintiffs were personally subjected to sexual harassment. The Supreme Court, as well as the Tenth Circuit, have rec-

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PLACE: IS IT A PROBLEM? 76 (1981) [hereinafter Is IT A PROBLEM?]. Both reports noted that forty-two percent of the women surveyed experienced some form of sexual harassment during the survey period. AN UPDATE, *supra*, at 11; Is IT A PROBLEM?, *supra*, at 36. Fourteen percent of the men surveyed in 1988 and fifteen percent surveyed in 1981 experienced some form of sexual harassment during the survey period. AN UPDATE, *supra*, at 11; Is IT A PROBLEM?, *supra*, at 36.

46. Woodward v. City of Worland, 977 F.2d 1392, 1403 (10th Cir. 1992).

47. *Id.* at 1404 n.16.

48. Appellant's Opening Brief at 17, Woodward v. City of Worland, 977 F.2d 1392 (10th Cir. 1992) (No. 91-8034) ("As the supervising Dispatcher, DeSomber, after she supported Molina . . . alleges that Sheriff Seghetti pressured her to stop the complaint."); Appellees' Brief at 7, Woodward v. City of Worland, 977 F.2d 1392 (10th Cir. 1992) (No. 91-8034) ("Because of her own experiences and because she believed that no employee should have to put up with sexual harassment, Desomber openly supported Molina in her complaint against Williams. Sheriff Seghetti put pressure on DeSomber to stop Molina's complaint. . . ."); *Woodward*, 977 F.2d at 1396.

49. *Woodward*, 977 F.2d at 1404.

50. Sexual harassment severe or pervasive enough to actually affect the alleged victims work conditions creates a hostile work environment and is considered a violation of 42 U.S.C. § 2000 (1986). Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). The actions of the officers were alleged to include the following: rubbing the plaintiffs' necks, pinching and patting their buttocks and physical simulation of masturbation in the plaintiffs' presence. Appellees' Brief at 3, *Woodward* (No. 91-8034). There were also invitations for sex and statements such as "spread 'em baby", "I want your bod", and "I'd like to rip your tits off". *Id.* at 5.

ognized that sexual harassment need not be targeted at an individual, but may be so pervasive as to create a generally hostile work environment.[51] The crucial allegation in *Woodward* concerned retaliation for their complaints of sexual harassment.

If the actions of any one of or all of the defendants, by harassment or retaliation, constituted a hostile environment as to the female defendants, this situation is analytically indistinct from Patrick's speech on behalf of a black woman against racially discriminatory policies in city government. Patrick's speech was intended to redress a discriminatory practice as applied to one person. The result of *Woodward* begs the question. If one of the plaintiffs had stated, "I ask you to stop harassing me on behalf of all women," would their complaints then be protected from retaliation? To require such a statement to bring the issue under the ambit of "public concern" fails to recognize that we all have a right as citizens to speak out against oppression, regardless of where it occurs and who is the victim.

### B. *Pretextual Prosecution to Suppress Speech*

In *Bantam Books, Inc. v. Sullivan*, the Supreme Court recognized that freedom of expression is "vulnerable to gravely damaging, yet barely visible encroachments" requiring rigorous procedural safeguards.[52] *Bantam Books* involved a state commission's administrative restraint, by threatened prosecution of wholesalers, on the distribution of publications absent a judicial determination that such publications were lawfully banned. The Court imposed a heavy presumption against the constitutional validity of any system of prior restraint of expression and stated such a system would be tolerated only where it allowed judicial supervision and assurance of "almost immediate judicial determination of the validity of the restraint."[53]

Two years later in *Dombrowski v. Pfister*, the Court returned to the issue of prior restraint of speech upon review of a district court's denial of declaratory and injunctive relief.[54] The plaintiffs in *Dombrowski*, civil rights activists, asked the district court to enjoin the Louisiana state governor, law enforcement officials, and a legislative committee from prosecuting or threatening to prosecute them for violations of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law.[55] The district court dismissed the complaint

51. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-66 (1986); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987). There are two different types of sexual harassment claims recognized under Civil Rights laws: *quid pro quo* and hostile work environment. *Vinson*, 477 U.S. at 65. *Quid pro quo* sexual harassment occurs when the alleged victim is required to exchange sexual favors or tolerance of the harassment as a condition of continued employment. *Id.* Hostile work environment sexual harassment occurs when the workplace is so offensive such that it effects the proper performance of duties required for the employee's position. *Id.*

52. 372 U.S. 58 (1963).

53. *Id.* at 66-70.

54. Dombrowski v. Pfister, 380 U.S. 479 (1965).

55. *Id.* at 482.

and the court of appeals affirmed. The Supreme Court reversed, noting that the "chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospect of its success or failure."[56]

An unusual twist on prior restraint of speech may occur in the context of a criminal prosecution causing the indirect result of suppressing speech by subjecting the speaker to the costs of the criminal proceeding. In a criminal case, there is no constitutional right of appeal.[57] There is a statutory right of appeal for "final" decisions of district courts.[58] In *Abney v. United States* the Supreme Court addressed the issue of whether the denial of a motion to dismiss a criminal indictment was a "final" decision which would allow appellate review.[59] The Court's prior decision of *Cohen v. Beneficial Indus. Loan Corp.* created a collateral order exception to the final judgment rule of 28 U.S.C. § 1291.[60] The collateral order exception allows a court of appeals to review a non-final collateral order if the order meets three conditions: (1) the district court has fully disposed of the question, in no sense leaving the matter open, unfinished or inconclusive; (2) the decision resolves an issue completely collateral to the cause of action asserted; and (3) the decision involves an important right which would be irreparably lost if review has to await final judgment on the merits.[61]

In *Abney*, the Court determined that the collateral order exception was applicable to a motion to dismiss an indictment on double jeopardy grounds.[62] The collateral order exception could arguably be applied to other instances where constitutional rights may be affected if a criminal prosecution is allowed to proceed. For example, if a criminal defendant prosecuted under obscenity laws asserts that the prosecution was a pretextual attempt to chill his First Amendment rights, the continuation of the prosecutorial proceeding as pretext is an issue collateral to whether the speech is in violation of the criminal law.[63]

### 1. The Chilling of First Amendment Rights: *United States v. P.H.E.*[64]

The Tenth Circuit case of *United States v. P.H.E.* involved an "unu-

56. *Id.* at 487.

57. McKane v. Durston, 153 U.S. 684, 697 (1894).

58. 28 U.S.C. § 1291 (1988). "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." *Id.*

59. Abney v. United States, 431 U.S. 651 (1977).

60. 337 U.S. 541 (1949).

61. *Id.*

62. *Abney*, 431 U.S. at 662. The Court held that "pretrial orders rejecting claims of former jeopardy . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291." *Id.*

63. *Id.* at 660-62. The issue of the guilt or innocence of the criminal defendant is separable from the issue of the practical effect of the trial on the defendant's constitutional rights. *Id.* at 659-60.

64. 965 F.2d 848 (1992) (before McWilliams, Moore and Aldisert, J.) (opinion by Aldisert, J.) (McWilliams, J., dissenting).

sual, perhaps unique confluence of factors."[65] In 1985 a United States Attorney from Utah sent a letter to Edwin Meese, then United States Attorney General, proposing a coordinated, nationwide prosecution strategy against companies that sold obscene materials.[66] The strategy called for multiple prosecutions at all levels of government in many locations.[67] The intent of bringing multiple prosecutions was to impose a financial burden on the companies such that the expense of defending the prosecutions would undermine profitability, resulting in the termination of the enterprise.[68] As a result of this letter, and other concerns related to pornography, the Attorney General created the National Obscenity Enforcement Unit to oversee the prosecution of obscenity violations nationwide.[69] The Justice Department's prior policy discouraged multiple obscenity prosecutions unless materials were unquestionably obscene.[70] In September 1987 the Justice Department changed its policy and encouraged multiple prosecutions against large organizations.[71]

The first action against PHE[72] began in 1986 in North Carolina and ended in an acquittal in 1987.[73] During plea negotiations in that case, prosecutors stated that the only way PHE could avoid multiple prosecutions was by ceasing distribution in *Utah* of "all sexually oriented materials" *including some materials protected by the First Amendment*.[74] PHE declined to cease distribution and spent more than $700,000 defending the prosecution in North Carolina. Subsequently, a federal grand jury in the Western District of Kentucky subpoenaed documents as part of an investigation in that state, and the United States Attorney's office in Utah began to coordinate prosecutorial efforts between Kentucky, Utah and North Carolina.[75]

The defendants sought an injunction in the Federal District Court

65. *Id.* at 855.

66. *Id.* at 850. The attorney who drafted the letter was Mr. Brent Ward.

67. *Id.* (Ward and Assistant United States Attorney Richard Lambert developed the idea of multiple prosecutions).

68. *Id.* This goal was initially posited by Ward in his first letter to the Attorney General.

69. *Id.* at 851.

70. *Id.* A prior and unrelated case where PHE sought and was granted an injunction against multiple prosecutions in the District Court for the District of Columbia notes the change in policy as reflected in amendments to the United States Attorney's Manual occurring between 1986 and 1988. PHE, Inc. v. United States Dep't of Justice, 743 F. Supp. 15, 19 (D.D.C. 1990). *See also* UNITED STATES COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 387 (1970) [hereinafter PORNOGRAPHY COMMISSION, 1970 REPORT]. The report notes the difficulties of defining what is legally obscene. This results in "exceedingly rare" enforcement of obscenity laws with "campaigns" being conducted by police and prosecutors in response to citizen complaints "to make the public periodically aware of law enforcement 'concern' with obscenity." *Id.*

71. *P.H.E.*, 965 F.2d at 851. It is unclear whether this change in policy was due to Ward's letters or to some other reason.

72. Throughout the remainder of this discussion, "PHE" collectively refers to the appellants PHE and any one of the number of defendants named individually.

73. *P.H.E.*, 965 F.2d at 851.

74. *Id.* Materials included *Playboy* Magazine and DR. ALEX COMFORT, THE JOY OF SEX (1972). *Id.* at 852.

75. *Id.* at 851.

for the District of Columbia against the Department of Justice and various individuals to bar prosecutors from causing or permitting indictments for violations of federal statutes prohibiting the mailing of obscene or crime inciting matter to be returned against them in more than one federal judicial district within the United States.[76] A preliminary injunction was granted pending the Court's ruling on a permanent injunction.[77] Subsequently, a Utah grand jury returned an indictment against PHE which was the subject of this appeal.[78] The defendants sought further injunctive relief in the Federal District Court for the District of Columbia which was denied.[79]

In Utah, PHE moved for dismissal claiming the prosecution was in bad faith and was brought in retaliation for the injunction.[80] The district court denied the motion, citing the defendants' failure to connect prosecutorial conduct which occurred in North Carolina and Kentucky with the decision to seek an indictment against the defendants in Utah.[81] The court of appeals reversed concluding that the defendants had satisfied their burden of showing pretext. On remand the burden shifted to the government to justify its decision to prosecute with "legitimate, articulable, objective reasons."[82]

a. *Majority Opinion*

The majority began its opinion by confirming jurisdiction through the application of the collateral order exception. The review of the record for pretext was required because if the prosecution was allowed to continue, the defendant's First Amendment rights would be lost if review had to await final judgment.[83] The government asserted that the defendants' rights could be protected on appeal from conviction, citing *United States v. Hollywood Motor Car Co.*[84] The majority rejected this assertion since *Hollywood Motor Car* involved the protection of a procedural right under the Federal Rules of Civil Procedure, a concern less pressing than the defendants' First Amendment rights.[85] The majority proceeded to analyze the defendants' appeal under those cases in which a prosecutor threatened the actual exercise of First Amendment rights.[86]

76. PHE, Inc. v. United States Dep't of Justice, 743 F. Supp. 15, 28 (D.D.C. 1990) (quoted in *P.H.E.*, 965 F.2d at 852).

77. *Id.*

78. *P.H.E.*, 965 F.2d at 852.

79. PHE, Inc. v. Dep't of Justice, No. 90-0693(JHG), 1991 WL 25753 (D.D.C. Feb. 6, 1991) (unpublished order).

80. *P.H.E.*, 965 F.2d at 852.

81. *Id.* at 852-53.

82. *Id.*

83. *Id.* at 853-54.

84. 458 U.S. 263 (1982) (per curiam). This case involved the prosecution for the violation of customs laws. The defendant asserted rights under the Federal Rules of Civil Procedure for a change of venue and was subject a superseding indictment charging four new counts. The defendant moved for dismissal of the indictment on grounds of vindictive prosecution. *Id.*

85. *P.H.E.*, 965 F.2d at 855.

86. *Id.* at 855-56.

Drawing primarily from Supreme Court the decisions of *Bantam Books, Inc. v. Sullivan*,[87] *Dombrowski v. Pfister*,[88] and the most recent decision of *Fort Wayne Books Inc. v. Indiana*,[89] the majority noted that "the state may not use the agents and instrumentalities of law enforcement to curb speech protected by the First Amendment."[90] Because the defendants asserted that the act of going to trial under a pretextual prosecution would have a chilling effect on protected expression, the right asserted is a "right not to be tried."[91] Therefore, the right which would be lost if the prosecution were allowed to continue was the right to be free from the chilling of protected rights under the First Amendment.[92] Finally, citing *Bender v. Clark*,[93] the majority recognized that even if the issue is not collateral, justice requires immediate review where the danger of injustice by delaying review outweighs the inconvenience and costs of piecemeal review.[94]

b. *Dissenting Opinion*

The dissenting opinion focused on the majority's acceptance of the appeal for review. Relying on *Hollywood Motor Car*[95] and *United States v. Butterworth*,[96] the dissent noted the crucial distinction between a "right not to be tried" and a right whose remedy may require dismissal of charges in post-conviction proceedings. The "right not to be tried" can only be vindicated prior to trial.[97] The dissent simply failed to see how the defendants in this case had a right not to be tried.[98] Furthermore, the majority's reliance on *Bender* as an alternative cause for review was dismissed as being impertinent at this time.[99]

2. Analysis

The dissent's failure to see how the defendants had a right not to be tried requires an analysis of the majority's application of prior doctrine as well as of the inability to vindicate freedom of expression once restrained. The dissent correctly notes that two of the cases relied upon by the majority, *Dombrowski* and *Fort Wayne Books*, did not involve the question of whether the denial of a motion to dismiss a grand jury indictment is immediately appealable.[100] Those cases discussed circumstances where a defendant's constitutional rights would be irreparably

87. 372 U.S. 58 (1963). *See supra* note 52 and accompanying text.
88. 380 U.S. 479 (1965). *See supra* note 54 and accompanying text.
89. 489 U.S. 46 (1989).
90. *P.H.E.*, 965 F.2d at 856.
91. *Id.* (quoting United States v. Hollywood Motor Car Co., 458 U.S. 263, 267 (1982)).
92. *Id.*
93. 744 F.2d 1424 (10th Cir. 1984).
94. *P.H.E.*, 965 F.2d at 857.
95. 458 U.S. 263 (1982).
96. 693 F.2d 99 (9th Cir. 1982).
97. *P.H.E.*, 965 F.2d at 862.
98. *Id.*
99. *Id.*
100. *Id.*

lost if the proceeding below was to continue without review.[101] But although the analysis in *P.H.E.* was performed under the collateral order doctrine, the court of appeals focused on the third prong of this analysis.[102] A review under the third prong is analytically consistent with the review of a denial of injunctive relief performed in *Dombrowski*.[103] Furthermore, adjudicating the proper scope of the First Amendment protections has been recognized as a federal policy that merits application of an exception to the general finality rule.[104] The *Fort Wayne Books* rationale allowing for review where refusal to do so "might seriously erode federal policy" is applicable to this appeal.[105] Not only may PHE's constitutional rights be eroded, but the integrity of the United States government may also be questioned if a lengthy trial, resulting in tremendous taxpayer expense, were to result in a reversal due to a pretextual prosecution.[106]

Next, the district court's conclusion that PHE had failed to connect the questionable behavior of Utah Assistant United States Attorney Lambert's involvement in both the North Carolina case and the prosecution in this case formed the basis for the finding of lack of unconstitutional motivation by prosecutors.[107] The Tenth Circuit found the district court's conclusion "clearly erroneous" on the facts and found its allowance of prosecutors to proceed on the "tainted" indictment as er-

101. What these cases did examine was the chilling of First Amendment rights by actions short of physically confiscating materials by the state. In *Dombrowski*, the plaintiffs were threatened with prosecution under a state Communist propaganda control law. The Court noted that "determining the contours of the regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of the regulation." *Dombrowski*, 380 U.S. at 487.

In *Fort Wayne Books*, the Court noted that the "probable cause" standard for allowing seizures under the fourth amendment was not adequate to remove books or films from circulation believed to be obscene but not judicially determined to be so. *Fort Wayne Books v. Indiana*, 489 U.S. 46, 63 (1989).

102. *P.H.E.*, 965 F.2d at 854-55.

103. *See supra* note 61 and accompanying text. In *Dombrowski*, the Court noted that there was no immediate prospect of a final state adjudication, uncertainty that the prosecutions would resolve all constitutional issues, and that a series of state criminal prosecutions would not provide satisfactory resolution of constitutional issues. *Dombrowski*, 380 U.S. at 489.

104. *See, e.g.*, National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 44 (1977).

105. *Fort Wayne Books*, 489 U.S. at 55. *Fort Wayne Books* applied an analysis recognized in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), for reviewing cases as "final" even though further proceedings are pending in state courts. An application of *Cox* turns on whether a refusal to immediately review the state court decision might "seriously erode federal policy." *Cox*, 420 U.S. at 482-83.

106. *See P.H.E.*, 965 F.2d at 851. Defendant spent $700,000 in connection with the North Carolina prosecution that ended in acquittal. Although the cost of prosecution is not determined, any figure close to this amount, expended solely in an attempt to drive a defendant out of business rather than secure a criminal conviction pursuant to federal statutes, would call into question the government's allocation of resources.

107. "As the government convincingly notes, there is no allegation of bad faith motivation on the part of Benson [the Utah prosecutor] nor is any improper motive to be found in the prosecution memorandum prepared by Lambert and upon which Benson relied in deciding to seek an indictment." Memorandum Decision and Order at 7, United States v. P.H.E. Inc., Case No. 90-CR-177W (C.D. Utah Aug. 28, 1991).

ronous as a matter of law.[108] The fact that the indictment was issued by an independent grand jury was insufficient to remove the "taint" of a pretextual prosecution that had begun years earlier in other jurisdictions.

The larger issue is the Department of Justice's use of federal funds to pursue a political agenda outside of the bounds of First Amendment jurisprudence.[109] Such pursuits are reflective of a form of "pragmatic liberal affirmative action" where government on behalf of the "better" interests of society espouses "normative standards regulating sexual desire and depictions."[110] Where the focus is limited by a political agenda to inhibit a particular form of constitutionally protected expression, it is the duty of the judiciary to widen this focus and direct attention to the true liberty interest at stake.

The majority's use of the collateral order doctrine analysis merely provided a framework for analyzing the "unique confluence of factors" involved in this particular case. The collateral order doctrine is equally applicable in both civil and criminal proceedings.[111] The "final decision" which would allow review requires a practical rather than technical construction.[112] In this case, the final decision of the district court—that pretext was not a factor—would result in the continuation of the prosecution. The defendants, if correct in their assertion that the goal of the government was to make the defense of the prosecution cost prohibitive, could not possibly vindicate their First Amendment rights post-trial as their ability to distribute their goods was already impaired.[113] Thus, the government's use of the vehicle of the trial may result in a chilling of the defendant's First Amendment rights. Where the government uses the threat of trial as a pretext for closing down the defendant's operation, "the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment

108. *P.H.E.*, 965 F.2d at 857-60.

109. The change in philosophy by prevailing political winds is evident by a comparison of two separate reports from the Attorney General's Commission on Pornography. In 1970, the Commission recognized that there was some value of pornography through the exchange of dialogue concerning obscenity and an opportunity for the development of healthy attitudes toward sexuality. *See generally*, PORNOGRAPHY COMMISSION, 1970 REPORT, 233-56, 309-38.

> A 1986 report from the same Commission found almost no value in pornography:
> Still, when we look at the standard pornographic item in its standard context of distribution and use, we find it difficult to avoid the conclusion that this material is so far removed from any of the central purposes of the First Amendment, and so close to so much of the rest of the sex industry, that including such material within the coverage of the First Amendment seems highly attenuated.

1 U. S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY: FINAL REPORT 267 (1986).

110. DONALD A. DOWNS, THE NEW POLITICS OF PORNOGRAPHY 26 (1989). The author discusses the effect of conservative politics on traditional standards of liberty.

111. Abney v. United States, 431 U.S. 651, 659 n.4 (1977).

112. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). A technical construction would require an adjudication on the issue of guilt or innocence, rather than allowing an expedited review of the infringement of constitutional rights.

113. The Supreme Court has recognized that freedom of the press embraces circulation, the right to receive, as well as publication. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

standard of review."[114]

## III. ELEVENTH AMENDMENT—SOVEREIGN IMMUNITY

In *Ex parte Young*,[115] the Supreme Court held that the Eleventh Amendment[116] does not bar a federal court injunction to stop state officials from enforcing state laws that violate the United States Constitution. Sixty-six years later in *Edelman v. Jordan*,[117] the Supreme Court revisited *Young* and allowed a federal court injunction and prospective relief consistent with the requirements of the Equal Protection Clause of the Fourteenth Amendment.[118] While *Edelman* went further to deny the award of retroactive benefits as a violation of Eleventh Amendment immunity, prospective relief was granted in both cases to individuals whose constitutional rights had been violated.[119] The division created by *Young* and *Edelman*—that a state is not immune from injunctive relief but may assert immunity when faced with retroactive monetary relief—creates an analytical framework by which Eleventh Amendment sovereign immunity questions are to be determined. This requires a weighing of the right to the relief requested by an individual against the right of a state's citizens to have their public funds insulated from repercussions that may arise out of state officials performing their duties.

### A. *Relief Through Bankruptcy: In re Crook* [120]

The Tenth Circuit decision of *In re Crook* addressed the United States Bankruptcy Court's practice of "writing down" mortgages held by a state.[121] Under reorganization, 11 U.S.C. § 506(a) permits the bankruptcy court to declare debt to be secured up to the actual market value of the property, while the amount of debt beyond market value of the property becomes unsecured.[122] The portion of debt that becomes un-

114. Arcara v. Cloud Books Inc., 478 U.S. 697, 708 (1986) (O'Connor, J., concurring) (noting a city's use of a nuisance statute as pretext for closing down a bookstore because it sold indecent books as implicating the first amendment).

115. 209 U.S. 123 (1908).

116. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

117. 415 U.S. 651, 664 (1974).

118. The plaintiff in *Edelman* sued for injunctive and declaratory relief, alleging State officials had violated the Equal Protection Clause by non-compliance with federal regulations. *Id.* at 653.

119. *Young* involved the denial of due process rights under the Fourteenth Amendment. *Young*, 209 U.S. at 131. *Edelman* involved the denial of equal protection under the Fourteenth Amendment. *Edelman*, 415 U.S. at 653.

120. 966 F.2d 539 (10th Cir.) (before Anderson, Aldisert and Brorby, Circuit Judges) (opinion by Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation), *cert. denied*, 113 S. Ct. 491 (1992).

121. *Id.* The case involved the state of Oklahoma. "Writing down" occurs through the application of 11 U.S.C. § 506(a) (1988) of the bankruptcy code and is then applicable to the states, as is the rest of the code, through 11 U.S.C. § 106(c) (1988).

122. 11 U.S.C. § 506(a). The debtors applied for relief under Chapter 12 reorganization and as part of the reorganization included the writing down of the mortgages in the reorganization plan. *Crook*, 966 F.2d at 540.

secured is that part which is "written down." In *Crook*, the debtors had mortgaged property to the Commissioners of the Land Office, an agency of the State of Oklahoma.[123] The State foreclosed on the mortgages and the debtors filed for bankrupcty under Chapter 12.[124] Applying 11 U.S.C. §§ 506(a) and 106(c), the bankruptcy court declared the State's notes to be secured only up to market value, with the remainder of debt as unsecured.[125] The State appeared specially to contest the bankruptcy court's constitutional authority to exercise jurisdiction under § 106(c) over the State's mortgage interest.[126]

The argument advanced by the State in the bankruptcy court began by explaining state law and state constitutional provisions which enable public funds to be invested in mortgages.[127] If a portion of the mortgage is unrecoverable due to writing down, "depletion of state coffers through the exercise of unconsented state jurisdiction" for the loss incurred to the state mortgage fund would result.[128] The bankruptcy court rejected the State's contentions. Citing *Pennsylvania v. Union Gas*,[129] which permitted the abrogation of a state's immunity by Congress pursuant to the Commerce Clause, the bankruptcy court analogized the powers granted to Congress under the Commerce Clause and the Bankruptcy Clause thus permitting the abrogation of a state's immunity under both clauses.[130] Furthermore, the "unmistakably clear" language of § 106(c) made that portion of the bankruptcy code applicable to the states.[131]

The State appealed and the United States intervened.[132] The district court affirmed, applying the bankruptcy court's analysis. On fur-

123. *Crook*, 966 F.2d at 540.

124. *Id.* Chapter 12 of the bankruptcy code allows for reorganization rather than total relinquishment of assets. *See* 11 U.S.C.A. § 1205 (West Supp. 1992).

125. *Crook*, 966 F.2d at 540.

126. *Id.* at 539.

127. *Id.* at 540. The Oklahoma Constitution requires the reimbursement of funds, disbursed for purposes of financing mortgages, to state trust. *See* OKLA. CONST. art. XI, § 2; Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).

128. *Crook*, 966 F.2d at 541 (quoting appellant's brief).

129. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (holding Article I power permits some abrogation of sovereign immunity).

130. Memorandum Order on State of Oklahoma, ex rel. Commissioners of the Land Office Objection to Jurisdiction, In re: Randy Crook, KK No. 89-3972-LN Chap. 12, (Bank. W.D. Okla. July 30, 1990). The bankruptcy court reasoned that the plurality opinion of *Union Gas* noted that the commerce clause both expands federal power and contracts state power. The contraction of state power by the commerce clause, coupled with the plenary power granted to Congress through the surrender of that portion of state sovereignty in Article I allowed for the abrogation of the states' eleventh amendment immunity through the bankruptcy clause. *Id.* at 7.

131. *Crook*, 966 F.2d at 541. *See also* 11 U.S.C. § 106(c) (1988).

132. Intervention occurred pursuant to 28 U.S.C. § 2403(a) providing, in relevant part:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

28 U.S.C. § 2403(a) (1988).

ther appeal, the Tenth Circuit affirmed the judgment, not on the basis of Article I but rather on the basis that the relief against the State was declaratory or injunctive in nature and resulted in mere incidental expenditure of state funds.[133]

The court of appeals noted three issues for consideration: (1) whether § 106(c) contains "unmistakably clear" language indicating that Congress meant that section to apply against the states; (2) if so, whether Article I bankruptcy power authorizes Congress to abrogate Eleventh Amendment immunity through application of the bankruptcy laws; and (3) whether the bankruptcy court's ruling violates the Tenth Amendment.[134] Addressing the first issue, the court noted the recent Supreme Court decision of *United States v. Nordic Village, Inc.*,[135] which held that the application of § 106(c) did not establish a textual waiver of government immunity.[136] *Nordic Village* was then distinguished as an action for damages, while the case at hand concerned an action for injunctive and declaratory relief. Given this distinguishing factor, the analysis performed by the bankruptcy court using *Pennsylvania v. Union Gas* and Article I (state immunity balancing) was inapplicable. The court then analyzed the case using the *Ex parte Young* and *Edelman* line of cases.

Under § 1227(a) of the bankruptcy code, a bankruptcy court's approval of the debtors' reorganization plans, including the writing down of mortgages, is a declaratory order that binds each creditor.[137] Application of the general provisions of § 524(a) provides a discharge of obligation that voids any judgment obtained against the debtor and operates as an injunction against any action to recover on such debts.[138] Furthermore, citing *Hoffman v. Connecticut Income Maintenance Dep't*,[139] the court noted the Supreme Court's construction of § 106(c) where the determination of an issue that binds the governmental unit but does not require a monetary recovery from a state is more indicative of declaratory and injunctive relief.[140]

The State asserted that reliance on *Ex parte Young* and *Edelman* was misplaced because there was no unlawful act committed by the State.[141] The court disagreed noting that *Ex parte Young* and its progeny were con-

133. *Crook*, 966 F.2d at 540, 542-44.

134. The Tenth Amendment issue is not analyzed in this survey as it was decided under Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), and involves no novel issue for consideration.

135. 112 S. Ct. 1011 (1992).

136. *Id.* at 1017. *Nordic Village* involved an adversarial proceeding by a trustee in bankruptcy against the Internal Revenue Service to recover corporate funds used illegally to pay an individual's tax liability. The Supreme Court addressed federal immunity under § 106(c).

137. *Crook*, 966 F.2d at 543. The relevant portion of 11 U.S.C. § 1227(a) provides: "[T]he provisions of a confirmed plan bind the debtor [and] each creditor . . . whether or not the claim of such creditor . . . is provided for by the plan, and whether or not such creditor . . . has objected to, has accepted, or has rejected the plan. 11 U.S.C. § 1227(a) (1988).

138. *Crook*, 966 F.2d at 543.

139. 492 U.S. 96 (1989).

140. *Crook*, 966 F.2d at 543.

141. *Id.*

cerned with the relationship between two sovereigns rather than the grant of relief by a party aggrieved.[142] This case involved two competing interests, the State's interest in protecting its financial investment and the bankruptcy courts interest in settling the debtors accounts in accordance with bankruptcy laws.[143] In this case, the court found no violation of the Eleventh Amendment in resolving these competing interests.[144]

B. *Analysis*

By construing the act of writing down a mortgage under the bankruptcy code as part of a larger request for injunctive or declaratory relief, the court of appeals was able to hold that Eleventh Amendment immunity is not compromised by the application of certain provisions of the bankruptcy code. While such a construction may be sufficient to adjudicate this particular factual situation, it fails to answer the question posed by the State of Oklahoma: does action by the Federal Judiciary taken on behalf of a individual against the legal rights of a state constitute a violation of sovereign immunity?

The court of appeals correctly concluded that the bankruptcy court's actions with respect to following the letter of the bankruptcy code provides relief that is injunctive in nature.[145] However, the issue concerns the devaluation of property under 11 U.S.C. § 506(a) and the application of this provision to a state held legal interest. While it is true that the Supreme Court decision of *Nordic Village* involved a claim for monetary damages, that decision held that § 6(c) did not establish a waiver of governmental immunity from a bankruptcy trustee's claims for monetary relief.[146] If no waiver on the part of Oklahoma is established through § 6(c) then the resolution with respect to sovereign immunity turns on how "writing down" under § 506(a) is to be construed.

Applying § 506(a) by "writing down" results in a devaluation of the state's economic interest yielding two results. The state is restrained from pursuing common law remedies and is compelled by state law to reimburse the state trust. This result highlights the Supreme Court's division of Eleventh Amendment jurisprudence characterized by *Young* and *Edelman*. The reasoning of *Edelman*[147] applies to the second result of "writing down." The state is compelled to reimburse the trust by the

142. *Id.*
143. *Id.*
144. *Id.* at 544.
145. *See supra* notes 118 & 119 and accompanying text.
146. *Nordic Village*, 112 S. Ct at 1017. "Neither § 106(c) nor any other provision of law establishes an unequivocal textual waiver of the Government's immunity from a bankruptcy trustee's claims for monetary relief." *Id.*
147. Edelman v. Jordan, 415 U.S. 651, 664-67 (1974). At issue in *Edelman* was the retroactive payment of public aid benefits to correct delays in processing claims. The Court reasoned that such payments would reduce availability of future public funds:

> [W]here the state has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing

amount of devaluation of the mortgages. Thus, the *Edelman* portion of Eleventh Amendment doctrine should work to protect the state from this result of the application of the bankruptcy code.

The other analysis of this case concerns the source of power that creates the prospective relief for the debtors and how that power is used, not to protect but to encroach on the rights of the state. It is on this point that the court fails to discuss the important issues of federalism that arise when a congressional grant of power, made pursuant to the bankruptcy clause, does not act to shield a debtor but works a result prohibited by *Edelman*. Such a result may have a resounding effect on state supported financing programs which would only serve to diminish the availability of resources for a state's citizens to better their economic welfare.[148] In absence of the protection granted by the Eleventh Amendment, the citizenry deserves at least an explanation.

## IV. FOURTEENTH AMENDMENT — SUBSTANTIVE DUE PROCESS

In *Youngberg v. Romeo*,[149] the Supreme Court considered the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment.[150] The Court, drawing from prior decisions,[151] held the involuntarily committed have a right to the established liberty interests of personal security and freedom from bodily restraint, as well as a right to such training related to safety and freedom from restraint of professionals who are charged with ensuring those rights.[152] In the more recent case of *DeShaney v. Winnebago County Department of Social Services*,[153] the Court addressed the question of whether a state is categorically obligated to protect a child who was taken into custody by a state agency then released to the natural father and suffers harm caused by the father. The Court answered this question in the negative. However, in a footnote, the Court suggested that where a state affirmatively exercises its power to remove the child from free society and place him in a foster home a sufficiently analogous situation to institutionalization may arise that may trigger application of *Youngberg*.[154] This footnote has created some confusion as to what factual situations may call for substantive due process protections. The Tenth Circuit Court of Appeals was faced with two different situations in

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will invariably mean there is less money available for payments for the continuing obligations of the public aid system.

*Id.* at 666 n.11.

148. *Id.*

149. 457 U.S. 307 (1982).

150. The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

151. *Youngberg*, 457 U.S. at 316-15 (citing Ingraham v. Wright, 430 U.S. 651 (1977) (right to personal security constitutes a historic liberty interest)); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (liberty from bodily restraint recognized as a core liberty protected).

152. *Youngberg*, 457 U.S. at 322.

153. 489 U.S. 189 (1989).

154. *DeShaney*, 489 U.S. at 201 n.9.

*Yvonne L v. New Mexico Department of Human Services*[155] and *Maldonado v. Josey*[156] which required review to determine if they were sufficiently analogous to *Youngberg* to trigger due process protections.

A. *Tenth Circuit Cases*

1. *Yvonne L. v. New Mexico Dep't of Human Servs.*

The plaintiffs, Yvonne L., age 9, and Demond L., age 7, were in the physical and legal custody of the State of New Mexico Human Services Department (HSD) in August 1985 when they were placed in a not-for-profit foster care facility for children.[157] Yvonne was sexually assaulted in the presence of Demond by another child in an unsupervised area of this facility on August 16, 1985. Plaintiffs brought a § 1983 action against HSD[158] for alleged violations of their federal statutory[159] and constitutional rights while in foster care. The district court dismissed the constitutional claim under qualified immunity, finding that there was no clearly established constitutional right in August, 1985, protecting a child in the legal and physical custody of the state from bodily harm from third persons.[160] The plaintiffs appealed.

The court of appeals reversed.[161] In a unanimous opinion the court held that the law was sufficiently clear at the time of the incident to afford due process protections to those individuals in the physical custody of the state. The court cited the *DeShaney* footnote referring to cases holding due process protections existed in slightly different factual contexts.[162] Furthermore, the *Youngberg* decision established a state duty to assume responsibility for the safety and general well-being of a person taken into custody and held against their will by the state. The court cited opinions from three circuits[163] explicitly finding an right to reasonable safety while in foster care established prior to 1986. Finally, citing the Tenth Circuit decision of *Milonas v. Williams*, the court quoted its own language regarding a juvenile involuntarily placed in foster care: "Such a person has the right to reasonably safe conditions of confinement."[164]

The HSD asserted that the plaintiffs failed to show that HSD acted

155. 959 F.2d 883 (10th Cir. 1992) (before Logan, Seymour, and Moore, J.) (opinion by Logan, J.).

156. 975 F.2d 727 (10th Cir. 1992) (before Seymour, Tacha, and Benson, J.) (opinion by Tacha, J.) (Seymour, J., concurring), *cert. denied*, 61 U.S.L.W. 3581 (1993).

157. *Yvonne L.*, 959 F.2d at 885.

158. All defendants are referred throughout this survey as "HSD".

159. The statutory violations alleged were part of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671 (1988).

160. *Yvonne L.*, 959 F.2d at 885. *See supra* note 12 and accompanying text for an explanation of qualified immunity.

161. *Yvonne L.*, 959 F.2d at 884.

162. *See supra* note 154 and cases cited therein.

163. *Yvonne L.*, 959 F.2d at 891 (citing Doe v. New York City Dep't of Social Serv's., 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983)); Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989); K.H. ex rel. Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990).

164. 691 F.2d 931, 942 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

with "deliberate indifference," the standard applicable to their conduct.[165] Although the district court never addressed the standard to be applied, the court of appeals did so to provide guidance on remand.[166] The court elected to use the "failure to exercise professional judgment" standard enunciated in *Youngberg* noting that it is a higher standard than mere negligence, implying "abdication of the duty to act professionally in making the placement" to foster care.[167] To the extent that this standard differs from deliberate indifference, the court noted that foster children are entitled to more considerate treatment and conditions than criminals.[168]

2. *Maldonado v. Josey*

On March 16, 1987, Mark Maldonado was an eleven year-old fifth grade student attending a state-run school in Raton, New Mexico.[169] He became caught on his bandana in a cloakroom adjacent to his classroom and died of strangulation.[170] He had allegedly been in the cloakroom, unsupervised, for twenty minutes while Margaret Berry, his teacher and the person responsible for his supervision, conducted class in the classroom.[171] On August 7, 1990, Leroy Maldonado, as personal representative for Mark's estate, filed a § 1983 action for wrongful death.[172] The complaint asserted that the death occurred because of the deliberate indifference to training and supervision requirements by Berry and two school administrators.[173] The district court granted summary judgment finding that the plaintiff failed to show deliberate indifference on behalf of the administrators and that the law regarding a teacher's duty to observe every student in class during classtime was not clearly established.[174] The plaintiff appealed, challenging only the judgment with regard to the teacher.[175] The court of appeals affirmed.[176]

a. *Majority Opinion*

The court viewed the plaintiff's contention that a liberty interest and protection from deprivation of life without due process were implicated by the failure to provide reasonable care and safety for public

165. *Yvonne L.*, 959 F.2d at 893. The "deliberate indifference" standard articulated by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), and applied to conduct alleged as a violation of the Eighth Amendment right against cruel and unusual punishment was applied in *Taylor*, 818 F.2d at 795-97, and *Doe*, 649 F.2d at 141-45.

166. *Id.*

167. *Id.* at 894.

168. *Id.* The court went on to state: "These are young children, taken by the state from their parents for reasons that generally are not the fault of the children themselves. The officials who place the children are acting in place of the parents." *Id.*

169. 975 F.2d 727, 728 (10th Cir. 1992).

170. *Id.*

171. *Id.*

172. *Id.* *See supra* note 8 for relevant language of 18 U.S.C. § 1983.

173. *Maldonado*, 975 F.2d at 728.

174. *Id.*

175. *Id.*

176. *Id.* at 733.

grade school children and by reckless indifference to supervision requirements in a public grade school, as an assertion of a categorical obligation to protect Mark Maldonado.[177] The assertion of a "categorical obligation" is analyzed under *DeShaney*.[178]

The court proceeded to set forth the *DeShaney* limitation of a state's obligation to protect an individual from harm caused by third persons and the limited situations where a duty has been found to exist.[179] In framing the issue to be decided on appeal, the court cited the *DeShaney* requirement that it is the "[s]tate's affirmative act of restraining the individual's freedom to act on his own behalf-through . . . institutionalization, or other similar restraint of personal liberty" which triggers due process protections.[180] Thus, the issue was whether state compulsory attendance laws restrain a school child's personal liberty such that due process imposes an obligation to protect that child.[181]

Cases involving extreme corporal punishment, or sexual abuse or harassment by a teacher were distinguished as inapplicable because those cases involve direct infliction of the harm by a state actor.[182] This case more closely resembles *DeShaney*, where the harm was inflicted by a private actor.[183] The court went on to distinguish a prior discussion of the relationship between the state and public school students made in the Tenth Circuit decision of *Hilliard v. City and County of Denver*.[184] The dictum concerning a schools duty of care in *Hilliard* was created in the context of bringing a due process claim under *Ingraham v. Wright*,[185] a corporal punishment claim involving a state actor and was therefore inapplicable to the present case.

The *Maldonado* court held that compulsory attendance laws in no way restrain a child's liberty so as to render a child and his parents unable to care for the child's basic needs, and therefore fail to trigger the

177. *Id.* at 729.

178. *Id.* It is unclear whether the court meant the substantive portion of the *DeShaney* opinion or footnote 9 which creates the possibility for finding a constitutional obligation. *See supra* note 154 and accompanying text.

179. *Maldonado*, 975 F.2d at 729.

180. *Id.* (citing DeShaney v. Winnebago City Social Servs. Dep't, 489 U.S 189, 200 (1989)).

181. *Maldonado*, 975 F.2d at 730.

182. *Id.* (citing Ingraham v. Wright, 430 U.S. 651 (1977); Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3d Cir. 1989); Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988)).

183. *Id.* at 731.

184. Hilliard v. City and County of Denver, 930 F.2d 1516 (10th Cir.), *cert. denied*, 112 S. Ct. 656 (1991). *Hilliard* addressed the duty of police officers to ensure the safety of those persons who are not in custody but are placed in a more dangerous position due to the actions of the officers. The exact language in *Hilliard* was:

> Public school students, although not restricted to the same degree as arrestees, convicts and patients involuntarily committed to state mental hospitals, are similarly involved in an environment where the state has some lawful control over their liberty. Students are required by state law to attend school and thus are prevented by the state from voluntarily withdrawing from situations posing the risk of personal injury.

*Id.* at 1520.

185. Ingraham v. Wright, 430 U.S. 651 (1977).

due process obligation to protect school children from harm.[186] The court noted with approval two courts of appeals decisions which came to the same conclusion.[187] These cases reasoned that incarceration and institutionalization involve full time severe and continuous restrictions of liberty. By contrast, school children reside in their parents' home, attend the schools of their parents' choice and the parents retain primary responsibility for meeting the child's basic human needs.[188] The court concluded by noting that parents remain the primary caretakers of the students, charged with determining and addressing the child's basic needs.[189] For these reasons, compulsory attendance laws do not impose restraints so severe as to implicate the Due Process Clause.[190]

b. *Concurring Opinion*

The concurring opinion noted that *Yvonne L.* held that the state owes children in its custody an affirmative duty of protection.[191] The *Maldonado* majority limits that duty by excluding schoolchildren. The concurrence advocated the imposition of a duty of some level of protection to school children because they are forced into temporary day-time custody of the state due to compulsory attendance laws.[192] However, since the plaintiff failed to show the deliberate indifference of the defendant to the danger of injury to Mark Maldonado, the concurrence would affirm summary judgment on qualified immunity grounds.[193]

The concurring opinion began with reviewing the Tenth Circuit's *Yvonne L.* analysis, noting the standard approved by that decision of "failure to exercise professional judgment" with respect to the danger.[194] The concurrence next distinguished cases cited by the majority in two ways. First, those cases involved repeated incidents that afforded a parent the opportunity to know of the danger and to take action.[195] Second, those cases failed to recognize that during the school day and class periods, parents are incapable of ensuring the reasonable safety of their children.[196] This obligation is better left to a teacher or other school staff members. The opinion went on to cite two cases that failed to follow the majority's reasoning because of the custodial relationship

186. *Maldonado*, 975 F.2d at 731.

187. D.R. v. Middle Bucks Area Vocational Technical Sch., Nos. 91-1136, 91-1137, 1992 WL 191115 (3d Cir. Aug. 11, 1992); J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990). *Middle Bucks* distinguished student care from foster care because foster care children depend on the state to meet their needs creating a continuing obligation, while school children are not so dependent. *Middle Bucks*, Nos. 91-1136, 91-1137, 1992 WL 191115 at **8.

188. *Maldonado*, 975 F.2d at 731-33.

189. *Id.* at 733.

190. *Id.*

191. *Id.* (Seymour, J., concurring).

192. *Id.*

193. *Id.*

194. *Id.* at 735; *see supra* note 167 and accompanying text.

195. *Maldonado*, 975 F.2d at 734-35. *Middle Bucks* involved repeated sexual assaults by students while *Alton* involved repeated sexual assaults by a teacher.

196. *Maldonado*, 975 F.2d at 735.

between teachers and students.[197] The concurrence concluded by stating that it would affirm the dismissal of the complaint for a failure to allege facts sufficient to show deliberate indifference or failure to exercise professional judgment by the teacher.[198]

B. *Analysis*

The different outcomes of *Yvonne L.* and *Maldonado* highlight divergent analyses of alleged substantive due process violations in the context of § 1983. The issue to be resolved is whether the imposition of a duty on the alleged tortfeasor may be based on some constitutionally supplied norm. In *Yvonne L.*, the court took the first step by applying the tort-based standard of *Canton v. Harris*.[199] This standard begins with requiring malfeasance, in that the defendants should have known that their actions in formulating a policy to provide for the physical safety of the children as well as their action in placing the children in foster care put the plaintiffs in personal danger.[200] The second requirement is that the defendant know that the placement would put the children in danger.[201] Finally, there must be a causal link between either action of the defendant and the injury. These elements must be met for the plaintiffs to be held liable for the deprivation of the recognized substantive due process interests in safe conditions, personal security and bodily injury for persons in state custody.[202]

The issue of duty in *Maldonado* involved a slightly different factual circumstance. The duty was to be imposed on the teacher, rather than the school administrators.[203] The issue of qualified immunity under *Harlow* was the same, whether the law regarding the existence of a duty

197. *Id.* (The concurrence cited Pagano v. Massapequa Public Schools, 714 F. Supp. 641 (E.D.N.Y. 1989) and Waechter v. School District No. 14-030, 773 F. Supp. 1005 (W.D.Mich. 1991)).

198. *Id.*

199. Canton v. Harris, 489 U.S. 378 (1989). The plaintiff is required to show three things: (1) that the defendant instituted a policy or training program; (2) the defendant knew of the asserted danger or failed to exercise professional judgment with respect to the danger; and (3) that there be a direct causal link between the policy or custom and the alleged constitutional deprivation. *Id.* at 385-90.

200. *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 890 (10th Cir. 1992) (In *Yvonne L.* there were two opportunities for the plaintiffs to show a violation under *Canton* since there were two affirmative acts that may have been causally linked to the injuries).

201. *Id.* at 890. This requirement has been characterized by some courts as "deliberate indifference" to the danger or more affirmatively by the U.S. Supreme Court as a failure to exercise professional judgment. Youngberg v. Romeo, 457 U.S. 307, 323 (1982). For an extensive critique of the Court's creation of differing standards see Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1483-90 (1989).

202. It is unclear whether the interest in bodily integrity for persons in state custody is an existing constitutional right or whether the custody signifies the requirement of "state action" for purposes of a section 1983 action. *See supra* note 8.

203. Maldonado v. Josey, 975 F.2d 727, 728 (10th Cir. 1992). The district court found that the school administrators could not reasonably be said to have been "deliberately indifferent". *Id.* This standard is higher than the *Youngberg* standard adopted in *Yvonne L.* which requires a showing of "a substantial departure from accepted professional judgment, practice, or standards." *Youngberg*, 457 U.S. at 323. The differing standard notwithstanding, the appeal pertained only to the teacher's liability. *Maldonado*, 975 F.2d at 728.

was clearly established.[204] The court's analysis differed sharply from that in *Yvonne L.* Instead of analyzing whether the teacher owed a duty to supervise Maldonado within the *Youngberg* standard, the court premised its finding of "no duty" on the fact that the teacher did not inflict the injury rather than whether the teacher could have prevented the harm.[205] The duty to prevent harm is precisely the issue addressed in both *DeShaney* and *Youngberg*.

Applying the tort-based standard of *Canton* to *Maldonado*, the act which satisfies the first element is the requirement that students attend school through the state compulsory attendance law.[206] The court's analysis should have determined whether a duty could be imposed based on whether the actions of the teacher amounted to malfeasance, or nonfeasance given the supervisory capacity she held.[207] The court analyzed this point by citing cases that considered whether a "special relationship" existed between students and schools such that a duty may be imposed.[208] However, *Maldonado* is not a "special relationship" case. Compulsory attendance laws provide the duty. There are affirmative acts on the part of the defendant, one of which consists of providing a supervised and safe environment conducive to the education of children.[209] Although the law is clear after *DeShaney* and *Youngberg* regarding the existence of a duty when the state takes custody of a person, the court uses a strained definition of custody to obfuscate the law and fails to provide a standard for determining which forms of custody would give rise to a duty.

## V. CONCLUSION

During the survey period, the Tenth Circuit was faced with similar

204. *See supra* note 12 and accompanying text for an explanation of qualified immunity.

205. *Maldonado*, 975 F.2d at 731.

206. "Every child of school age and of sufficient physical and mental ability shall be required to attend a public or other school during such period and for such time as prescribed by law." N.M. CONST. art. XII, § 5.

207. Under *Youngberg*, malfeasance or nonfeasance is not the determining factor but whether either is a substantial departure from accepted professional judgment, practice, or standards. *Youngberg*, 457 U.S. at 323. In this case the teacher's inaction with knowledge that her student was absent from the classroom for twenty minutes would be analyzed using the *Youngberg* standard.

208. *See supra* note 187 and accompanying text. The Fifth Circuit case of Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir. 1992) found a duty to protect school children based on compulsory attendance laws and the fact that schoolchildren are dependent on their parents to guard against the dangers of their surroundings. "By removing a child from his home . . . the state obligates itself to shoulder the burden of protecting the child from foreseeable trauma." *Id.* at 146. This author would advocate a varying degree of duty commensurate with the age of the child and foreseeability of harm by the supervisor.

209. A public school "assumes a duty to protect [the schoolchildren] from dangers posed by anti-social activities . . . and to provide them with an environment in which education is possible." Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 480 (5th Cir. 1982). The Supreme Court has recognized that schools "act" as parents to protect students from some harms. "[Prior] cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986). The audience was "captive" in a school assembly.

questions of individual rights under different factual circumstances. The cases surveyed do not give a clear indication of the direction the court will take in a particular factual scenario. However, the Tenth Circuit is slow to recognize the existence of constitutional duties or rights absent a showing that such duties or rights exist by decisions of other circuits. It is certain that the increasing use of Civil Rights laws to address violations of an individual's constitutional rights will continue to confront the court and the court will proceed with extreme caution.

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