Denver Law Review

Volume 65
Issue 4 *Tenth Circuit Surveys*

Article 9

January 1988

# Constitutional Law

Boston H. Stanton Jr.

# Constitutional Law

# CONSTITUTIONAL LAW

## OVERVIEW

During the survey period, the Tenth Circuit Court of Appeals decided several cases involving constitutional issues. Some of the cases cast new light on old problems while others reinforced principles previously enunciated in settled precedent. Overall, the Tenth Circuit displayed a well-balanced approach to upholding the constitutional rights of the individual, while meeting the legitimate concerns of the government and the public. The Tenth Circuit was more protective of substantive due process rights of students in public schools than the United States Supreme Court in its decision regarding corporal punishment. In its decisions in other areas, in particular involving the first, fifth, and fourteenth amendments, the court effectively used precedent to further develop the law.

Although no new concepts were introduced by the Tenth Circuit in these cases, they are of interest as illustrations of this circuit's application of principles previously discussed and accepted by this and other circuits. The article which follows is a sampling of the more significant and interesting cases.

## I. THE STANDARD USED TO MAINTAIN SUIT IN FEDERAL COURT

### A. *Background*

#### 1. First Amendment

The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] This command has two components: the establishment clause and the free exercise clause.[2] The basic purpose of the establishment clause is, in the words of Thomas Jefferson, to erect "a wall of separation between church and state."[3] The image of a "wall", however, does not help very much in determining what types of state actions violate the establishment

1. U.S. CONST. amend. I, cl. 1. The establishment clause is applied to the state via the fourteenth amendment. Everson v. Board of Educ., 330 U.S. 1 (1974).

2. The establishment clause and free exercise clause were intended to be "mutually supportive," yet each works separately to protect distinct liberties. The free exercise clause seeks to prevent government from acting in a way that intrudes upon the individual's right to exercise religious beliefs, while the establishment clause is meant to restrain the government from passing laws favoring a particular religion, thereby placing indirect pressure upon citizens to adopt a particular belief as their own. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-2 (1978).

3. T. JEFFERSON, THE COMPLETE JEFFERSON 519 (S. PADOVER ed. 1943). *See generally* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645 (1978).

clause.[4]

The courts presently employ a three-fold test to determine if the command of neutrality imposed by the establishment clause is violated.[5] In order to pass constitutional muster, state action must have a valid secular purpose, have a primary effect that neither advances nor inhibits religion, and must avoid fostering an excessive entanglement between government and religion.[6] When an action is challenged under the establishment clause it must pass all three prongs of this test to be valid.[7] The establishment clause is not merely a command of equal treatment among religions; the government cannot pass laws which aid one religion or prefer one religion over another.[8]

Despite criticism from commentators[9] and members of the Court,[10] the *Lemon* test remains the yardstick by which state endorsement of religion is measured. Although the Court has repeated its reluctance to confine establishment clause analysis to the *Lemon* test,[11] it officially remains the standard in establishment clause cases.

2. Self-imposed Limitations on Judicial Review

a. *Standing*

Standing is a threshold inquiry concerned primarily with whether a litigant's stake or interest in a suit is sufficient for judicial redress.[12] Litigants generally have standing to challenge government action that

4. Comment, *Hiding Behind the Wall: Friedman v. Board of County Comm'rs*, 64 DEN. U.L. REV. 81, 82 (1987).

5. Lemon v. Kurtzman, 403 U.S. 602 (1971).

6. *Id.* at 612-13. What has become known as the *Lemon* test is really an amalgamation of the holdings of three cases. The requirement that state action be motivated by a valid secular purpose was first articulated in McGowan v. Maryland, 366 U.S. 420, 445 (1961). In that case, the Court upheld a mandatory Sunday closing law, finding that the state was acting to further the nonreligious goal of assuring a uniform day of rest. In Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963), the Court added the requirement that the effect of state action must neither advance nor inhibit religion. The Court held that a Pennsylvania statute requiring daily bible readings in public schools had the effect of advancing religion, and therefore violated the establishment clause. Finally, the rule that otherwise permissible state action will be invalidated if it fosters excessive entanglement between government and religion was incorporated into establishment clause analysis in Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970). There the Court upheld a grant of tax-exempt status to religious institutions. The Court justified its decision by finding that denial of the exemption would entangle the government in the affairs of religion more than granting of the exemption.

7. Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam).

8. *See generally* Everson v. Board of Education, 330 U.S. 1 (1947).

9. *See* Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1, 15-19; Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094, 1122-26 (1985); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1473 (1981).

10. *See generally* Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting); Committee for Pub. Educ. v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

11. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

12. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) ("Whether a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue."). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-17 (1980).

would create a judicially cognizable right of action if committed by a private party.[13] If, however, the plaintiff challenges a government action that results in an indirect harm unprotected by a particular legal interest, such as a government expenditure, standing becomes less certain.[14]

Until 1968, the only Supreme Court decision on whether federal taxpayers have standing to contest violations of constitutional limits on Congress' taxing and spending power was *Frothingham v. Mellon*.[15] In *Frothingham* the Supreme Court squarely addressed the question of whether federal taxpayers have standing to challenge government expenditures. The taxpayer in *Frothingham* attacked the maternity Act of 1921,[16] which provided grants to states engaged in programs to reduce mother and infant mortality, as an unconstitutional infringement of the states' tenth amendment rights.[17] Mrs. Frothingham alleged that she was a taxpayer and in that capacity she was injured because "the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law."[18] The Court held that she lacked standing because her interest in the moneys of the Treasury is shared with millions of others and "is comparatively minute and indeterminable; and the effect upon future taxation . . . remote . . . ."[19]

*Frothingham* barred federal taxpayer suits for forty five years until it was questioned and partially overcome in *Flast v. Cohen*.[20] The plaintiff taxpayers in *Flast* challenged federal expenditures to aid religious secondary schools.[21] Their complaint alleged that the expenditures violated the establishment clause of the first amendment.[22] The *Flast* majority first held that the rule of *Frothingham* was one of judicial self-restraint and not required by the Constitution, for "we find no absolute bar in article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs."[23] The Court, however, did not overrule *Frothingham*; rather it introduced a two-part standing test, which examined the issues, "to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[24] Applying this test to the federal taxpayers before it, the Court

13. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951).
14. *See generally* C. WRIGHT, THE LAW OF FEDERAL COURTS § 13 (4th ed. 1983).
15. 262 U.S. 447 (1923).
16. Maternity and Infancy Hygiene Act, ch. 135, 42 Stat. 224 (1921).
17. 262 U.S. at 479-80.
18. *Id.* at 486.
19. *Id.* at 487-88.
20. 392 U.S. 83 (1968).
21. *Id.* at 85. The disbursements, made under Titles I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241a (Supp. II 1984), were used to subsidize instruction in basic studies, such as reading and arithmetic, and to purchase textbooks. *Id.* at 85-86.
22. *Id.* at 86. The establishment clause prohibits Congress from passing any "law respecting an establishment of religion. . . ." U.S. CONST. amend. I, cl. 1.
23. 392 U.S. at 101.
24. *Id.* at 102.

articulated two conditions that must be met as a requisite for standing. First, plaintiffs must establish a connection between their status as taxpayers and the legislation attacked.[25] Taxpayers would thus have standing to challenge the constitutionality only of "exercises of congressional power under the taxing and spending clause of art. I sec. 8," and would consequently lack standing to challenge expenditures incidental to an essentially regulatory scheme.[26] Second, taxpayer-plaintiffs must establish a further nexus between their status and the substantive issues they seek to litigate. This prong requires that a taxpayer show that the challenged enactment exceeds "specific constitutional limitations" on the congressional taxing and spending power, and not that it was simply "beyond the powers delegated to Congress."[27] When both prongs are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.[28]

The major change in the direction of standing came in the 1974 companion decisions of *United States v. Richardson*[29] and *Schlesinger v. Reservist to Stop the War*.[30] These cases emphasized separation of powers principles in holding that a direct injury, not merely a general public interest, is required for standing. Neither as a citizen nor as a taxpayer may one invoke judicial review simply to vindicate a belief in the need for lawful conduct by Congress or public officials.[31]

In *Richardson*, the plaintiff alleged that the Central Intelligence Act,[32] which provided for the nondisclosure of the CIA's expenditures, violated the accounts clause of the Constitution.[33] The Court held that the plaintiff lacked standing under the *Flast* double-nexus test on two grounds: first, because he challenged a statute regulating executive agency action, not an exercise of Congress' taxing and spending power; second, because he made no allegation that funds were spent "in violation of a 'specific constitutional limitation.' "[34] The Court therefore concluded that there was no "logical nexus" between the plaintiff's status "of taxpayer and the claimed failure of the Congress to require the

25. *Id.*

26. *Id.*

27. *Id.* at 102-03. The Court distinguished *Frothingham* on this basis. *Id.* at 104-05. Mrs. Frothingham alleged that Congress' action, by infringing the state's tenth amendment rights, caused an increase in her tax bill. *Id.* at 105. She failed, however, to allege any right that specifically protected her from the increased tax liability, and she therefore lacked standing under the second nexus of the *Flast* test. *Id.*

28. *Id.* at 102-03. The Court stated that the plaintiffs satisfied the first nexus because they challenged an exercise of Congress' taxing and spending power, and satisfied the second nexus because the Court found the first amendment to be a "specific constitutional limitation" on congressional taxing and spending power. *Id.* at 103.

29. 418 U.S. 166 (1974).

30. 418 U.S. 208 (1974).

31. *See* C. WRIGHT, *supra* note 14, at 67.

32. 50 U.S.C. § 403 (1970).

33. U.S. CONST. art. I, § 9, cl. 7, (the accounts clause requires that a "regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time")

34. 418 U.S. at 175.

Executive to supply a more detailed report of the [CIA's] expenditures."[35]

The plaintiffs in *Schlesinger* sought to enjoin the membership of congressmen in the military reserves, alleging that such membership violated the incompatibility clause.[36] On the issue of citizen standing,[37] the Court found only "injury in the abstract."[38] The Court found that taxpayer standing did not exist because the plaintiffs below "did not challenge an enactment under art. I, sec. 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status."[39]

Since *Richardson* and *Schlesinger* the Court has continued to restrict taxpayer standing, even in establishment clause cases. In *Valley Forge Christian College v. Americans United for Separation of Church and State*,[40] the plaintiff organization alleged that the grant of federal property to a religious college violated the establishment clause.[41] In holding that plaintiffs failed to satisfy the first nexus of the *Flast* test[42] and therefore lacked standing, the Court delineated a more precise definition. First, the action challenged the decision of an executive agency to transfer property, not an exercise of congressional power.[43] Second, the legislation that authorized the transfer was passed under the property clause of article IV, not the taxing and spending clause of article I.[44]

b. *Political Question*

The doctrine of standing is often confused with other aspects of justiciability which focus on the issues in a suit and their amenability to

35. *Id.*

36. U.S. CONST. art. I, § 6, cl. 2 (the incompatibility clause states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office")

37. *Schlesinger*, 418 U.S. 208. The Court held that plaintiffs had no standing as citizens because they had not suffered a judicially cognizable injury. 418 U.S. at 216-17.

38. *Id.* at 217. The Supreme Court has consistently rejected claims of standing predicated on a citizen's right to require that the government behave in accordance with the Constitution. *See generally* Allen v. Wright, 468 U.S. 737 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 482-83 (1982).

39. *Schlesinger*, 418 U.S. at 228.

40. 454 U.S. 464 (1982).

41. *Id.* at 469. According to the Court, the plaintiffs lacked standing as citizens because they failed to allege a judicially cognizable injury, although the Court implied that this result might be different had the plaintiffs resided near the transferred federal property. *Id.* at 487 n.23.

42. 454 U.S. at 479-80.

43. *Id.* at 479. "The plaintiffs in *Flast* satisfied this test because '[t]heir constitutional challenge [was] made to an exercise by Congress of its power under art. I, sec. 8, to spend for the general welfare,'. . . and because the Establishment Clause, on which plaintiffs' complaint rested, 'operated as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by art. I, sec. 8. . . .'" *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 103-04 (1968)).

44. *Id.* at 480. The authorizing legislation, the Federal Property and Administrative Service Act of 1949, ch. 288, 63 Stat. 377 (1949) was an evident exercise of Congress' power under the property clause, art. IV, § 3, cl. 2. *Id.*

judicial resolution.[45] However, because other justiciability inquiries are concerned with the nature of the issues, they necessarily involve a more extensive inquiry into the merits of the case.[46]

Most discussions of the political question doctrine speak in terms of justiciability.[47] This concept reflects judicial concern that goes beyond the limits of article III of the Constitution: a concern for the "proper — and properly limited — role of the courts in a democratic society."[48] This concern manifests itself in the judicially created prudential limitations on the exercise of federal court jurisdiction which, while "closely related"[49] to the case or controversy requirement of article III of the

45. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 99-101 (1968) (standing does not involve a determination of whether substantive issues in a case are suitable for judicial resolution, i.e., justiciable). Those justiciability inquiries that focus on the substantive issues include the political question doctrine, mootness, ripeness, and the prohibition against advisory opinion. *See generally* L. TRIBE, *supra* note 12, §§ 3-10 to 3-17.

In Baker v. Carr, 369 U.S. 186 (1962), the Court provided a comprehensive list of factors that indicate when an issue is a nonjusticiable political question. *Id.* at 217. These factors range from those that constitutionally commit the issue to a separate branch, to those that compel a court to avoid the issue because of policy concerns. *Id.* For a thorough treatment of the possible constitutional, prudential, and functional sources of the factors in *Baker*, see L. TRIBE, *supra* note 12, § 3-16, note 1.

The doctrines of standing and political question are often confused and used interchangeably, in part because of the Supreme Court's own imprecise characterization of the two. For example, in *Flast*, the Court defined standing as an "aspect of justiciability" and then cited Lewis, *Constitutional Rights and the Mis-use of "Standing"*, 14 STAN. L. REV. 433, 453 (1962), for the proposition that many of the problems with standing arise because it is used as a shorthand for the "elements of justiciability," without defining precisely what element of justiciability was represented by standing. 392 U.S. at 98-99. Moreover, the *Flast* Court developed a standing test that required an examination of the substantive issues, *id.* at 102, despite its declaration that standing questions are decided without reference to the justiciability of the substantive issues involved, *id.* at 100. *See also* L. TRIBE, *supra* note 12, § 3-20 at 90 (in Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), the Court unnecessarily used standing to dismiss the suit, although a variety of pre-existing justiciability inquiries were already designed to handle the question adequately).

46. *E.g.*, United States v. Richardson, 418 U.S. 166, 206-07 (1974) (Stewart, J., dissenting). Justice Stewart argued that the case, though appealed on standing grounds, in reality was dismissed on the issue of justiciability and that the case should therefore be remanded, because a proper justiciability inquiry requires a more extensive analysis of the merits than standing requires. *Id.*

Courts often dismiss cases on standing grounds to avoid more difficult and involved justiciability inquiries. *See* Schlesinger v. Reservist Comm. to Stop the War, 418 U.S. 208, 215 (1974) (the Court commented that "[t]he more sensitive and complex task of determining whether a particular issue presents a political question causes courts . . . to turn initially . . . to the question of standing to sue") For the proposition that Frothingham v. Mellon, 262 U.S. 447 (1923), was decided on standing grounds to avoid an inquiry into the justiciability of the issues involved, *see* Finklestein, *Judicial Self-Limitation*, 37 HARV. L. REV., 338, 359-64 (1923).

47. For discussion on the nature of a political question see Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Jackson, *The Political Question Doctrine: Where Does it Stand After Powell v. McCormack, O'Brien v. Brown and Gilligan v. Morgan?*, 44 U. COLO. L. REV. 477 (1973); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925); *See also* Bickel, *The Supreme Court 1960 Term—Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 72 HARV. L. REV. 1 (1959).

48. Warth v. Seldin, 422 U.S. 490, 498 (1975).

49. *Id.* at 500.

Constitution, are "essentially matters of judicial self-governance."[50] The "political question" doctrine postulates that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution.[51]

The political question doctrine has existed in some form since the earliest days of the republic. In *Marbury v. Madison*, Chief Justice Marshall recognized that "[q]uestions in their nature political, or which are, by the [C]onstitution and laws, submitted to the executive, can never be made in this court."[52] In 1962, the Supreme Court gave its fullest treatment of the doctrine to date. In *Baker v. Carr*,[53] voters in Tennessee alleged that the apportionment of the state legislature produced inequality of representation in violation of the equal protection clause. In a detailed opinion, the Court held that the political question doctrine did not bar the federal courts from considering an equal protection challenge to a state voting apportionment structure.[54] The Supreme Court identified a list of general criteria to determine whether cases can properly be deemed political questions:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate

50. *Id. See also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). As professor Tribe aptly stated:

> There is, thus, a political question doctrine. It does not mark certain provisions of the Constitution as off-limits to judicial interpretation. But it does require federal courts to determine whether constitutional provisions which litigants would have judges enforce do in fact lend themselves to interpretation as guarantees of enforceable rights. To make such a determination, a court must first of all construe the relevant constitutional text, and seek to identify the purposes the particular provision serves within the constitutional scheme as a whole. At this stage of the analysis, the court would find particularly relevant the fact that the constitutional provision by its terms grants authority to another branch of government, if the provision recognizes such authority, the court will have to consider the possibility of conflicting conclusions, and the actual necessity for parallel judicial and political remedies. But ultimately, the political question inquiry turns as much on the court's conception of judicial competence as on the constitutional text. Thus the political question doctrine, like other justiciability doctrines, at bottom reflects the mixture of constitutional interpretation and judicial discretion which is an inevitable byproduct of the efforts of federal courts to define their own limitations.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 79 (1978).

51. The Supreme Court has held that the political question doctrine is inapplicable to constitutional challenges to actions of state governments. Baker v. Carr, 369 U.S. 186, 226 (1962). However, one leading commentator has argued that the doctrine has not historically been limited in this manner. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 538-39 (1966).

52. 5 U.S. (1 Cranch) 137, 170 (1803). *See also* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (the lawlessness of a state government is a political question committed to Congress).

53. 369 U.S. 186 (1962).

54. *Id.* at 209.

> political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging.[55]

Several categories of cases have helped mold the political question doctrine. One category contains cases arising under the guarantee clause of article IV of the Constitution.[56] In *Luther v. Borden*,[57] the Supreme Court refused to determine which of two competing bodies was the legitimate government of Rhode Island. Referring to article IV, the Court concluded that it is Congress' job to decide which government was the proper one, and whether that government was republican. Once this decision was made it could not be questioned by the judiciary.[58]

Another category of political question cases concerns the foreign relations of the United States. One commentator argues that the constitutionally granted power to administer foreign affairs is divided between the executive and legislative departments, completely excluding the judiciary.[59] In *Baker*, the Court agreed that foreign relations cases often required standards for resolution beyond judicial competence, and that there was often a need for a "single-voiced statement of the government's views."[60] The Court concluded, however, that before acting in

---

55. *Id.* at 217.

56. U.S. CONST., Art. IV., section 4 states in part, "The United States shall guarantee to every state in this Union a Republican Form of Government. . . ." The Supreme Court has generally held that only Congress and the President, and not the judiciary, can enforce the guarantee clause on the ground that all issues under the guarantee clause raise nonjusticiable "political questions." *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937); Ohio v. Akron Park Dist., 281 U.S. 74 (1930); Davis v. Ohio, 241 U.S. 565 (1916); Pacific Telephone v. Oregon, 223 U.S. 118 (1912); Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900).

57. 48 U.S. (7 How.) 1 (1849).

58. *Id.* at 42, 47.

59. *See* Weston, *supra* note 47, at 318-29. *See generally*, Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

60. 369 U.S. at 211-12. In a footnote, Justice Brennan cited an example of such "sweeping statements:" " 'The conduct of the foreign relations of our Government is

some cases it needed to assess the handling of a question by the political branches and the possible consequences of judicial action.[61]

The Court's role in deciding whether an issue is committed to another branch, in the context of whether Congress can control its own membership, is well illustrated by *Powell v. McCormack*.[62] The area of impeachment is often considered a political question. Article I, section 2 of the Constitution gives the House sole power of impeachment, and section 3 gives the Senate sole power to try impeachments. No statute defines impeachable offenses; thus it would be difficult for the Court to apply any judicial criteria for review of a legislative decision to impeach.[63] Nonetheless, when presented with the issue, the Court did not dismiss the question of the exclusion of a member of Congress from the House of Representatives.[64]

Congressman Adam Clayton Powell was re-elected to Congress in November 1966, but the Congress voted to exclude him. Powell sought a declaratory judgment that his exclusion was unconstitutional. The respondents argued that, pursuant to article I, section 5,[65] upon a two-thirds vote of the House a member could be expelled for any reason. Without deciding the question of the justiciability of the right of the House to expel a member, the Court determined that exclusion was a justiciable issue. The Court stated that section 5 did not give the House judicially unreviewable power to set and judge qualifications for membership,[66] and concluded "that the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[67]

An important consequence of the political question doctrine is that holding it applicable to a cause of action theory renders the government's conduct immune from judicial review.[68] Unlike other restrictions on judicial review — such as case or controversy requirements, standing, and ripeness, all of which may be cured by different factual circumstances — a holding of nonjusticiability is absolute in its foreclo-

committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.' " *Id.* at 211 n.31 (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)).

61. 369 U.S. at 211-12.

62. 395 U.S. 486 (1969).

63. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 109-10 (1978).

64. *Powell*, 395 U.S. 486 (1969). Adam Clayton Powell was re-elected to Congress while under heavy suspicion of wrongdoing. The House of Representatives refused to seat him on the grounds of improprieties committed as a congressman.

65. U.S. CONST., art. I, § 5, cl. 2, states, "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."

66. 395 U.S. at 520-22.

67. *Id.* at 522. (Emphasis in original.) The Court in *Powell* concluded that Congress' discretion in seating members is limited to expulsion for failure to meet the age, citizenship, or residence requirements of art. I, sec. 2. *Id.* at 548.

68. *Baker*, 369 U.S. 186, 209.

sure of judicial scrutiny.[69]

B. *Specific Doctrines Limiting Judicial Review: Phelps v. Reagan*

1. Case in Context

In *Phelps v. Reagan*,[70] the Tenth Circuit Court of Appeals reviewed the United States District Court for the District of Kansas' dismissal of an action requesting declaratory and injunctive relief. Fred W. Phelps, an attorney and Baptist minister, filed an action challenging President Ronald Reagan's appointment of William A. Wilson as United States Ambassador to the Vatican, or Holy See. Phelps sought a declaratory judgment and injunctive relief, claiming that the institution of such relations, and particularly the appointment of an ambassador to the Holy See, violated the first amendment of the Constitution.

The district court granted the government's motion to dismiss holding that Phelps lacked standing to maintain the action and that the case presented a nonjusticiable political question. Phelps appealed but the Tenth Circuit affirmed the district court's decision. The court held that a taxpayer and minister did not have standing to challenge the appropriations involved and that the question of whether to appoint an ambassador was vested solely in the executive branch, and could not be reviewed by a court.[71]

2. Statement of the Case

As a citizen, taxpayer, and minister of the Old School Baptist Order, Phelps filed a complaint in district court. Phelps claimed that the appointment of an ambassador to the Holy See, and the formalization of diplomatic relations with the Holy See, violated the first amendment. He charged that the Holy See is not a foreign government with which the United States has a legitimate need to establish foreign relations, but is instead the headquarters of the Roman Catholic Church. Phelps alleged that the government's conduct was patently violative of the establishment clause of the first amendment, in that it purposely accomplished a predominantly religious purpose, had the effect of favoring one religion over another, and involved the entanglement of the United States in the religious affairs of a church. Phelps claimed standing to bring suit as a taxpayer and citizen, and as a Baptist minister with a vested religious interest in the separation of church and state. Phelps requested a declaration that the government's conduct violated the first amendment and an injunction restraining the government from establishing full diplomatic relations with the Holy See or sending an ambassador to the Holy See.

The government sought dismissal of the suit. They argued that the court was without subject matter jurisdiction, since Phelps lacked stand-

69. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 102 (1986).
70. 812 F.2d 1293 (10th Cir. 1987).
71. *Id.* at 1294.

ing and presented nonjusticiable questions.[72]

3. Discussion and Analysis of the Tenth Circuit's Opinion

The Tenth Circuit affirmed the district court's rejection of Phelps' claim that he had standing to sue as a taxpayer under the doctrine set forth in Flast.[73] He alleged that tax funds were being used to fund the diplomatic mission to the Holy See and the expenses of the United States Ambassador to the Holy See. Phelps clearly did not meet the two-part test to establish taxpayer standing set forth in *Flast*.

To invoke the power of a federal court, a party must show that "he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[74] In light of the Supreme Court's decisions in the area of taxpayer standing, and the decision in *Valley Forge* in particular, two points are well established. First, the extremely narrow taxpayer standing doctrine of *Flast v. Cohen* may not be invoked to challenge an action arising exclusively in the executive branch. Second, to the extent that congressional action may be challenged under *Flast*, the challenge must be directed at a federal spending program enacted pursuant to the taxing and spending power of art. I, sec. 8, cl. 1.

Phelps, like the plaintiffs in *Valley Forge*[75] and *Schlesinger*[76] failed to satisfy the *Flast* test. As in those cases, Phelps' real challenge was to the actions of executive branch officials, and not to a congressional spending program enacted under the taxing and spending power of art. I, sec. 8, cl. 1. The appropriation of money by Congress for support of our embassies cannot be considered an exercise of Congress' taxing and spending power for the general welfare. Rather, it is spending pursuant to Congress' power in the area of foreign relations.[77]

While Phelps rested his assertion of standing primarily on his status as a taxpayer, he also seemed to claim standing as a non-taxpayer/citizen. He appeared to claim that he had standing to enforce the values which underlie the establishment clause of the first amendment. The Tenth Circuit also discounted this argument by affirming the district court's holding that he failed to establish non-taxpayer standing. Phelps' alleged injuries were simply a recasting of the policies which underlie the establishment clause — i.e., not preferring one religion over another and prohibiting entanglement in church affairs. Therefore, Phelps was simply attempting to claim standing to enforce establishment clause values. But as the Supreme Court's decision in *Valley Forge*[78] squarely holds, it is not enough to simply allege a belief that governmen-

72. *Id.*
73. *Flast*, 392 U.S. 83, 101-02 (1968).
74. *Frothingham*, 262 U.S. 447, 488 (1923).
75. *Valley Forge*, 454 U.S. at 479-80.
76. *Schlesinger*, 418 U.S. at 228 n.17.
77. *See*, TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17 (1978).
78. 454 U.S. at 482-486. *See supra* notes 40-44 and accompanying text.

tal action violates the Constitution, or a desire to protect the policies which underlie the establishment clause. Phelps alleged that the formalization of diplomatic relations between the United States and the Holy See placed the nation's official imprimatur of recognition and approval upon a selected religion, in aid of that religion, and in preference of that religion over all other religions, thereby entangling this government in the affairs of that religion in violation of the establishment clause of the first amendment.[79]

What Phelps described are theories supporting his claim of a constitutional violation, and not "distinct and palpable" injuries that he had personally sustained or was in immediate danger of sustaining. Like Phelps, the plaintiffs in *Valley Forge* claimed standing on the basis that they had a spiritual stake in the case to enforce establishment clause values.[80] The reasoning of *Valley Forge* is controlling here because standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy; nor are his strong beliefs or commitment to a constitutional principle a permissible substitute for the showing of injury itself.[81] Even assuming that some plaintiff had met the requisite standing, questions of diplomatic relations are committed by the Constitution to final decision by the Executive Branch and thus present nonjusticiable political questions.[82]

The Tenth Circuit also rejected Phelps' argument that the court could review the President's decision to enter into formal diplomatic relations with the Holy See. It has long been settled that the President's resolution of such questions constitutes a judicially unreviewable political decision.[83] Application of the political question doctrine calls upon the court to determine whether the Constitution itself prohibits judicial intrusion because the matter in dispute has been committed to a coequal branch of government, and whether prudential considerations make a judicial resolution inappropriate.[84] In this case, the factors discussed in *Baker* clearly indicate that the matter presented a nonjusticiable political question.[85] Judicial reluctance to become involved in the running of foreign affairs, and to second-guess the judgments of the political branches which make foreign policy decisions, is further compelled by the standards discussed in *Baker*.[86] These factors have special application to this case since there is a constitutional commitment to recognize governments and appoint and receive ambassadors in art. II, sec. 2, cl. 2, sec. 3. Resolution of Phelps' claims would be impossible without an initial policy determination, which would clearly amount to nonjudicial

79. *Phelps*, 812 F.2d at 1294.
80. *Valley Forge*, 454 U.S. at 482-83.
81. *Id.* at 486.
82. Americans United for Separation of Church and State v. Reagan, 786 F.2d 194, 201-02 (3d Cir. 1986) (citing Baker v. Carr, 369 U.S. 186 (1962)). *Baker v. Carr* is the case most frequently cited in discussions of the nonjusticiability of certain issues.
83. *Id.* at 201.
84. Baker v. Carr, 369 U.S. at 211.
85. *Id.* at 217.
86. *Id.* *See supra* text accompanying note 55.

discretion.[87] Moreover, to undertake the review requested by Phelps would be impossible as expressing lack of respect due coordinate branches of government.[88] To adjudicate this claim would have required the court to second-guess the decision of the President to appoint an ambassador and establish formal relations with the Holy See. Plainly, adjudication of Phelps' claim would have permitted the court to enter an order severing our relations with the Holy See and directing the removal of Ambassador Wilson, involving the "potentiality of embarrassment from multifarious pronouncements by various departments on one question."[89] In short, it is difficult to think of a case where the concerns discussed in *Baker v. Carr* are more applicable.

4. Implications of Holding

The precedential weight of this holding within the Tenth Circuit demonstrates that although the *Flast* exception represents a significant departure from the *Frothingham* rule, there are clear limits to that exception. The court's follow of the Third Circuit's lead in this area is an acknowledgment by the Tenth Circuit that there has been no change in the law of standing to require a departure from the *Frothingham*, *Flast*, or *Valley Forge* line of cases. Even though the court spent a lot of time addressing standing, the effect of this holding illustrates that once the issues in a particular case are found to rest on the political question doctrine, there is no need to address the issue of standing because a court could not adjudicate such a case absent the requisite subject matter jurisdiction. Although the Tenth Circuit did not directly address the issues presented in this case, it is likely that other courts will follow suit in the areas of the standing and political question doctrines.

## II. STANDARD APPLIED IN DETERMINING WHAT CONSTITUTES A LEGITIMATE GOVERNMENT INTEREST

### A. *Background*

1. First Amendment

The first amendment prohibits the government from infringing upon the people's right to free speech.[90] Where first amendment protections begin and end is unclear; Supreme Court Justices and legal scholars have heatedly debated the contours of the first amendment for many years.[91] Generally, a court that reviews an ordinance or statute abridging speech will make an initial analysis in the following manner. If

87. *Id. See also* Powell v. McCormack, 395 U.S. 486, 521 n.43 (1969).

88. *Baker*, 369 U.S. at 217.

89. *Id.*

90. The first amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The first amendment is extended to the states through the fourteenth amendment. For cases applying the first amendment to the states, see Stromberg v. California, 283 U.S. 359 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

91. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36 (1961) (majority adopted a balancing approach recognizing that speech may be restricted to favor a "subordinating" govern-

the law prohibits only a category of speech unprotected by the first amendment, the law will stand because there has been no constitutionally relevant abridgment of free speech.[92] If the regulation as written is wholly contradictory to the freedom of speech guarantee, the court will strike it down as unconstitutional "on its face."[93]

In *West Virginia State Board of Education v. Barnette*,[94] the Court struck down a West Virginia statute which compelled all students to participate in a daily flag salute ceremony, on the grounds that the law violated the first amendment by forcing students to declare a particular belief. The crucial question was "whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution."[95] Thus, for the Court, the issue was not whether the children should be allowed an exemption from a required ceremony, but whether governmental officials had the legitimate authority to compel such participation in the first instance.[96] The Court upheld the right of the students, for whom saluting the flag was a serious violation of religious duty, to be exempt from a school procedure which forced them to express support for values which directly conflicted with those espoused by their subcommunity. The Court, rather than evaluating the wisdom of the governmental policy, focused on the freedom of speech clause of the first amendment and found that it contained a core

---

mental interest). Justice Harlan delivered the majority opinion in *Konigsberg*, specifically rejecting the "absolutist" approach of Justice Black. *Id.* at 49-50.

As does Justice Black, Alexander Meiklejohn, a noted advocate of free speech, views the first amendment as an absolute—a specific reservation of sovereign power by the people to themselves. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 253-54. Meiklejohn suggested that the first amendment necessarily must protect all communication that insures that the people will acquire and maintain the experience and knowledge to effectively govern themselves. According to Meiklejohn, protected speech therefore includes, among other things, education and any speech promoting an understanding of philosophy, the sciences, literature, the arts, and public issues. *Id.* at 256-57.

For other theories regarding first amendment protection, see Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (proposing protection of only political speech); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) (arguing for "definitional balancing").

For a general discussion of the first amendment, see BeVier, *"The First Amendment and Political Speech: An Inquiry into the Substance and Limits of the Principle*, 30 STAN. L. REV. 299 (1978) (overview of the scope of the first amendment protections); DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161 (1972) (general discussion of approaches to first amendment protections).

92. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The *Chaplinsky* Court concluded that the Constitution does not prohibit a state from punishing "fighting words" or speech which is "lewd or obscene." *Id.* at 571-72.

93. *See, e.g.*, Lovell v. Griffin, 303 U.S. 444 (1938). The *Lovell* Court found an ordinance requiring a license to distribute religious pamphlets invalid on its face. The Court stated that the regulation struck "at the very foundation of the freedom of the press." *Id.* at 451. For Justice Stone's now famous statement that legislation which directly encroaches upon the domain of one of the first ten amendments must fall within a "narrower scope" to receive the Court's "presumption of constitutionality," see United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

94. 319 U.S. 624 (1943).

95. *Id.* at 636.

96. *Id.* at 634-36.

of absolute protection which the government could not infringe constitutionally, regardless of any perceived wisdom in so doing. Underscoring the pivotal position of free expression within the American constitutional framework and the necessity for school authorities to honor first amendment guarantees within their classrooms, Justice Jackson wrote for the Court majority: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[97]

In *Tinker v. Des Moines Independent Community School District*,[98] the Supreme Court recognized that neither student nor teacher "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[99] The dispute in *Tinker* arose when three students decided to publicize their opposition to the Vietnam War by wearing black armbands to school. The principals of the schools became aware of the plan and adopted a policy that students wearing armbands to school would be asked to remove them; students refusing would be suspended until they returned to school without the armbands. The students were aware of the regulation, but they ignored it and were suspended.[100] The Court held that the students' suspensions violated the first amendment because the school administrators failed to show that the students' "silent, passive"[101] expression of opinion materially and substantially interfered with school discipline and operation or collided with the rights of the other students.[102]

In reaching its conclusion, the Court balanced the schools' concern with discipline against the students' right to freedom of expression.[103] The Court rejected the district court's conclusion that school administrators acted reasonably in suspending the students because of the fear that the students wearing the armbands might cause a disturbance. This form of expression, "symbolic speech," the Court stated, is protected by the first amendment and cannot be prohibited merely because of school officials' fears of disruption.[104] The first amendment protects certain

97. *Id.* at 642.

98. 393 U.S. 503 (1969).

99. *Id.* at 506.

100. *Id.* at 504. The students sought an injunction restraining the school district from disciplining them. Tinker v. Des Moines Indep. Community School Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966). The district court dismissed the complaint on the ground that the school principals' actions were constitutionally permissible because they prevented the students from disturbing school discipline. *Id.* The Eighth Circuit considered the case en banc and, by an equally divided court, affirmed the district court's decision without opinion. Tinker v. Des Moines Indep. Community School Dist., 383 F.2d 988 (8th Cir. 1967) (en banc).

101. *Tinker*, 393 U.S. at 541.

102. *Id.* at 513.

103. *See Tinker*, 393 U.S. at 506-08; *see also supra* note 93 and accompanying text.

104. *Tinker*, 393 U.S. at 508. The school administrators attempted to justify the regulation on the grounds that some friends of a former classmate who was killed in Vietnam might confront the students and cause a disturbance. *Id.* at 509 n.3.

types of conduct as a symbolic form of speech.[105] When the government attempts to regulate the conduct aspect of that speech, however, it necessarily effects an incidental restriction on the speech. The Supreme Court developed analysis for incidental restrictions on speech in *United States v. O'Brien*.[106] In *O'Brien*, a draft resister challenged his conviction under a federal statute that prohibited the destruction of draft cards; O'Brien contended that the statute infringed upon his freedom of speech.[107] The Court upheld the federal statute and O'Brien's conviction. In doing so, it established a four-part test for evaluating a regulation that governs conduct, but incidentally restricts speech.[108] Governmental regulation of expressive conduct should be sustained

> . . . if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[109]

2. Equal Protection

Each of the guarantees of the first amendment has been held to be a fundamental right and made applicable to the states through the due process clause of the fourteenth amendment. Thus, when a state burdens the freedom of speech, the law must be analyzed under the strict scrutiny required by the first amendment as well as the general guarantees of the due process and equal protection provisions.[110] Whenever a statute allows some persons to speak, but not others, the statute at issue may be analyzed under equal protection as well as first amendment principles.[111] Pursuant to such a statute, a state or local government has the power to treat different classes of persons in different ways in the area of public health, safety and morality,[112] unless the classification is based on "criteria wholly unrelated to the objective of [the] statute."[113] Governmental bodies cannot, however, legislate persons into different classifications when the classifications are unrelated to the objective of the legislation.[114] If the classification is reasonable, the remedial scheme

105. *See* Stromberg v. California, 283 U.S. 359 (1931) (striking statute prohibiting display of red flag); *see also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (rejecting requirement that children salute flag in violation of their religious beliefs).

106. 391 U.S. 367 (1968).

107. *Id.* at 376. The Court noted that a "sufficiently important government interest in regulating the non-speech element can justify incidental limitations on first amendment freedoms." *Id.*

108. *Id.* at 377.

109. *Id. See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (discussion of the implications of the symbolic speech cases); Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1 (discussion of the *O'Brien* case).

110. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 783 (3d ed. 1986).

111. *Id.* at 852.

112. Reed v. Reed, 404 U.S. 71, 75 (1971).

113. *Id.* at 76. (The ends must of course be legitimate.)

114. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969).

does not violate the equal protection clause "simply because it fail[s] . . . to cover every evil that might conceivably have been attacked."[115]

3. Vagueness and Overbreadth

The Court will strike down a regulation for vagueness if the wording of the law is unclear and leaves speakers uncertain as to whether their speech will fall within the rule's prohibition. A statute violates due process if it is so vague that a person of common intelligence cannot discern what conduct is prohibited, required, or tolerated.[116] Reviewing courts will also strike down a regulation that chills speech if the regulation is overbroad, that is, if it reaches speech that is protected by the first amendment as well as unprotected speech.[117]

In recent years the Supreme Court has narrowed the scope of the overbreadth doctrine,[118] so that only when a reviewing court determines that a statute or ordinance is substantially overbroad may the court strike it down under the overbreadth doctrine.[119]

B. *Freedom of Expression:* Mini Spas v. South Salt Lake City Corp.

1. Case in Context

*Mini Spas v. South Salt Lake City Corp.*,[120] involved the Tenth Circuit Court of Appeal's review of the District Court for the District of Utah's grant of summary judgment in favor of the City of South Salt Lake. This was an action seeking to have an ordinance of the City of Salt Lake, Utah[121] declared invalid as in conflict with the Constitution of the

115. *Id.*

116. *See* Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

117. The overbreadth rule allows a court to strike down a statute that, while designed to prohibit activities not protected by the constitution, also prohibits activities which are constitutionally protected. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 868 (2d ed. 1983).

118. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973). The *Broadrick* court rejected an overbreadth challenge to Oklahoma's limitation on permissible political activity by civil servants. The majority concluded that: "particularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well. . . ." *Id.* at 615; *See also* New York v. Ferber, 458 U.S. 747 (1982). The *Ferber* court concluded that New York's statute prohibiting the sale of any material depicting a child engaged in sexual activity was not unconstitutionally overbroad. The court determined that "the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." *Id.* at 772. The *Ferber* court extended the substantiality requirement from cases involving conduct combined with speech to traditional forms of speech—books and films. *Id.* at 771.

119. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

120. 810 F.2d 939 (10th Cir. 1987).

121. The Ordinance, in pertinent parts, reads:

> (4) Each establishment shall provide to all patrons clean, sanitary and opaque coverings capable of covering the patron's specified anatomical areas. No common use of such covering shall be permitted, and reuse is prohibited unless having been adequately cleaned. In addition, no owner, operator, responsible managing employee, manager, or licensee in charge of or in control of the massage establishment shall permit nor shall any employee of masseur administer a massage unless the patron is covered by the covering provided by the establishment.
>
> (5) With the exception of bathrooms, dressing rooms, or any room utilized for

United States. The provisions of the ordinance mandated a dress code for massage parlor employees. Mini Spas, Inc. and the Society of Licensed Masseurs ("Mini Spas"), massage establishments doing business in South Salt Lake, contended that the dress code was unconstitutional because it proscribed expressive conduct in the form of nudity.[122] The city countered that the ordinance was enacted to control prostitution.[123] Cross motions for summary judgment were filed by both parties. The district court granted the city's motion, upholding the ordinance.

In its affirmance of the district court's grant of summary judgment, the Tenth Circuit held that: the city had a legitimate interest in regulating prostitution; the purpose of the ordinance was unrelated to inhibiting freedom of expression; the ordinance was not overly restrictive, overbroad, or unconstitutionally vague; and it did not violate equal protection.

The importance of this holding is that where a city adopts an ordinance regulating conduct which it seeks to restrict, the ordinance must be only restrictive enough to further the city's interest, that interest must be a substantial one, and the city must draft the ordinance so that it is a valid exercise of the police power. Regulation of prostitution falls within this category.

2. Statement of the Case

On October 13, 1982, South Salt Lake adopted an ordinance enti-

---

dressing purposes, no owner, operator, responsible managing employee, manager, or licensee in charge of or in control of any massage establishment shall permit any person in any area within the massage establishment which is used in common by the patrons or which can be viewed by patrons from such an area, unless the person's specified anatomical areas are fully covered. In addition, no owner, operator, responsible managing employee, manager or licensee in charge of or in control of a massage establishment shall permit any person to be in any room with another person unless all persons' specified anatomical areas are fully covered.

(6) No owner, operator, responsible managing employee, manager, or licensee in charge of or in control of a massage establishment shall permit any masseur or employee to be on the premises of a massage establishment during its hours of operation while performing or available to perform any task or service associated with the operation of a massage business, unless the masseur or employee is fully covered from a point not to exceed four (4) inches above the center of the knee cap to the back of the neck. The covering will be of an opaque material and will be maintained in a clean and sanitary condition.

(7) No masseur or employee, while performing any task or service associated with the massage business, shall be present in any room with another person unless the person's specified anatomical areas are fully covered.

(8) No masseur or employee shall be on the premise of a massage establishment during its hours of operation while performing or available to perform any task or service associated with the operation of a massage business, unless the masseur or employee is fully covered from a point not to exceed four (4) inches above the center of the knee cap to the base of the neck. For purposes of this subsection, the covering will be of an opaque material and will be maintained in a clean and sanitary condition.

SOUTH SALT LAKE, UTAH, REV. ORDINANCES tit. 38, ch. 8, § 3B-8-5 (1974) (as amended).

122. *Mini Spas*, 810 F.2d 939, 940.

123. *Id.*

tled "Massage Parlors and Masseurs."[124] The purpose of the ordinance was to regulate the licensing, dress, and operation requirements of massage parlors. Mini Spas attacked the constitutionality of the ordinance, contending that the dress code (1) was unreasonable, arbitrary, overbroad, and violated Mini Spa's first amendment right of freedom of expression; (2) denied equal protection of the law in violation of the fourteenth amendment; and (3) was unconstitutionally vague in violation of due process.[125]

3. Discussion and Analysis of the Tenth Circuit's Opinion

The Tenth Circuit recognized that non-verbal, expressive conduct has often been accorded first amendment protection,[126] but that not all conduct is necessarily "speech" under that amendment.[127] In *O'Brien*, the Court stated "[w]e can not accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[128] Nudity *per se* is not accorded protection under the first amendment.[129] What is protected as "speech" is expressive conduct. An example of protected conduct would be nude dancing.[130] The dress code ordinance of South Salt Lake does not regulate nude dancing nor modeling, rather the dress code regulates the manner in which massage practitioners should be dressed while practicing their profession.

The Supreme Court also noted that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[131] Using the above cited cases, it is clear that the dress code passed the *O'Brien* test, therefore, constitutional muster as well. According to the mayor of Salt Lake, the ordinance was enacted to both ensure that the massage parlors within the city be run in a clean, professional manner and that the massage parlors not be allowed to degenerate into houses of prostitution.[132] These non-speech elements of the ordinance justify whatever small limitation there might be on any speech because the government of Salt Lake has a substantial interest in the health and moral welfare of the citizenry which it has addressed through its massage parlor ordinance.

The Tenth Circuit, in reaching its conclusion, adopted the initial requirements for an overbreadth challenge outlined in *Broadrick v.*

124. *See supra* note 121 and accompanying text.
125. *Mini Spas*, 810 F.2d at 940
126. *Id.* at 941 (citing as examples West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) and Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969)).
127. *Mini Spas*, 810 F.2d at 941 (citing U.S. v. O'Brien, 391 U.S. 367 (1968)).
128. *O'Brien*, 391 U.S. at 376.
129. *Mini Spas*, 810 F.2d at 941.
130. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975).
131. *O'Brien*, 391 U.S. at 376.
132. *Mini Spas*, 810 F.2d at 941-42.

*Oklahoma*.[133] The court recognized that the overbreadth doctrine reflects a concern that a broadly written "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[134] "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it [the statute] to be facially challenged on overbreadth grounds."[135] Even if the manner in which massage practitioners should be dressed while practicing their profession somehow is accorded first amendment protection as a form of expression, the regulation did not affect the constitutional rights of any third parties not before the court. Therefore, the overbreadth challenge failed.

The court recognized that the fourteenth amendment, through its equal protection clause, does not deny to states the power to treat different persons in different ways.[136] However, the equal protection clause does deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.[137] The dress code ordinance's distinction of singling out massage parlors is equally applicable to every massage practitioner within the South Salt Lake city limits. South Salt Lake also has a legitimate interest in prohibiting prostitution and there is sufficient connection between the dress code provision and the prohibition of prostitution for the ordinance to be rationally related to this interest and withstand constitutional attack.

The Tenth Circuit accepted the district court's assumption that the city would enforce the dress code ordinance in a reasonable manner.[138] By doing so, the court did not have to address the issue of the statute being subject to more than one interpretation. A statute violates due process if it is so vague that a person of common intelligence cannot discern what conduct is prohibited, required, or tolerated.[139] By accepting the city's assertion that the restrictions in the ordinance did not apply to arms and hands of masseurs, the district court was able to construe the ordinance in a way to avoid the problem of unconstitutional vagueness.[140]

4. Implications of Holding

This decision sends a signal to cities within the Tenth Circuit not to be too concerned about the vagueness of their ordinances restricting speech. The Tenth Circuit seems to be saying that if a city can somehow

133. 413 U.S. 601 (1973). *See supra* notes 118 and 119 and accompanying text.

134. Member of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984) (quoting *Broadrick*, 413 U.S. at 612). Also, the *O'Brien* test is applied to states and municipal regulations. *Vincent*, 466 U.S. at 804-05.

135. *Vincent*, 466 U.S. at 801.

136. *Reed*, 404 U.S. at 75.

137. *McDonald*, 394 U.S. at 809.

138. *Mini Spas*, 810 F.2d at 942, 943.

139. *Id.* at 943. *See Connally*, 269 U.S. at 391.

140. *Mini Spas*, 810 F.2d at 943.

show that the ordinance in question is a valid exercise of their police power, or otherwise meets the *O'Brien* test, that in the face of vagueness, it would find a way to avoid an unconstitutional interpretation. It is unclear whether other circuits will follow this holding, for ordinances like statutes, should be drafted to avoid being susceptible to two different readings.

## III. STANDARD APPLIED IN THE TERMINATION OF GOVERNMENT EMPLOYEES

### A. *Background*

#### 1. Procedural Due Process

Procedural due process is derived from the fifth[141] and fourteenth[142] amendments, which only provide protection to individuals faced with governmental actions that may deprive them of life, liberty or property.[143] The threshold question facing courts in procedural due process cases is whether the private interest affected by government action can be considered a liberty or property interest. A litigant must show that he has been deprived of a protected liberty or property interest before he can claim the protection of procedural due process.[144]

##### a. *Liberty*

Federal courts have recognized a protected liberty interest in one's reputation[145] and freedom to take advantage of alternative means of employment.[146] The Supreme Court furnished a broad definition of liberty that was afforded procedural protection against arbitrary deprivation in *Meyer v. Nebraska*.[147] In *Miller v. City of Mission*,[148] the Tenth Circuit explained the circumstances in which a public employee's liberty

141. U.S. CONST. amend. V, provides in part: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

142. U.S. CONST. amend. XIV, § 1 states, in part: "[n]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

143. *See generally* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 452 (1977).

144. Board of Regents v. Roth, 408 U.S. 564 (1972) (no property interest in non-tenured teaching position). *But see* Perry v. Sinderman, 408 U.S. 593 (1972) (implied property interest in non-tenured teaching system).

145. *Roth*, 408 U.S. 564; Wisconsin v. Constantineau, 400 U.S. 433 (1971) (reputation interest affected by posting notice forbidding sale of liquor to claimant). *But see* Paul v. Davis, 424 U.S. 693 (1976) (no reputation interest affected by distribution of photo identifying claimant as shoplifter).

146. *Roth*, 408 U.S. 564; Miller v. City of Mission, 705 F.2d 368 (10th Cir. 1983) (assistant police chief stigmatized by public dissemination of reasons for firing).

147. 262 U.S. 390 (1923). In attempting to describe the liberty interest, the Court stated that liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally *to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.*" *Id.* at 399. (emphasis added).

148. 705 F.2d 368 (10th Cir. 1983).

interest may be violated by the manner of termination.[149] *Miller* required that notice of charges must be given to an employee a reasonable time before a hearing in order to provide the individual a meaningful opportunity to be heard.[150] *Miller* further required that, except in extremely unusual situations, the individual must be given a pretermination hearing in order to be afforded a meaningful time within which to be heard.[151]

In *Paul v. Davis*,[152] however, a sharply divided Court held that state defamation of a private individual "standing alone and apart from any other governmental action" did not implicate any liberty protected by the due process clause.[153] The five-person majority argued that "reputation alone, apart from some more tangible interest such as employment," lay outside the range of liberties protected by the fourteenth amendment.[154] The Court stated that interests other than judicially declared fundamental rights acquire the status of liberty or property protected by due process only if they "have been initially recognized and protected by state law."[155]

149. *See* Sullivan v. Stark, 808 F.2d 737 (10th Cir. 1987).

150. *Miller*, 705 F.2d at 372.

151. *Id.* The court stated: " 'The concept of liberty recognizes two particular interests of a public employee: (1) the protection of his good name, reputation, honor and integrity, and (2) his freedom to take advantage of other employment opportunities. The manner in which a public employee is terminated may deprive him of either or both of these liberty interests. When the termination is accompanied by public dissemination of the reasons for dismissal, and those reasons would stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may test the validity of the profferred grounds for dismissal." *Id.* at 373 (quoting Lipp v. Board of Educ., 470 F.2d 802, 805 (7th Cir. 1972)).

152. 424 U.S. 693 (1976). The activity challenged in *Paul* was the distribution by police of a flyer containing photographs of persons identified as active shoplifters to local merchants. A picture of Davis was included because he had been arrested on a shoplifting charge though he was never convicted. Davis brought an action under 42 U.S.C. § 1983 against the chief of police claiming that he had been deprived of liberty without due process because the police had damaged his reputation without providing him with a prior hearing to determine whether he was an active shoplifter.

153. *Id.* at 694.

154. *Id.* at 701. Although earlier cases had indicated that the personal interest in reputation was included within the constitutional protection of liberty, the Court fabricated tenuous ways to distinguish these cases. For example, Justice Rehnquist interpreted (or rather reinterpreted) the recognition in Wisconsin v. Constantineau, 400 U.S. 433 (1971), of a liberty interest in not having one's name posted by the sheriff in a liquor store as an alcoholic, as having been based on the fact that the " '[p]osting' . . . significantly altered [Constantineau's] status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." *Id.* at 708-09.

On Rehnquist's performance in *Paul*, one commentator noted: "The Court's re-rationalization of the earlier cases is wholly startling to anyone familiar with those precedents. In many ways . . . this [is] *Paul's* most disturbing aspect. Fair treatment by the court of its own precedents is an indispensable condition of judicial legitimacy." Monaghan, *supra* note 14, at 424. For additional criticism of the Court's opinion in *Paul*, see Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist*, 64 6 KY. L.J. 753, 754-57 (1976).

155. 424 U.S. at 710. The opinion further seemed to suggest that only in these areas of incorporation is the state's power to regulate conduct limited. *Id.* at 712-13.

b. *Property*

The definition of property since the 1972 decision in *Board of Regents v. Roth*[156] has centered on the concept of "entitlement." In *Roth*, the plaintiff was a Wisconsin State University teacher whose one-year contract had not been renewed. He challenged the nonrenewal partly on the ground that the University's failure to provide a statement of reasons and a hearing violated his right to procedural due process.[157] Roth was untenured, and the relevant Wisconsin statute provided that all state university teachers would be on probation until they had served continuously for four years. Because Roth was hired for one year only, without any promise that his employment would continue beyond that period, his expectation of reemployment was not "property" and was therefore not within the protection of the due process clause. Accordingly, Roth was not entitled to any procedural protections over and above those provided by state law. Roth's substantive interest was "created and defined by the terms of his appointment,"[158] and the Court looked to those state-law terms to determine whether or not Roth's expectation was "property."[159]

In *Perry v. Sindermann*,[160] a companion case to *Roth*, the Court exemplified the implied contractual approach. In *Sindermann*, the Court held that a property interest may arise from "such rules or mutually explicit understandings that support [an individual's] claim of entitlement to the benefit and that he may invoke at a hearing."[161] Like Roth, Sindermann was a teacher at a state college; unlike Roth, he alleged that his institution had a *de facto* tenure system.[162] Furthermore, he alleged that he had legitimately relied on statements in the college's official faculty guide that purportedly instituted an informal tenure system.[163] The Court accepted Sindermann's argument, advancing two theories to support its finding that the *de facto* tenure system created a protected interest — an implied contract theory and an industrial common law theory.[164] If

156. 408 U.S. 564 (1972).

157. Roth also alleged that his termination was invalid because it transgressed a substantive limitation. He charged that he had been fired because of first amendment activity. This charge, however, was not before the Supreme Court; the district court had stayed proceedings on that issue pending Supreme Court review of the summary judgment. *Id.* at 574.

158. *Id.* at 578.

159. *Id.* at 577. In a frequently cited passage, the Court explained: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Id.* *See also* Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982); Kendall v. Board of Educ., 627 F.2d 1 (6th Cir. 1980).

160. 408 U.S. 593 (1972).

161. *Id.* at 601.

162. *Id.* at 599-600. Like Roth, Sindermann also claimed he had been terminated for exercising his free speech right to criticize the school administration. *Id.* at 594-95.

163. *Id.* at 600.

164. *Id.* at 601-02. The court announced that property interests "are not limited by a few rigid, technical forms," *id.* at 601, noting that the absence of a written contract does

Sindermann, on remand, could prove "the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution,' " the Court held, he would be entitled not to reinstatement but to procedural due process — that is, to a hearing on the grounds for his termination.[165]

An enlightening example of the statutory entitlement approach is *Bishop v. Wood*.[166] There, the Court closely examined the language of the relevant state statutes and ordinances to determine whether Bishop, a probationary employee of the police department, had an enforceable expectation of continued employment and therefore could be discharged only for cause.[167] Finding that, under those statutes and ordinances, Bishop's employment was terminable at will,[168] the Court held that Bishop had no property interest. Consequently, he had no right to procedural protection against arbitrary dismissal.[169]

---

not foreclose a claim of entitlement supported by principles of implied contract. *Id.* at 601-02 (citing 3A CORBIN, ON CONTRACTS, §§ 561-72A (1960)). As for the industrial common law theory, the court stated that Sindermann "might be able to show from the circumstances of [his] service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure." *Id.* at 602. The basic principle was that a school may create an entitlement by creating a system of tenure "in practice," much as the common law of a particular industry may supplement a collective bargaining agreement. *Id.* at 602 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579-80 (1960) (gaps in a labor agreement were "to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement"—such practices described as the "common law of the shop")).

It now appears unlikely that a practice alone, with no explicit promise attached, would be found to create a property entitlement. Subsequent case law has stressed the need for a "rule or mutually explicit understanding." For example, in Leis v. Flynt, 439 U.S. 438, 441-43 (1979) (per curiam), the Court held that a consistent state practice of admitting attorneys to practice *pro hac vice* did not give rise to property interest because the interest involved was not derived from a statute or rule, and because any understanding that existed, even if reasonable, was neither mutual nor explicit. The court expressly rejected the theory, put forth in Justice Stevens' dissent that an implicit promise could create an entitlement "as if by estoppel." *Id.* at 444 n. 5, thereby limiting the reach of *Sinderman*. *See* Terrell, *supra* note 54, at 912-18. *See generally* Comment, *Leis v. Flynt: Retaining a Nonresident Attorney for Litigation*, 79 COLUM. L. REV. 572 (1979).

165. 408 U.S. at 603 (citation omitted). *See also, e.g.*, Orloff v. Cleland, 708 F.2d 372, 377 (9th Cir. 1983) (postponement of termination of Veterans Administration employee after initial expiration date of appointment may have given rise to property interest in continued employment); Ashton v. Civiletti, 613 F.2d 923, 928-30 (D.C. Cir. 1979) (representations in FBI's employee's handbook amounted to "clearly implied promise of continued employment"). *Id.* at 930 (quoting Board of Regents v. Roth, 408 U.S. at 577). *Cf.* Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980).

166. 426 U.S. 341 (1976).

167. *Id.* at 345.

168. *Id.* The relevant ordinance provided:

> *Dismissal.* A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, . . . he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.

*Id.* at 344 n.5 (quoting MARION, N.C. PERSONNEL ORDINANCE, Art. II, § 6).

169. *Id.* at 347. Nor, moreover, did Bishop have a liberty interest at stake, according to the Court, because he had not been stigmatized or foreclosed from future employment prospects. *Id.* at 347-49; *see also* Board of Regents v. Roth, 408 U.S. 564, 572-75 (1972).

Once it has been determined that a specific private interest is a liberty or property interest, within the meaning of the due process clause, judicial due process analysis must address a second question: whether minimal procedural safeguards were followed before deprivation of the private interest. *Mathews v. Eldridge* adopted a balancing of private-versus-governmental interest approach.[170] In the last decade the Court has consistently applied the *Mathews* three-pronged balancing test[171] which maximizes judicial discretion.[172]

## B. Entitlement to Government Employment : Sullivan v. Stark

### 1. Case in Context

In *Sullivan v. Stark*,[173] the Tenth Circuit Court of Appeals dealt with the dismissal of a complaint filed by Sullivan, a park ranger, against the National Park Service for terminating his employment prior to the expiration of the period specified in his employment agreement.[174] Sullivan's complaint alleged a violation of his constitutional rights because of a refusal to give him an opportunity to answer and refute his termination, stating a deprivation of liberty and property without due process of law. The district court granted defendants' motion to dismiss, holding that Sullivan was an "excepted service"[175] employee who could be discharged at any time, with or without cause.

The Tenth Circuit held that (1) the termination of Sullivan by the Park Service did not violate his liberty interest because the termination neither damaged his reputation nor barred him from seeking other employment; (2) a public employee with a valid contract of employment for a definite term has a property interest in employment for the duration of the term; and (3) a government agency making an excepted service appointment has power to enter into employment contracts that confer property rights on an employee for the duration of the contract period. In so holding, the court reversed and remanded the case to the district court for a determination as to whether there existed a contract for a

170. 424 U.S. 319 (1976).

171. *See* Parham v. J.R., 442 U.S. 584, 599-600 (1979); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17 (1978); Dixon v. Love, 431 U.S. 105, 112 (1977); Ingraham v. Wright, 430 U.S. 651, 675 (1977).

172. In Matthews v. Eldridge, 424 U.S. at 334-35, the Court indicated the following factors should be considered in determining the "specific dictates" of due process: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens which the additional or substitute procedural requirement would entail.

173. 808 F.2d 737 (10th Cir. 1987).

174. *Id.* at 739. (The United States District Court for the District of Wyoming dismissed the action).

175. " 'Excepted Service' employees are ordinarily considered to be 'at will' employees, and are not entitled to the statutory procedural protections against discharge accorded federal employees in the competitive service." *Sullivan*, 808 F.2d at 740 (citing 5 U.S.C. §§ 7511(a)(1), 7513(b)); Fowler v. United States, 633 F.2d 1258, 1260 (8th Cir. 1980).

definite term of employment.[176]

The Tenth Circuit's reversal of the district court's decision to dismiss Sullivan's complaint, based on the fact that he was an "excepted service" employee, is an example of the Circuit's imposition of a high standard of care on the government. Where the government contracts, it will be held to the terms of the contract where the breach of that contract would be a deprivation of a property interest in violation of the due process clause of the fifth amendment.

2. Statement of the Case

Sullivan was hired as a seasonal employee in the excepted service. On May 5, 1982, he signed a "Letter of Acceptance and Employment Agreement" with the Park Service to work as a park ranger. This agreement provided that Sullivan work approximately four months, from June 8, 1982 through September 30, 1982. The employment agreement contained an express provision for early termination.[177] On August 8, 1982, Sullivan was advised that his employment at Grand Teton National Park had been terminated for unsatisfactory performance. Sullivan immediately demanded, but was told that he had no right to, a hearing.

Sullivan exhausted all administrative remedies in attempting to contest his termination and then filed suit in the United States District Court for the District of Wyoming. Sullivan contended that the employment agreement created a legitimate expectation of continued employment; that his constitutional rights were violated when the Park Service refused to give him an opportunity to answer, refute, and contest the alleged grounds for the termination; and that the agreement further created the expectation that the employment would continue throughout the term of the contract and would be terminated only for cause. The district court dismissed the complaint and the Tenth Circuit reversed. The case was remanded back to the district court for a determination of whether there existed a contract based on the agreement that only bore Sullivan's signature. A finding of a valid contract for a term would require the district court to decide what type of hearing due process requires.[178]

3. Discussion and Analysis of the Tenth Circuit's Opinion

The Tenth Circuit rejected the Eighth Circuit's approach to the excepted service employee,[179] and recognized the right of the individual to contract.[180] Relying on *Board of Regents v. Roth*[181] the court stated

176. *Sullivan*, 808 F.2d at 741.

177. "I understand that due to extenuating circumstances, such as lack of funds or other management changes, this offer of employment may be withdrawn or I may be terminated before my stated ending date." *Sullivan*, 808 F.2d at 738.

178. *Id.* at 741.

179. *Id.* at 740.

180. *See supra* note 164.

181. 408 U.S. 564 (1972).

that if Sullivan had a valid contract of employment for a definite term he had a property interest, protected by procedural due process, in employment for the duration of that term.[182] The Tenth Circuit saw nothing prohibiting the Interior Department from contracting for a definite term under its summer employment program but didn't know whether it had done so.[183] When the court looked at the document in the record, it noted that it was only signed by Sullivan with no expressed reciprocal promise of term employment by the Park Service.[184] The Tenth Circuit, by its reference to other information furnished in a letter of employment and a Seasonal Employee Handbook, by implication suggested that on remand the district court should apply the standards established in *Perry v. Sindermann*.[185] In that case the Supreme Court stated that a written contract with an explicit tenure provision is clear evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient cause is shown.

As previously stated, the agreement provided that Sullivan's employment was to be effective from June 8, 1982, through September 30, 1982. When Sullivan entered into the employment agreement, he relied on the past practice, custom and procedures of the National Park Service in thinking that his tenure of employment would not be interrupted except upon the showing of sufficient cause. Even in the absence of an express reciprocal promise by the Park Service, the district court on remand could have found that there was an explicit understanding between the parties that the agreement was for a fixed term, and that Sullivan had a reasonable expectation of continued employment through the end of that term by the provision in the agreement.

Relying on *Miller v. City of Mission*,[186] the Tenth Circuit had no problem disposing of Sullivan's liberty interest claim.[187] The court found that Sullivan's reputation was not damaged because the termination was not disseminated to the public nor was he barred from seeking other employment.[188]

4. Implications of Holding

The precedential weight of this holding within the Tenth Circuit will make it likely that where the government breaches a contract of employment for a definite term, plaintiff's property interest in employment for the duration of the term has been offended and a hearing will be required. This holding could have an adverse effect on the government's reliance on employee categories when dealing with the termination of an employee, because of the weight given to an individual's right

182. *See supra* notes 156-165 and accompanying text.
183. *Sullivan*, 808 F.2d at 741.
184. *Id.*
185. 408 U.S. 593 (1972). *See supra* notes 160-165 and accompanying text.
186. 705 F.2d 368 (10th Cir. 1983). *See* Paul v. Davis, 424 U.S. 693 (1976); *see also supra* notes 151-155 and accompanying text.
187. *Sullivan*, 808 F.2d at 739.
188. *Id.* at 739.

to contract. By implication, this holding also stands for the proposition that a public employee's liberty interests are implicated when the reasons for his discharge impugn his reputation or good name, or hinder his freedom to seek other employment.

## IV. STANDARD APPLIED TO DETERMINE THE CONSTITUTIONALITY OF CORPORAL PUNISHMENT

### A. *Background*

#### 1. Substantive Due Process

The Constitution prohibits the federal government and the states from depriving a person of "life, liberty or property without due process of law."[189] The due process clauses traditionally have been held to provide a foundation for analyzing the adequacy of government procedures.[190] In addition, apart from the procedural limitations inhering in the concept of due process,[191] the clauses have been construed to provide "substantive constitutional protection of liberty and property."[192] This due process limit on the substance of government regulation has come to be known as the doctrine of substantive due process.[193]

#### 2. Corporal Punishment as a Violation of Substantive Due Process

The protection of substantive due process has been used to challenge the constitutionality of statutes and regulations authorizing corporal punishment and of the discipline as administered in individual cases.[194] The use of corporal punishment as a means of disciplining school children has deep roots in this country.[195] It was used extensively during the colonial period when the practice was justified as a Biblical exhortation.[196] Corporal punishment is defined as "[p]hysical punishment as distinguished from pecuniary punishment or a fine; any kind of punishment of or inflicted on the body."[197] Although there is a sharp division of opinion among both educators and the general public regarding its use,[198] corporal punishment remains an authorized

189. U.S. CONST. amends. V and XIV. *See also supra* notes 141-142 and accompanying text.

190. *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1166 (1980) [hereinafter *Developments*].

191. W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 420 (5th ed. 1980).

192. *Developments*, *supra* note 189, at 1166; *see also* E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948).

193. *Developments*, *supra* note 189, at 1166.

194. Note, *Corporal Punishment in Public Schools: Constitutional Challenge After Ingraham v. Wright?*, 31 VAND. L. REV. 1449, 1451 (1978).

195. R. MNOOKIN, CHILDREN AND THE LAW (1978).

196. H. FALK, CORPORAL PUNISHMENT 11-48 (1941).

197. BLACK'S LAW DICTIONARY 306 (5th ed. 1979).

198. *See, e.g.*, E. BELMEIER, LEGALITY OF STUDENT DISCIPLINARY PRACTICES (1976); H. FALK, CORPORAL PUNISHMENT (1941); J. HYMAN & J. WISE, CORPORAL PUNISHMENT IN AMERICAN EDUCATION (1979); K. JAMES, CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS (1963); S. LEVINE & E. CARY, THE RIGHTS OF STUDENTS 84-86 (rev. ed. 1972); National Education Association, Report of the Task Force on Corporal Punishment (1972); B. SKIN-

method of discipline in most public school systems.[199]

In *Ingraham v. Wright*,[200] the Supreme Court addressed the rights of students in the context of public school corporal punishment. Pupils in a Florida junior high school sought damages and injunctive relief, alleging that school officials had violated their constitutional rights by subjecting them to disciplinary corporal punishment. The plaintiffs initially based their claims on three grounds: first, corporal punishment of schoolchildren amounts to cruel and unusual punishment; second, severe corporal punishment of public school students violates fourteenth amendment substantive due process because it is "arbitrary, capricious and unrelated to achieving any legitimate educational goal"; and third, the school system's policies for corporal punishment violate fourteenth amendment due process standards by failing to provide the pupils with any procedural safeguards before administering punishment.[201]

Although the Court acknowledged that the punishment complained of in *Ingraham* was "exceptionally harsh"[202] it denied or avoided the various constitutional claims. In a 5-4 decision written by Justice Powell,[203] the Court decided that the eighth amendment was designed to protect persons convicted of crimes and did not apply to paddling of schoolchildren.[204] All members of the Court agreed that the students had a four-

---

NER, SCIENCE AND HUMAN BEHAVIOR 192-93 (1953); Reitman, Follman, & Ladd, *Corporal Punishment in Public Schools*, ACLU REPORT (1972).

199. *Ingraham*, 430 U.S. 651, 660-61 (1977).

200. 430 U.S. 651 (1977).

201. 525 F.2d 909, 911-12 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651 (1977). The Supreme Court, however, denied certiorari on the substantive due process question. *See infra* notes 260-262 and accompanying text.

202. 430 U.S. at 657. The testimony before the district court revealed the experiences of students at the junior high school. For example, on one occasion a teacher asked some students, including James Ingraham, to leave the stage of the school auditorium. The students left, but were slow in doing so. Taken to the office to be paddled, James protested his innocence and refused to be hit. Aided by two other school officials who held James, the principal hit him at least twenty times with a wooden paddle. The punishment produced a hematoma on the buttocks; a doctor who examined James advised him to stay home from school for at least one week.

Roosevelt Andrews, the other named plaintiff in the case, stated that one year he was paddled at least ten times, often for being late for physical education class or for wearing an improper gym uniform. On one occasion, paddling by the principal caused severe swelling of his wrist and he was unable to use his arm for a week.

Another student's hand was fractured and apparently disfigured as a result of a paddling. Yet another pupil accused of making an obscene telephone call to a teacher was paddled approximately fifty times, a different child later confessed to the offense. Two boys were struck about fifty times each for "playing hooky." One boy who had asthma and heart trouble was hit on the back with a paddle because he wanted to clean his chair in the auditorium before sitting down. The child had to have an operation to remove a lump that developed where he had been struck. On two other occasions this same child vomited blood after being paddled. Many students testified that they had been subjected to paddlings for a variety of offenses, including chewing gum and not keeping their shirttails tucked in, and also testified that administrators carried paddles and brass knuckles around the school. Ingraham v. Wright, 498 F.2d 248, 255-59 (5th Cir. 1974), *rev'd on rehearing*, 525 F.2d 909 (5th Cir. 1976) (en banc).

203. Justice Powell's opinion was joined by Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist. The dissenting opinion by Justice White was joined by Justices Brennan, Marshall and Stevens. Justice Stevens also wrote a brief dissenting opinion.

204. 430 U.S. at 664.

teenth amendment liberty interest and that the students were deliberately punished by restraint and the infliction of "appreciable physical pain" by school officials acting under color of state law.[205] The majority held, however, that the availability of common law restraints and remedies adequately satisfied the requirements of procedural due process in protecting those liberty interests.[206]

The *Ingraham* Court denied certiorari on the substantive due process question,[207] which was posed broadly: "Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?"[208] *Ingraham* thus left unanswered "the substantive due process issue of the child's own right to physical integrity."[209]

In *Hall v. Tawney*,[210] the United States Court of Appeals for the Fourth Circuit became the first federal court to recognize that public school children have a substantive due process right to ultimate bodily security.[211] The court held that to vindicate this right, a school child may claim federal relief under 42 U.S.C. § 1983[212] when specific corporal punishment exceeds in severity that which is reasonably related to the state interest in maintaining order in the schools.[213] In this case a school administrator, purportedly without provocation, struck a minor plaintiff with a paddle made of hard rubber and about five inches in width, across her left hip and thigh. When the plaintiff resisted, she was shoved against a large stationary desk and was again "stricken repeatedly and violently" by the administrator. As a result of this application of force the plaintiff was taken to the emergency room of a nearby hospital where she was admitted and kept for a period of ten days for treatment of traumatic injury to the soft tissue of the left thigh, and trauma to the soft tissue with ecchyniosis of the left buttock. In addition, the plaintiff was "receiving the treatment of specialists for possible permanent

205. *Id.* at 674.

206. *Id.* at 672, 683. For an excellent commentary on *Ingraham*, see Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978) [hereinafter Rosenberg].

207. 430 U.S. at 659 n.12, 679 n.47.

208. *Id.* at 659 n.12.

209. Rosenberg, *supra* note 206, at 107. Professor Rosenberg stated that "[a] principled resolution thereof . . . would have required a finding that severe corporal punishment is unconstitutional." *Id.* at 100.

210. 621 F.2d 607 (4th Cir. 1980).

211. *Id.* at 613. The substantive due process analysis has been engaged in within a variety of contexts by lower federal courts, but has never been applied in the context of school corporal punishment. *See generally*, Sewell, *Conclusive Presumptions and/or Substantive Due Process of Law*, 27 OKLA. L. REV. 151, 165-71 (1974).

212. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), specifically provides:

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

213. *Hall*, 621 F.2d at 611.

injuries to her lower back and spine."[214]

In its review of this case, the *Hall* panel upheld the United States District Court's dismissal of the cruel and unusual punishment claim and the procedural due process allegation; however, it overruled that court's dismissal of the substantive due process complaint.[215] Although recognizing that the *Ingraham* Court had refused to review a claim that excessive corporal punishment violated a right to substantive due process, the Fourth Circuit determined that the availability of state civil and criminal remedies did not preclude a federal cause of action under section 1983 when rights to substantive due process might be implicated.[216] The Fourth Circuit concluded that school children have a right to ultimate bodily security based on substantive due process and set forth the following test to determine whether the right has been violated:

> . . . the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.[217]

In *Rochin v. California*,[218] the Supreme Court held that the forced pumping of a suspect's stomach was a clear violation of fourteenth amendment due process because it "shocks the conscience,"[219] although it was the only means of obtaining the criminal evidence that the police sought.[220] The Court indicated that an individual's interest in freedom from bodily intrusion is a fundamental interest. In finding that the treatment violated the due process clause, Justice Frankfurter recognized that the clause protected "personal immunities" that are "fundamental" or "implicit in the concept of ordered liberty."[221]

### 3. Section 1983 and Qualified Immunity

Most corporal punishment cases are litigated in state courts under charges of battery,[222] or assault and battery;[223] however, an increasing

214. *Id.* at 614.

215. *Id.* at 615.

216. *Id.* at 611. The Court had held the allegations sufficient to state a claim for relief under 42 U.S.C. § 1983 and further held that the episodic nature of the punishment did not preclude the federal action. *Id.* at 614-15.

217. *Id.* at 613. The *Hall* panel acknowledged that the Supreme Court, in *Ingraham*, had ruled that school paddlings violated neither procedural due process nor eighth amendment rights, and that since neither of these two rights were violated it might be possible to imply a holding that neither could there be a violation of any substantive due process right. *Id.* at 611. However, the *Hall* panel reasoned that the implication was not compelled due to the Supreme Court's express reservation of the issue.

218. 342 U.S. 165 (1952).

219. *Id.* at 172. Irvine v. California, 347 U.S. 128, 133 (1954), limited *Rochin* to situations involving coercion, violence, or brutality to the person.

220. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-9 (1978).

221. 342 U.S. at 169 (quoting Cardozo, J., Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

222. People v. Ball, 58 Ill.2d 36, 317 N.E.2d 54 (1974).

number of litigants are bringing actions in federal court under 42 U.S.C. § 1983.[224] This federal law allows a plaintiff whose civil rights have been violated by state officials, to bring a constitutional tort or equity action in federal court against such officials[225] or the governmental agency that employs the individuals accused of committing the civil wrong.

Many individuals who claim that their civil rights have been violated prefer to seek damages in federal court under section 1983 primarily because federal law prevents school districts and other municipal agencies from claiming immunity under existing state law for the civil rights violations committed by employees.[226] However, qualified immunity, also known as the good faith defense, generally protects a public official from liability if he can prove he acted in "good faith."[227]

In *Harlow v. Fitzgerald*,[228] the Supreme Court significantly changed the basis for establishing the defense of qualified immunity in section 1983 actions. Under the *Harlow* test, government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[229] The decision eliminated the subjective considerations that were enunciated in *Wood v. Strickland*.[230] Determination of qualified immunity is now to be based "on the objective reasonableness of an official's conduct, as measured by reference to clearly established law."[231]

## B. *Constitutional Implications of Corporal Punishment in Public Schools*: Garcia v. Miera

### 1. Case in Context

*Garcia v. Miera*[232] involved the Tenth Circuit Court of Appeals' re-

223. Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954).

224. *See supra* note 212 and accompanying text.

225. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Traditionally, defendants had their conduct tested against both an "objective" and a "subjective" standard. *See* Wood v. Strickland, 420 U.S. 308 (1975). However, *Harlow* dispensed with the subjective element and held that the defendant is not liable under § 1983, so long as his official actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

226. Owen v. City of Independence, 445 U.S. 622 (1980). In this case, the Supreme Court held that when a public body is subject to liability, it cannot assert an immunity based on the good faith of its officers as a defense even though the officials themselves might assert such a defense when they are sued individually.

227. *See generally*, Note, *Eleventh Annual Tenth Circuit Survey: Civil Rights*, 61 DEN. U.L. REV. 163, 165-66 (1984) (discussing the distinction between the subjective and objective test, as applied by the Tenth Circuit).

The defendant must prove by a preponderance of the evidence that he acted in good faith. S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 8.01 (1979).

228. 457 U.S. 800 (1982).

229. *Id.* at 818.

230. Wood v. Strickland, 420 U.S. 308 (1975). *See supra* notes 235 and 237 and accompanying text.

231. *Harlow*, 457 U.S. at 818.

232. 817 F.2d 650 (10th Cir. 1987).

view of the United States District Court for the District of New Mexico's grant of summary judgment. The district court found that the school officials involved in the two incidents of corporal punishment were insulated from liability under 42 U.S.C. § 1983[233] by qualified immunity.

Teresa Garcia, an elementary school pupil at the Penasco Elementary School in New Mexico, by her parents and best friends Max and Sandra Garcia, sued the school officials in their individual capacities for denying her substantive due process in violation of section 1983 arising from two beatings suffered at their hands.[234] The district court granted summary judgment to the school district, concluding that it was shielded from liability by the defense of good faith immunity[235] because "the law governing whether excess corporal punishment can give rise to a substantive due process claim [was] not clearly established."[236] Garcia appealed the district court's grant of summary judgment contending that at the time of the beatings excessive corporal punishment by school officials did violate her clearly established substantive due process rights.

In reversing the district court's decision, the Tenth Circuit referred to the United States Supreme Court's ruling in *Ingraham v. Wright*,[237] where the Court declared that "corporal punishment in public schools implicates a constitutionally protected liberty interest."[238]

2. Statement of the Case

Teresa Garcia was a grammar school student at the Penasco Elementary School, Penasco, New Mexico in 1982 and 1983. On February 10, 1982, Theresa Miera, the school principal, summoned Garcia, then in the third grade, to her office to punish her for hitting a boy who had kicked her. Miera attempted to paddle Garcia, but she refused to cooperate, resulting in Miera's calling J.D. Sanchez, a teacher at the school, for assistance. Sanchez grabbed Garcia's ankles and held her upside down while Miera hit her leg with the paddle.[239] The beating made a two inch cut on Garcia's leg that left a permanent scar. Shortly after this incident, Garcia's parents voiced their concerns to Miera and requested that they be notified in the event their daughter was to be subjected to corporal punishment again.

Garcia received a second beating about one and one-half years later when she was summoned to Miera's office for saying she had seen a teacher, Judy Mestas, kissing a student's father, Denny Mersereas, during a field trip. Garcia also said that Mestas had sent love letters to Mersereas through his son.[240] After suffering two blows with the paddle,

233. *See* § 1983, *supra* note 212 and accompanying text.
234. *Garcia*, 817 F.2d at 652.
235. *Id.*
236. *Id.*
237. 430 U.S. 651 (1977).
238. *Id.* at 672.
239. The paddle "was split right down the middle, so it was two pieces, and when it hit, it clapped [and] grabbed." *Garcia*, 817 F.2d at 653.
240. *Id.* at 653, *see also* n.3.

Garcia refused to receive the remaining three and asked permission to telephone her parents. Miera refused to allow Garcia to phone her parents until the paddling was completed. Miera then called Edward Leyba, an administrative associate at the school, to assist her in delivery of the remaining three blows. Leyba assisted by pushing Garcia towards a chair over which she was to bend and receive the last three blows. Garcia and Leyba struggled and Garcia hit her back on Miera's desk. She then submitted to the last three blows. Garcia suffered back pains for several weeks as a result thereof.

Garcia received medical treatment for multiple and severe bruises to her buttocks she sustained from the second paddling. Dr. Albrecht, M.D., the attending physician, stated, "I've done hundreds of physicals of children who have had spankings . . . and I have not seen bruises on the buttocks as Teresita had, from routine spankings . . . [T]hey were more extensive, deeper bruises . . . ."[241] The examining nurse, Betsy Martinez, testified that if a child received such injuries by a parent's hand, she would be obligated to notify protective services.[242]

Garcia alleged that the severity of the paddlings violated her substantive due process rights. Miera, defendant-appellee, based her motion for summary judgment on the fact that the law concerning substantive due process rights of school children subjected to corporal punishment was not clearly established, entitling them to good faith immunity.

3. Discussion and Analysis of the Tenth Circuit's Opinion

The Tenth Circuit rejected the Fifth Circuit's approach to substantive due process in *Ingraham*, aligning itself with the Fourth Circuit on this crucial issue. In *Hall v. Tawney*,[243] the Fourth Circuit indicated that the infliction of corporal punishment by a public school official may violate a schoolchild's constitutional rights. The court determined that "there may be circumstances under which specific corporal punishment administered by state school officials gives rise to an independent federal cause of action to vindicate substantive due process rights under 42 U.S.C. § 1983."[244] Although the test *Hall* proposed for determining a due process violation is extremely stringent, the decision provides a framework for the analysis of the substantive due process rights of students subjected to excessive physical punishment. In coming to its conclusion, the *Hall* court went beyond the scope of *Ingraham*, in which the Supreme Court expressly reserved the issue of substantive due process.[245]

*Ingraham* made clear that reasonable corporal punishment violated

241. *Garcia*, 817 F.2d at 653.
242. *Id.*
243. 621 F.2d 607 (4th Cir. 1980). *See also* Milonas v. William, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) (the use of excessive physical force may violate schoolchildrens' constitutional rights).
244. 621 F.2d at 611.
245. *Ingraham*, 430 U.S. 651, 659 n.12.

no substantive due process rights of school children.[246] The Tenth Circuit held that by acknowledging that "corporal punishment implicates a fundamental liberty interest protected by the Due Process Clause," *Ingraham* clearly signaled that, at some degree of excessiveness or cruelty, the meting out of such punishment violates the substantive due process rights of the pupils.[247]

Because the Tenth Circuit had addressed the issue of excessive corporal punishment of a student in *Milonas v. Williams*,[248] it decided that the law was clearly established at the time of the second beating. By relying on *Harlow*'s objective test of what a reasonable person would have known, the Tenth Circuit acknowledged the split between the Fifth and the Fourth Circuits, but stated that the Supreme Court when it addressed the Fifth Circuit's decision in *Ingraham*, indicated that corporal punishment in public schools is a constitutionally protected right.

4. Implications of Holding

Although the Supreme Court in *Ingraham* foreclosed section 1983 actions based on the eighth amendment or procedural due process, the Tenth Circuit concluded that corporal punishment could violate substantive due process and hence serve as a basis for federal relief under section 1983. The *Garcia* court's recognition of the right to ultimate bodily security as a matter of substantive due process provides review in federal courts of the conduct of public school officials. The Tenth Circuit has helped clear the way for the Supreme Court to declare severe corporal punishment of schoolchildren a violation of substantive due process.

## CONCLUSION

During the survey period, the Tenth Circuit balanced the right of the individual with that of the governmental interest. In *Phelps v. Reagan*, the Tenth Circuit had to decide if the first amendment was a limitation on the President's power to appoint ambassadors. The court decided that the case was foreclosed by the political question doctrine but not before it addressed the standing issue, determining that *Flast* and *Valley Forge* were still the precedent in the area of the first amendment establishment clause cases. In *Mini Spas v. Salt Lake City Corp.*, the court was also faced with a first amendment claim, freedom of expression. Here the court determined that massage parlor's interest in freedom of expression was outweighed by the city's interest in regulating their dress so as to prevent the parlors from degenerating into houses of prostitution. In *Sullivan v. Stark*, the Tenth Circuit required the government to comply with due process requirements. The court stated that it saw no reason why the government could not enter into employment contracts

246. *Id.* at 676.
247. *Garcia*, 817 F.2d at 654.
248. 691 F.2d 931 (10th Cir. 1982).

— having so contracted — it was bound to the terms of such contract because there is a property interest in employment. In *Garcia v. Miera*, the Tenth Circuit found a substantive due process right of students in public schools in the area of corporal punishment. In an area of confusion among the circuits and faced with silence from the Supreme Court, the Tenth Circuit pioneered the field for the Supreme Court to adopt a substantive due process standard in the area of corporal punishment. Although the Tenth Circuit swung back and forth between the individual's rights and the governmental interest in the areas of procedural and substantive due process, its overall approach was well-balanced.

*Boston H. Stanton, Jr.*