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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 in interpreting the constitution; others reinforced principles previously enunciated in settled precedent; and in others, the appellants failed to raise valid constitutional challenges.

This article focuses primarily on first amendment cases. The lead case addresses the constitutionality of an Oklahoma statute that attempted to prohibit school teachers from advocating or engaging in "public homosexual conduct."[1] Other important Tenth Circuit constitutional law cases touch on such diverse areas as a Wichita obscenity ordinance,[2] Jewish school teachers' freedom of religion rights,[3] and the Oklahoma Take-over Bid Act.[4] And, to the chagrin of non-smokers working in smoke-filled offices throughout the Tenth Circuit, the court of appeals refused to use the Constitution to ban smoking in the workplace, thereby rejecting appellants claim to a constitutional right to think.[5]

I. FREEDOM OF SPEECH: *NATIONAL GAY TASK FORCE V. BOARD OF EDUCATION*

A. *Facts*

In *National Gay Task Force v. Board of Education*,[6] the Tenth Circuit addressed the question of whether a statute[7] which punishes school

1. National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *prob. juris. noted*, 105 S. Ct. 76 (Oct. 1, 1984) (No. 83-2030) (arguments heard January 14, 1985; decision pending). *See infra* notes 6-52 and accompanying text.

2. M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983). *See infra* notes 53-70 and accompanying text.

3. Pinsker v. Joint School Dist. No. 28J, 735 F.2d 388 (10th Cir. 1984). *See infra* notes 87-99 and accompanying text.

4. Mesa Petroleum Co. v. Cities Servs. Co., 715 F.2d 1425 (10th Cir. 1983). *See infra* notes 136-152 and accompanying text.

5. Kensell v. Oklahoma, 716 F.2d 1350 (10th Cir. 1983). *See infra* notes 128-135 and accompanying text.

6. 729 F.2d 1270 (10th Cir.), *prob. juris. noted*, 105 S. Ct. 76 (Oct. 1, 1984) (No. 83-2030) (arguments heard January 14, 1985; decision pending).

7. 70 OKLA. STAT. § 6-103.15 (1981). This statute provides:

> 1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
> a. committed with a person of the same sex, and
> b. indiscreet and not practiced in private;
> 2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
> 3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.
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> B. In addition to any ground set forth in Section 6-103 of Title 70 of the

teachers for "public homosexual activity"[8] and "public homosexual conduct"[9] violates the Constitution. Oklahoma law, as written in state statutes and subsequently interpreted by the state courts, defined homosexual "activity" as including the commission of oral or anal sodomy.[10] Homosexual conduct, however, was statutorily defined as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity."[11] Punishment for public homosexual conduct or activity by a teacher included refusal to hire or rehire, suspension or dismissal.[12]

The National Gay Task Force (NGTF), a political action group which promotes the rights of homosexuals and which includes among its membership teachers employed by the defendant school district, challenged the facial constitutionality of the statute on the grounds that the section prohibiting homosexual activity deprived its members of the right to privacy[13] and equal protection under the law,[14] and that the law was vague.[15] The appellants also contended that the section outlawing public homosexual conduct was infirm in that it was overbroad, invading freedom of speech.[16] Finally, NGTF argued that the statute violated the establishment clause of the first amendment[17] because it reflected

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Oklahoma Statutes, a teacher, student teacher or a teacher's aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity; and
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors shall be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's, or teachers' aide's official duties;
3. Any extenuating or aggravating circumstances; and
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

8. *Id.* In this statute, homosexual activity refers exclusively to the actual commitment of an act defined in 21 OKLA. STAT., § 886 (1981), which states: "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years." In Berryman v. State, 283 P.2d 558, 563 (Okla. Crim. App. 1955), the Oklahoma court construed § 886 as proscribing oral and anal copulation. The United States Supreme Court in Wainwright v. Stone, 414 U.S. 21 (1973), upheld a nearly identical Florida statute.

9. *See supra* note 7. In this statute, public homosexual conduct refers not to the commission of sodomy, but to the advocacy of homosexual activity as defined in note 7, *supra*.

10. *See supra* note 8.

11. *See supra* note 7.

12. *See supra* note 7.

13. Brief for the Appellant at 21-36, National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984).

14. *Id.* at 36-45.

15. *Id.* at 17-21.

16. *Id.* at 14-16.

17. U.S. CONST. amend. I states, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

majoritarian religious preferences.[18]

B. *The Decision*

The Tenth Circuit, speaking through Judge Logan, upheld the section of the law which permits the state to fire teachers for committing indiscreet public acts of sodomy.[19] Although the court did not comment extensively, it ruled that because the statute prohibits only public homosexual activity, it does not violate any constitutionally protected right to privacy.[20] In response to the equal protection challenge, the court ruled that since the choice of sexual partner has not been held to be a suspect class,[21] the state may reasonably discharge a teacher "for engaging in an indiscreet public act of oral or anal intercourse."[22]

The Tenth Circuit agreed with the district court in rejecting the NGTF establishment of religion challenge with little comment other than reference to *Harris v. McCrae*.[23] In *Harris*, the United States Supreme Court ruled that just because a law coincides or harmonizes with a religious belief, it does not necessarily follow that the law was inspired by that belief, citing for example that the Judaeo-Christian ethic against stealing does not negate larceny laws.[24]

The Tenth Circuit further ruled that the homosexual activity section of the statute was not invalid for vagueness.[25] Relying on *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*,[26] the court stated that an appellant must show that a challenged law is "impermissibly vague in all its applications."[27] Noting that the challenged statute defines public homosexual activity as the "commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes,"[28] and that Oklahoma courts have construed this section as proscribing oral and anal intercourse,[29] the appeals court ruled that the behavior prohibited by the statute is clearly defined, and thus the law is not void for vagueness.[30]

The section of the statute which proscribed advocating public homosexual conduct[31] did not fare as well as the section outlawing public homosexual activity. The court ruled that this section reached protected speech.[32] The trial court had also found that the statute forbade protected speech, but upheld its constitutionality by reading into it a "mate-

18. Brief for the Appellant at 46-47.
19. 729 F.2d at 1273.
20. *Id.*
21. *Id.* at 1273 (citing Frontiero v. Richardson, 411 U.S. 677 (1973)).
22. 729 F.2d at 1273.
23. 448 U.S. 297 (1980)
24. *Id.* at 319-320.
25. 729 F.2d at 1273. *See supra* notes 7 and 8.
26. 455 U.S. 489 (1982).
27. 729 F.2d at 1273 (quoting *Hoffman Estates*, 455 U.S. at 497).
28. *See supra* note 3.
29. 729 F.2d at 1273 n.1 (citing Berryman v. State, 283 P.2d 558, 563 (Okl. Crim. App. 1955)).
30. 729 F.2d at 1273.
31. *See supra* note 7.
32. 729 F.2d at 1274.

rial and substantial disruption" test.[33] The Tenth Circuit ruled, however, that it could read no such test into the statute, and thus found it an unconstitutional invasion of free speech.[34]

Citing *Broadrick v. Oklahoma*,[35] the court acknowledged that first amendment facial challenges based on overbreadth are "strong medicine," to be used "sparingly and only as a last resort."[36] Nevertheless, the court felt compelled to invalidate the advocacy section of the statute because it regulated pure speech,[37] it has a "deterrent effect on legitimate expression,"[38] and because it would not be "readily subject to a narrowing construction by the state courts."[39]

The court found that even though the statute sought to condemn advocacy of a crime, the first amendment protects such speech so long as the illegal activity is to take place at "some indefinite future time."[40] Only advocacy intended to incite *imminent* lawlessness is not so protected, the court noted, citing *Brandenburg v. Ohio*.[41] The court observed that a teacher appearing before the Oklahoma legislature to lobby for homosexual rights, although exercising protected speech, would be subject to punishment under the statute if his advocacy came to the attention of his students or school employees.[42] Thus, under the statute, the court noted, teachers necessarily must restrict their expression in order to protect their jobs.[43]

Recognizing that in some instances the state may restrict teachers' freedom of speech,[44] the court ruled that such a restriction is constitutionally proper only when the speech creates a "material or substantial interference or disruption in the normal activities of the school."[45] The court went on to observe that the appellee had made no showing that mere advocoacy would create such a disruption.[46]

C. *The Dissent*

Judge Barrett, in a vigorous dissent, entirely rejected the majority's

33. *Id.* at 1272-73.
34. *Id.* at 1274.
35. 413 U.S. 601 (1973).
36. 729 F.2d at 1274 (quoting *Broadrick*, 413 U.S. at 613).
37. 729 F.2d at 1274 (citing New York v. Ferber, 458 U.S. 747, 772-73 (1982)).
38. 729 F.2d at 1274 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975)).
39. *Id.*
40. 729 F.2d at 1274 (citing Hess v. Indiana, 414 U.S. 105, 109 (1973)).
41. 395 U.S. 444, 447 (1969).
42. 729 F.2d at 1274.
43. *Id.* at 1274 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 217 (1975)).
44. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (teachers' interest in commenting upon matters of public concern must be balanced against the State's interest, as an employer in public employee efficiency); Childers v. Independent School Dist. No. 1, 676 F.2d 1338 (10th Cir. 1982) (public employee's first amendment rights of expression are protected unless the employer demonstrates that some restriction is necessary to ensure effective employee performance or to prevent disruption of official functions).
45. 729 F.2d at 1274 (citing Tinker v. Des Monies, 393 U.S. 503 (1969)).
46. 729 F.2d at 1274.

constitutional overbreadth analysis, and would have upheld the Oklahoma statute in its entirety.[47] Declaring sodomy to be "*malum in se*,"[48] Judge Barrett concluded that advocacy of homosexual conduct merited no constitutional protection.[49] Not being protected speech, the judge asserted that the state is not required to demonstrate that such advocacy would cause a material or substantial disruption of school activities. Rather, all the state need show was that "such advocacy is advanced in a manner that creates a substantial risk that such conduct will encourage school children to commit the abominable crime against nature."[50] The judge concluded that, regardless of the situs where made, any public advocacy involved a substantial risk of reaching the ears of school children, creating a danger that it would incite them to "participate in the abominable and detestable crime against nature."[51] Such speech, opined the judge, "is without First Amendment protection."[52]

II. OBSCENITY: *M.S. NEWS V. CASADO*[53]

In *M.S. News Co. v. Casado*,[54] the Tenth Circuit considered a first amendment challenge to the constitutionality of a proposed Wichita, Kansas, obscenity ordinance. The case presented to the court two previously unraised questions: first, the constitutionality of incorporating a modified *Miller* definition of "obscenity" into an ordinance designed for the protection of children as an audience;[55] and second, the constitutionality of protecting children from the display of materials which are not legally obscene in the possession of an adult. Relying on a related

47. *Id.* at 1275 (Barrett, J., dissenting).

48. *Id.* at 1276. Judge Barrett defines *malum in se* as an act "immoral and corruptible in its nature without regard to the fact of its being noticed or punished by the law of the state." *Id.*

49. *Id.* at 1276.

50. *Id.* at 1277.

51. *Id.* at 1276.

52. *Id.*

53. The author gratefully acknowledges the assistance of Lawrence K. Hoyt in drafting this section of the article.

54. 721 F.2d at 1281 (10th Cir. 1983). The case also raised equal protection, prior restraint, and sixth amendment issues. On each of these issues the court ruled against the plaintiff news company. The equal protection claim, which arises frequently in conjunction with obscenity issues, was disposed of by directly applying Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973) (Supreme Court stated that "stemming the tide of commercialized obscenity" is a legitimate state interest).

The court rejected outright the plaintiff's prior restraint claim, noting that the ordinance penalizes violations of its terms, "[i]t does not require prior approval of the authorities before any material can be distributed or displayed." 721 F.2d at 1292.

The court also rejected the plaintiff's sixth amendment argument that, because prosecutions under the ordinance are tried before the municipal court, the ordinance violates the right to a jury determination of what constitutes contemporary community standards. 721 F.2d at 1293. The court determined that Kansas' "two-tier" adjudicatory system, which provides an appellant the right to a trial *de novo* in the district court where trial by jury may be requested, adequately affords an accused his right to a jury trial. *Id.* at 1294. The court refused to accept plaintiff's argument that the application of the constitutional obscenity test must, in the first instance, be by a jury. *Id.* at 1295.

55. In Miller v. California, 413 U.S. 15 (1973), a majority of five justices agreed on a new definition of "obscenity" which is constitutionally acceptable for use in determining when materials or speech are not entitled to first amendment protection. The decision

but not clearly precedential Supreme Court decision, the Tenth Circuit rejected in a logical manner each of the arguments raised against the ordinance.

The plaintiff, a wholesale and retail distributor of publications, was appealing the district court's dismissal of its request for injunctive and declaratory relief against enforcement of the ordinance.[56] The ordinance, if enforced, would render illegal the sale of sexually oriented materials to minors and would limit the display of such materials. The ordinance specifically required that material "harmful to minors" must be kept behind devices commonly known as "blinder racks" so that the lower two-thirds of the material would not be visible.[57]

The Tenth Circuit first cited *Ginsberg v. New York*[58] for the general principle that it is constitutionally permissible to accord minors a more restrictive right to purchase sexually related materials than that given to adults.[59] The court then addressed the plaintiff's allegation that the Wichita ordinance was void due to overbreadth and vagueness. Observing that the *Ginsberg* Court had upheld, in the face of vagueness and overbreadth claims, a New York statute which similarly prevented the sale of obscene materials to minors, the Tenth Circuit reconciled two important factual differences between *Ginsberg* and the case at bar.[60]

First, the New York obscenity ordinance in *Ginsberg* had defined materials "harmful to minors" by incorporating the definition of "obscenity" as set forth in the now overruled *Memoirs v. Massachusetts*,[61] modifying each of the three elements of the *Memoirs* definition so that it applied to minors.[62] The Wichita ordinance, however, used the current *Miller* definition of obscenity, modifying it in the same manner to derive its definition of "harmful to minors."[63] Because the *Ginsberg* Court had held that such a modification to a constitutionally acceptable definition did not cause the resulting definition to fail for overbreadth or vague-

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modified the definitions previously set forth in Roth v. United States, 354 U.S. 476 (1957) and Memoirs v. Massachusetts, 383 U.S. 413 (1966).

The *Miller* guidelines are (a) "whether 'the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest" (quoting *Roth*), (b) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the state law," and (c) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. 15, 24 (1973).

56. 721 F.2d at 1285.

57. *Id.* at 1296, 1297.

58. 390 U.S. 629 (1968).

59. 721 F.2d at 1285.

60. *Id.* at 1286.

61. 383 U.S. 413-18 (1966).

62. 721 F.2d at 1286 (citing Ginsburg v. New York, 390 U.S. 629, 646 (1968)).

63. 721 F.2d at 1296. The Wichita ordinance defined as "harmful to minors" any material or performance having the following characteristics:

> (a) The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors; and
>
> (b) The average adult person applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sado-masochistic abuse in a manner that is patently

ness, the Tenth Circuit reasoned, by implication, that the Wichita ordinance should likewise be upheld against the vagueness and overbreadth claims.[64]

The second important difference between the Wichita and *Ginsberg* ordinances was that the Wichita ordinance included the display prohibition. The Tenth Circuit held that although the prohibition was content-based regulation, it was valid as a reasonable time, place and manner regulation designed to further "the substantial governmental interest of protecting minors from harmful adult material."[65] The plaintiff's overbreadth argument was therefore rejected.[66] The court noted that adults were not deprived of access to the material, and minors were deprived only of material that was obscene as to them.[67] The court further reasoned that the display regulation could be categorized as governing "speech plus conduct," rather than pure speech, thereby invoking the requirement that the overbreadth of the challenged statute must be "substantial" before invalidation is justified.[68]

The court rejected the plaintiff's vagueness claim by holding that the ordinance's clearly defined obscenity standard gives each seller of sexually oriented material sufficient notice of when displays must be restricted.[69] The scienter provision in the ordinance was found to further

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offensive to prevailing standards in the adult community with respect to what is suitable for minors; and

(c) The material or performance lacks serious literary, scientific, educational, artistic, or political value for minors.

Id. at 1296. Compare the ordinance definition of "harmful to minors" with the *Miller* definition of obscenity presented at *supra* note 55.

64. 721 F.2d at 1286-87.

65. *Id.* at 1288 (citing Young v. American Mini Theatres, 427 U.S. 50, 63-72 (1976)).

The Tenth Circuit rationale should not, however, be interpreted as allowing or encouraging content-based regulation of speech beyond the obscenity context. Unlike the evolution of the Supreme Court's definition of obscenity which, since *Miller*, has apparently reached a condition of stability (see *supra* note 55), the Supreme Court's position on the validity of content-based regulation is in a state of flux. The plurality opinion in *American Mini Theatres* supported a broader use of content-based regulation, 427 U.S. at 63 & n.18, but Justice Powell, the swing vote, and Justice Stewart, with whom three Justices joined in dissent, wrote that an ordinance discriminating between theatres solely on the basis of the content of the films shown is unconstitutional. *Id.* at 75, 76, 86. Furthermore, there has historically been a presumption against the validity of content-based regulations as indicated by the recent Supreme Court decisions in Metromedia Inc. v. City of San Diego, 453 U.S. 490, 516 (1981), and Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 536 (1979). Therefore, *M.S. News* should not be relied upon as authority for content-based regulation of speech beyond the obscenity context. However, see FCC v. Pacifica Found., 438 U.S. 726, 749-51 (1978), which upholds a content-based regulation designed to protect children from indecent forms of speech.

66. 721 F.2d at 1289. *See also* Dover News, Inc. v. City of Dover, 381 A.2d 752, 755 (1977) in which the Supreme Court of New Hampshire suggested that a properly written display ordinance would be upheld as a reasonable time, place and manner restriction. *Compare* American Booksellers v. Superior Court of Los Angeles, 129 Cal. App. 3d 188, 204, 205, 181 Cal. Rptr. 3d 33, 38 (1983), ruling that a display ordinance was overbroad to the extent it denied access of adults and minors to material that was not obscene to each group respectively.

67. 721 F.2d at 1288-89.

68. *Id.* at 1289 (citing New York v. Ferber, 458 U.S. 747, 770 (1982)).

69. 721 F.2d at 1290.

mitigate any claim of vagueness or lack of notice.[70]

III. Freedom of Religion

The Tenth Circuit considered two cases in which appellants invoked a freedom of religion argument to vindicate perceived invasions of constitutional rights. In both cases, the appeals court rejected the claims of the appellants.

A. Denver Post of The National Society of The Volunteers of America v. NLRB.[71]

The Volunteers of America (VOA) and its affiliated Denver chapter is an organization whose stated purpose is to bring people to "a knowledge of God."[72] Although the Denver chapter operates three chapels in the metropolitan area, it also operates six social welfare facilities in coordination with various state and local governmental agencies.[73] In 1981, several of its social workers were the targets of an organizing effort by the United Nurses, Professionals and Health Care Employees (the Union). The Union filed a petition with the National Labor Relations Board (NLRB) requesting that it be certified as the bargaining agent for VOA employees. VOA objected to the certification on the grounds that it was a religious organization, and that its complex relationship with various governmental levels, especially for funding and administration, made negotiations for wages, hours, and conditions of employment with a third party almost impossible.[74] Nevertheless, the NLRB certified the Union, which subsequently won an election among VOA employees.

When the Union sought to negotiate a wages-and-hours contract, VOA refused on the ground that the jurisdictional certification issued by the NLRB was erroneous. The NLRB regional director issued a complaint against VOA alleging violations of the National Labor Relations Act.[75] Shortly thereafter VOA and the Union jointly filed a stipulation requesting that the NLRB issue an order charging the VOA with a technical refusal to bargain. The sole purpose of the requested order was to place VOA's objections to the NLRB certification before the Tenth Circuit.[76]

Before the appellate court, VOA cited *NLRB v. Catholic Bishop*[77] as authority for its refusal to bargain with the Union. In *Catholic Bishop*, the United States Supreme Court rejected a bid by the NLRB to force a union election in church schools, observing that "the 'obvious fact [is] that the raison d'être of parochial schools is the propagation of a reli-

70. *Id.*
71. 732 F.2d 769 (10th Cir. 1984).
72. *Id.* at 770.
73. *Id.* at 771 n.1.
74. *Id.* at 771.
75. 29 U.S.C. §§ 158(a)(1) and (5) (1982).
76. 732 F.2d at 771.
77. 440 U.S. 490 (1979).

gious faith.' "[78] This, the court ruled, would cause the NLRB, a governmental organization, to become impermissibly entangled in church affairs.[79]

The circuit court observed that, although the primary purpose of the VOA is to help people find God through the social programs it administers, the religious aim clearly is not the "central role . . . [of] the programs themselves."[80] Thus, the court ruled that VOA was not entitled to the same first amendment protection as that given parochial schools. The court noted that, although all VOA officers are ordained ministers, the staff of its various social work programs have no religious training and provide no spiritual guidance to their clients. This, concluded the court, is "a far cry from that of the parochial school teachers in *Catholic Bishop*," and poses little potential for entangling the NLRB in religious matters.[81] However, the court noted that if the VOA was using funds received from federal and state sources for sectarian purposes, it would raise "serious establishment questions under the First Amendment, as well as the Colorado Constitution."[82]

The appellate court also ruled against VOA's contention that it should be exempt pursuant to the National Labor Relations Act provision which excludes governmental bodies from NLRB jurisdiction.[83] The court found that VOA was a private contractor rather than a governmental agency. As such, it had sufficient control over wages, hours and working conditions to bargain meaningfully with the Union.[84] Citing its decision in *R.W. Harmon & Sons, Inc. v. NLRB*,[85] the appeals court ruled that whether an employer had sufficient control over employee relations to bargain effectively is a question of fact, and that the NLRB finding would not be disturbed so long as it is supported by substantial evidence.[86] Thus, having ruled against VOA on both of its objections to

78. *Id.* at 503 (quoting Lemon v. Kurtzman, 403 U.S. 602, 628 (1971) (Douglas, J. concurring)).

79. *See, e.g.*, NLRB v. Bishop Ford Cent. Catholic High School, 623 F.2d 818, 823 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981), in which the appeals court ruled that a first amendment conflict arose because of "the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed."

80. 732 F.2d at 772.

81. *Id. See, e.g.*, NLRB v. St. Louis Christian Home, 663 F.2d 60 (8th Cir. 1981), in which the NLRB was upheld in ordering union elections in a church-operated home for battered children. The court emphasized that the home was operated in the same manner as secular child-care centers, hired employees without regard to religion, and received substantial public funding. *See also* Tressler Lutheran Home for Children v. NLRB, 677 F.2d 302 (3d Cir. 1982).

82. 732 F.2d at 772 n.2.

83. 29 U.S.C. § 152(2) (1982).

84. 732 F.2d at 774-75. *But see* Board of Trustees of Memorial Hosp. v. NLRB, 624 F.2d 177 (10th Cir. 1980), in which the court ruled against the NLRB on the grounds that the hospital did not have sufficient control over employment relations to bargain meaningfully.

85. 664 F.2d 248 (10th Cir. 1981).

86. 732 F.2d at 774. *See also* NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403 (1947); NLRB v. St. Louis Comprehensive Health Center, Inc., 633 F.2d 1268, 1272 (8th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981).

the NLRB's findings, the court enforced the Board's order to bargain collectively with the Union.

B. Pinsker v. Joint District Number 28J[87]

The appellant, Gerald Pinsker, an Aurora, Colorado, school teacher, and the Aurora Education Association, filed this suit against the school district claiming a violation of the 1964 Civil Rights Act,[88] and of his first and fourteenth amendment rights to freedom of religion.[89] Pinsker alleged that the district's annual schedule is arranged so that Christmas is not a school day, and that in most years Good Friday or Good Friday afternoon are not school days.[90] Jewish teachers, however, must take personal leave or unpaid leave to celebrate Yom Kippur and Rosh Hashanah. The appellants argued that this leave policy discriminates against Jewish teachers on religious grounds and burdens their rights to free exercise of religion.[91]

The appeals court observed that the collective bargaining contract between the school district and its teachers provides for twelve days of paid leave, two of which may be used for special purposes. Traditionally, Jewish teachers who chose to celebrate Yom Kippur and Rosh Hashanah have used their two days of special leave and one day of unpaid vacation.[92]

Citing *Trans World Airlines, Inc. v. Hardison*,[93] the court ruled that the 1964 Civil Rights Act[94] requires an employer to either make a reason-

87. 735 F.2d 388 (10th Cir. 1984).

88. 42 U.S.C. §§ 2000e-2000e-17 (1982). The applicable subparagraphs provide:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e. Definitions

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

89. 735 F.2d at 389.

90. *Id.*

91. *Id.* The parties to the suit stipulated that if Pinsker prevailed, any relief accorded him would be extended to other Jewish teachers. *Id.* at 389 n.1.

92. *Id.* at 390.

93. 432 U.S. 63, 74 (1977) (Holding that the "intent and effect" of 42 U.S.C. § 2000e(j) was to require employers to make "reasonable accommodations, short of undue hardship," for employee religious practices. According to the court, requiring an employer "to bear more than a *de minimus* cost" in order to accommodate employee religious practices constituted "undue hardship." *Id.* at 84. *See also* McDaniel v. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978).

94. 42 U.S.C. § 2000e(j) (1982). *See supra* note 88.

able accommodation to an employee's religious beliefs or demonstrate that such accommodation would be an undue hardship.[95] But, the court stated, reasonable accommodation does not mean that the employer must do exactly what the employee wants, or cause the employee no expense. Therefore, the court ruled that requiring a teacher to take occasional unpaid leave "is not an unreasonable accommodation of teachers' religious practices."[96]

The plaintiffs also claimed that the leave policy burdened Pinsker's right to free exercise of religion. The Tenth Circuit relied on *Thomas v. Review Board*,[97] in which the United States Supreme Court ruled that a burden on religion exists when the state puts substantial pressure on an employee "to modify his behavior and to violate his beliefs."[98] The court held that loss of an occasional day's pay by a teacher does not constitute a substantial burden, citing *Braunfeld v. Brown*.[99]

IV. Minor Party Ballot Access and Mootness

In *Thournir v. Buchanan*,[100] the Tenth Circuit addressed appellant's claim that a Colorado ballot access law[101] violates article I, section 2 of the United States Constitution.[102] Colorado law requires that if a person is not affiliated with a political party recognized by the state, that person must be a registered voter in the political subdivision he seeks to represent for at least one year prior to the placing of his name in nomination.[103] The law permits the transfer of current registration from county-to-county within the state, but specifically denies transfer of party affiliation from without the state.[104]

Eileen Thournir, a registered member of the Socialist Workers Party in California, moved to Colorado in 1981 but failed to register her

95. 735 F.2d at 391 (citing as support Brener v. Diagnostic Center Hosp., 671 F.2d 141, 145-46 (5th Cir. 1982)).

96. 735 F.2d at 391. However, the court's "reasonable accommodation" analysis failed to address Pinsker's primary argument; namely, that the school board practiced invidious discrimination *because* it accommodates Christian teachers by closing the schools for Christian holidays, but requires Jewish teachers to take leave, paid or unpaid, to observe their religious holidays. The issue was not whether Pinsker was being reasonably accommodated, but whether the school district invidiously discriminated between Jewish teachers and Christian teachers.

97. 450 U.S. 707 (1981).

98. *Id.* at 717-18.

99. 366 U.S. 599 (1961). In this case the Court ruled that Sunday closing laws, although causing economic loss to Jewish merchants, do not interfere with the free exercise of religion.

100. 710 F.2d 1461 (10th Cir. 1983).

101. Colo. Rev. Stat. § 1-4-801(1) (i) (1973):

> No person shall be placed in nomination by petition unless the person is a registered elector of the political subdivision or district in which the officer is to be elected and unless he was registered as unaffiliated, as shown on the books of the county clerk and recorder, for at least twelve months prior to the date of filing of the petition . . . .

102. *See infra* note 112.

103. *See supra* note 101.

104. Colo. Rev. Stat. 1-2-219(1) (Cum. Supp. 1983).

party affiliation in Colorado until July of 1982.[105] Thournir attempted to run for Congress in the 1982 election, filing the petition required by Colorado statute[106] with the secretary of state. In September, appellee Buchanan, then secretary of state, sued to have Thournir's name struck from the ballot on the ground that Thournir had not been a registered unaffiliated voter for the statutorily required time period.[107] The Denver District Court, on September 30, 1982, ordered Thournir's name struck from the ballot.[108] The Colorado Supreme Court, on October 1, 1982, declined to review the decision.[109] On October 13, 1982, the appellant filed a section 1983 suit[110] in federal district court seeking to have her name restored to the ballot, and to recover damages and attorney's fees.[111] Thournir also sought to have the Colorado statute which denied her access to the ballot declared unconstitutional.[112]

On October 15, 1982, the federal district court denied relief, treating the suit as a motion for a preliminary injunction against striking her name from the ballot. The court did not reach the constitutional question raised by Thournir,[113] denying the injunction upon the basis that, although Thournir had shown irreparable harm, she had not demonstrated a likelihood that she would prevail on the merits.[114] Requests for a mandatory stay order to both the Tenth Circuit and the United States Supreme Court were subsequently refused.[115] After the election, Thournir appealed to the Tenth Circuit. The court, per Judge Carrigan, declined to review the case, declaring that the only relief sought was the injunction, and, since the election had already been held, the case was moot.[116]

The Tenth Circuit further ruled that it could not address the constitutional issues raised by Thournir because those issues had not been adequately argued before the federal district court.[117] Noting, however, that the case presented delicate and subtle issues of constitutional law

105. 710 F.2d at 1462.
106. COLO. REV. STAT. § 1-4-804(1) (1980).
107. 710 F.2d at 1462.
108. *Id.*
109. *Id.*
110. 42 U.S.C. § 1983 (1982). Section 1983 provides, in pertinent part:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

111. 710 F.2d at 1462.
112. Thornir asserted that COLO. REV. STAT. § 1-4-801(1)(i) (Cum. Supp. 1983) was unconstitutional because it imposed more stringent qualification requirements upon candidates for Congress than those imposed by Article I, § 2, cl. 2 of the United States Constitution, which states: "No person shall be Representative who shall not have attained to the Age of twenty five years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."
113. 710 F.2d at 1462.
114. *Id.*
115. *Id.*
116. *Id.* at 1462-63 (Carrigan, J., sitting by designation).
117. *Id.* at 1465.

not yet settled, the court invited the appellant to "litigate the matter in the district court if she so chooses."[118]

V. CASE DIGESTS

A. *Tenth Circuit Denies Prisoners' Right to Court Appointed Counsel in Paternity Suits*[119]

In *Nordgren v. Mitchell*,[120] several Utah state prison inmates who were defendants in paternity suits brought an action claiming that the due process and equal protection clauses of the fourteenth amendment requires the state to provide them counsel in paternity proceedings. The appellate court, using the analyses ordered in *Lassiter v. Department of Social Services*[121] and *Matthews v. Eldridge*,[122] determined that the state need not provide counsel in these cases.[123] *Eldridge* requires a three step evaluation in determining the need for the presence of counsel in a court action: first, the private interest affected by the action; second, the risk of erroneous deprivation of such interest; and third, the government's interest, including the function involved and the financial and administrative burdens imposed.[124] If the *Eldridge* factors indicate the need for the presence of counsel, then, under the *Lassiter* evaluation, this need must be weighed against the probability that the defendant in a suit would lose his freedom.[125]

The Tenth Circuit, after weighing the *Eldridge* factors, opined that need for the presence of counsel was indicated but ruled that the appellants' likelihood of losing their freedom was minimal and, therefore, held for the state.[126] The court reasoned that since indigence is a defense against criminal non-support, there was little likelihood that any of the appellants would lose their freedom because of a lack of counsel.[127]

B. *Tenth Circuit Rejects Constitutional Right to Think*

In *Kensell v. Oklahoma*,[128] a state employee filed suit against the state

118. *Id.*

119. The right to counsel in student disciplinary proceedings was the sole issue before the Tenth Circuit in Rustad v. United States Air Force, 718 F.2d 348 (10th Cir. 1983). This case is analyzed extensively *infra* at 109.

120. 716 F.2d at 1335 (10th Cir. 1983).

121. 452 U.S. 18, 25, 27 (1981).

122. 424 U.S. 319, 335 (1976).

123. 716 F.2d at 1339.

124. *Id.*

125. 716 F.2d at 1339 (citing *Lassiter*, 452 U.S. 18, 31 (1981)). The *Lassiter* court formulated the test as follows:

> The dispositive question . . . is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel.

452 U.S. at 31.

126. 716 F.2d at 1339.

127. *Id.*

128. 716 F.2d 1350 (10th Cir. 1983).

of Oklahoma and several of its agencies and officials claiming a section 1983[129] tort. The appellant claimed that these agencies and officials, by not providing him a smoke-free place to work, deprived him of his right to think. Kensell asked for damages and injunctive relief.[130]

The appellant alleged that he suffered from respiratory and cardiovascular ailments, and that smoke interfered with his ability to think, drawing an analogy between his case and *Rogers v. Okin*.[131] In *Rogers*, which was subsequently vacated by the United States Supreme Court,[132] patients at a Massachusetts mental hospital claimed that forcible injections of psychotropic drugs deprived them of the right to think, an element of the right to privacy.[133]

The appellant also claimed that being forced to breathe smoke constituted an assault, a tort actionable under section 1983, and that he was being deprived of a property right by being forced to choose between breathing smoke and quitting his job. Without extensive comment, the Tenth Circuit denied the appellant's claims, observing that being forced to breathe smoke is not analogous to being forced to take psychotropic drugs; that no official abused his power in the case; and that appellant had suffered no property loss because he still had his job, which he took voluntarily, knowing that there were smokers in the workplace.[134] The court stated that, whatever his claims for relief, the appellant could not expect the federal judiciary to use the United States Constitution to impose no-smoking rules in the workplace. To do so "would support the most extreme expectations of the critics who fear the federal judiciary as a superlegislature promulgating social change under the guise of securing constitutional rights."[135]

C. *The Commerce Clause: Tenth Circuit Declares Oklahoma's Take-Over Bid Act Unconstitutional*

In 1981 Oklahoma passed the Take-Over Bid Act (the Act),[136] which sought to regulate tender offers made to Oklahoma "target companies." As defined by the Oklahoma Act, a qualifying target company was any company organized under Oklahoma law, or having its principal place of business and substantial assets in Oklahoma, or having significant operations and assets in Oklahoma, or having Oklahoma resident shareholders controlling ten percent or more of the securities subject to the take-over bid.[137] The Oklahoma Act empowered the Administrator

129. 42 U.S.C. § 1983 (1982).
130. 716 F.2d at 1350.
131. 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom.*, Mills v. Rogers, 457 U.S. 291 (1982).
132. *Id.*
133. 716 F.2d at 1351.
134. *Id.*
135. *Id. Accord* Federal Employees For Nonsmokers' Rights v. United States, 446 F. Supp. 181 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 310 (D.C. Cir. 1979).
136. 71 OKLA. STAT. §§ 431-51 (1981).
137. Mesa Petroleum Co. v. Cities Serv. Co., 715 F.2d 1425 (10th Cir. 1983) (citing 71 OKLA. STAT. § 433(4)(a)-(d) (1981)).

of the Department of Securities to rule upon the adequacy of any disclosure made in connection with tender offers for qualifying target companies. Thus, by the terms of the Act, the Administrator could delay or even prohibit any tender offer involving a "target company."[138]

In *Mesa Petroleum Co. v. Cities Service Co.*,[139] appellees Mesa Petroleum (Mesa), Occidental Petroleum (Occidental), and the Bendix Corporation (Bendix) sought to have the Oklahoma Act declared unconstitutional on the grounds that it violated the commerce clause and the supremacy clause of the United States Constitution.[140] The appellees had each prevailed in separate proceedings, obtaining restraining orders to prevent enforcement of the Oklahoma Act.[141] The appellants, the Acting Administrator of the Oklahoma Department of Securities, and Cities Service Company and Martin Marietta Corporation, the target companies, appealed.

The circuit court consolidated these cases on appeal because all involved the same dispositive issue: "whether the Oklahoma Act violates the commerce clause of the United States Constitution as an unreasonable restraint on interstate tender offers for corporate securities."[142] The consolidated cases all arose out of disputed tender offers. Appellee Mesa made a cash tender offer for Cities Service, which had substantial assets and its executive offices in Oklahoma. Subsequently, appellees Gulf Oil and Occidental made equivalent offers for Cities Service, with Occidental ultimately prevailing and acquiring Cities Service.[143] In a separate transaction, appellee Bendix tried to acquire appellant Martin Marietta but failed.[144] All the take-over companies followed the same procedure: instead of filing an information statement with the state as required by the Act, they filed successfully for temporary restraining orders (TRO) with the federal district court.[145] Upon a hearing on the merits, the federal district court granted permanent injunctions against enforcement and declared the Act unconstitutional.[146]

During this maneuvering, the United States Supreme Court struck down a similar Illinois act[147] on the grounds that it conflicted with the Williams Act,[148] and that it unnecessarily burdened interstate commerce.[149] The problem with the Illinois act, the Supreme Court observed, was that it allowed Illinois state officials to thwart a nationwide tender offer, even if none of the stockholders of the target company re-

138. 715 F.2d at 1427 (citing 71 OKLA. STAT. § 437 (1981)).
139. 715 F.2d at 1425 (10th Cir. 1983).
140. *Id.* at 1426.
141. *Id.*
142. *Id.*
143. *Id.* at 1427-28.
144. *Id.* at 1428.
145. *Id.* at 1427-28.
146. *Id.*
147. *See* Edgar v. Mite Corp., 457 U.S. 624 (1982), where the Court found unconstitutional the Illinois Business Take-Over Act, ILL. REV. STAT. ch, § 121½ (1979).
148. 15 U.S.C. §§ 78m(d)-(e) and 78n(d)-(f) (1982).
149. U.S. CONST. art. I, sec. 8, cl. 3.

sided in Illinois.[150] If the Illinois act were upheld other states could enact similar statutes, thereby stifling "interstate commerce in securities transactions generated by tender offers . . . ."[151]

The Tenth Circuit held that the Oklahoma Act differed from the unconstitutional Illinois act only in "inconsequential variants of degree."[152] It therefore declared the Act unconstitutional.

D. *Eleventh Amendment: Tenth Circuit Bars Federal Courts from Awarding Attorney's Fees and Costs arising from State Court Proceeding.*

In *Wallace v. Oklahoma*,[153] the appellant, attempting to collect attorney's fees and costs awarded as a court-appointed counsel for an indigent client, sought a writ of mandamus from the Oklahoma Supreme Court to compel the Creek County Fund Board to pay the fees. Instead of issuing the writ of mandamus, the Oklahoma Supreme Court, in its administrative capacity ordered the county board to pay the $8500 owed Wallace, and agreed to dismiss the suit as moot when the fees were paid.[154] Again, the board did not pay. When Wallace entered a second motion for mandamus, the board, in response to a new administrative order from the Oklahoma Supreme Court, paid the $8500 fee. In sustaining the actions against the Creek County board, Wallace incurred court costs and attorney's fees of $3000. The Oklahoma Supreme Court denied Wallace's motion for mandamus to recover those costs.[155]

In federal district court, the appellant sued the State of Oklahoma to recover both the $3000 and the legal fees incurred by prosecuting the federal action.[156] The district court dismissed the suit on the grounds that under the eleventh amendment, a state is immune from suit by its citizens when brought in federal court.[157] The Tenth Circuit affirmed.

The only significant point made by the appellant was that the state, by entering into a contract with him, waived immunity.[158] The appeals court quoted *Edelman v. Jordan*,[159] in which the United States Supreme

150. 457 U.S. at 640-43.
151. *Id.* at 642.
152. 715 F.2d at 1429.
153. 721 F.2d 301 (10th Cir. 1983).
154. *Id.* at 302.
155. *Id.*
156. *Id.*
157. The eleventh amendment provides that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." This amendment has been construed to preclude suits in federal court against a state by citizens of that state. 721 F.2d at 303 (citing Edelman v. Jordan, 415 U.S. 651 (1974)); Hans v. Louisiana, 134 U.S. 1 (1890); Hefley v. Textron, Inc., 713 F.2d 1487 (10th Cir. 1983)).
158. As a preliminary matter, the Tenth Circuit stated that the Federal Question Jurisdictional Amendments Act, 28 U.S.C. § 1331 (1982), "should be applied retroactively to cases pending on appeal." 721 F.2d at 303 (citing Morris v. Washington Metropolitan Area Transit Authority, 702 F.2d 1037, 1042-43 n.12 (D.C. Cir. 1983); Eikenberry v. Callahan, 653 F.2d 632 (D.C. Cir. 1981) (per curiam); *cf.* Andrus v. Charleston Stone Prods. Co., 436 U.S. 604, 607-08 n.6 (1978)).
159. 415 U.S. 651 (1974).

Court held that a waiver exists only "where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' "[160] Finding neither an express waiver nor implication of a waiver, the appeals court rejected the appellant's argument.[161] In dicta the court noted that, even if the state did waive immunity, that waiver should not be extended to Oklahoma's immunity under the eleventh amendment absent an express indication of legislative intent. Without this express waiver, "recovery must emanate from the state forum."[162]

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160. *Id.* at 673 (quoting Edelman v. Jordan 415 U.S. 651, 673 (1974) (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909))).

161. 721 F.2d at 306.

162. *Id.* at 305 (citing Nichols v. Department of Corrections, 631 P.2d 746, 748-51 (Okla. 1981)).