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United States Supreme Court Review of Tenth Circuit Decisions

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UNITED STATES SUPREME COURT REVIEW OF TENTH CIRCUIT DECISIONS

I. *UNITED STATES V. NEW MEXICO*—AFFIRMED

In *United States v. New Mexico*,[1] the Supreme Court unanimously affirmed the Tenth Circuit's decision[2] that three Department of Energy (DOE)[3] contractors and their suppliers were subject to state taxes. The Court upheld the constitutional validity of the imposition of these state taxes because the contractors could "be considered entities independent of the United States."[4] The Court's decision clarified the extension of federal immunity from state tax burdens to federal contractors.[5]

The three contractors, Sandia Corp. (Sandia), Zia Co. (Zia), and Los Alamos Constructors, Inc. (LACI), had separate contracts with DOE to provide services at federally-owned laboratories in New Mexico.[6] In 1975, the United States filed suit in the United States District Court for the District of New Mexico seeking a declaratory judgment on behalf of these three private corporations.[7] Specifically, the United States sought clarification as to whether these contractors must pay the following taxes: 1) the compensating use tax[8] on property purchased by the contractors outside of the state but used in New Mexico; and 2) the gross receipts tax[9] on federal funds advanced to the contractors to pay creditors and employees. In addition, the United States wanted to clarify whether vendors selling property to these contractors must pay New Mexico's gross receipts tax on such sales.[10]

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1. 455 U.S. 720 (1982).
2. United States v. New Mexico, 624 F.2d 111 (10th Cir. 1980), *aff'd*, 455 U.S. 720 (1982).
3. This agency was formerly called the Atomic Energy Commission. 455 U.S. at 722-23.
4. *Id.* at 738-44.
5. *Id.* at 733-44.
6. Sandia's contract authorized Sandia's management of the government-owned Sandia Laboratories in Albuquerque, New Mexico as well as engagement in federally-sponsored research. *Id.* at 723. Zia's contract governed its responsibilities concerning "management, maintenance, and related functions at the [g]overnment's Los Alamos Scientific Laboratory." *Id.* at 724. LACI's contract limited its operations to "construction and repair work at the Los Alamos facility." *Id.*
7. *Id.* at 728; 624 F.2d at 113.
8. N.M. STAT. ANN. § 72-16A-7 (1953 & Supp. 1975) (current version at N.M. STAT. ANN. § 7-9-7 (1978 & Supp. 1982)).
9. N.M. STAT. ANN. § 72-16A-4 (1953 & Supp. 1975) (current version at N.M. STAT. ANN. § 7-9-4 (1978 & Supp. 1982)).
10. *See* 455 U.S. at 728, 741-43. The Court used the phrase "sales tax" in discussing this issue. *Id.* at 741-43.

An analysis of the structure of the Gross Receipts and Compensating Tax Act is necessary for a more technical understanding of the tax issues involved. Section 72-16A-4 imposes an excise tax on "gross receipts" of "any person engaging in business in New Mexico." N.M. STAT. ANN. § 72-16A-4 (1953 & Supp. 1975) (current version at N.M. STAT. ANN. § 7-9-4 (1978 & Supp. 1982)). Section 72-16A-7 imposes an excise tax for the privilege of "using" both property and services in New Mexico. N.M. STAT. ANN. § 72-16A-7 (1953 & Supp. 1975) (current version at N.M. STAT. ANN. § 7-9-7 (1978 & Supp. 1982)). Section 72-16A-12.1 provides that "receipts" of the United States, its agencies, and its instrumentalities are "exempted" from the gross receipts tax. N.M. STAT. ANN. § 72-16A-12.1 (1953 & Supp. 1975) (current version at N.M. STAT. ANN. § 7-9-13 (1978)). Similarly, § 72-16A-12.2 provides that the "use of property

The United States claimed that the contractors and their suppliers were *constitutionally* immune from state taxation.[11] The district court agreed,[12] but the Tenth Circuit reversed.[13] The Supreme Court granted certiorari "to consider the seemingly intractable problems posed by [s]tate taxation of federal contractors."[14]

Beginning with *M'Culloch v. Maryland*,[15] the Court reviewed its decisions involving the doctrine of federal immunity from state taxation. According to the Court, *M'Culloch* relied on the general notion of federal supremacy to invalidate Maryland's tax on the Second Bank of the United States.[16] Cases subsequent to *M'Culloch*, however, have not been consistently decided.[17] Thus, the Court decided to "return to the underlying constitutional principle" of federal supremacy to decide this and future cases.[18]

The rule announced by the Court is that "tax immunity is appropriate in only one circumstance: where the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned."[19] Thus, the Court went beyond requiring merely an agency relationship.[20] Any deviation from this narrow constitutional limit must expressly be made by Congress.[21]

In determining whether the compensating use tax applied to the contractors, the Court emphasized that the contractors were privately owned

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by the United States, its agencies, and its instrumentalities are "exempted" from the compensating tax. N.M. STAT. ANN. § 72-16A-12.2 (Supp. 1975) (current version at N.M. STAT. ANN. § 7-9-14 (1978)). In contrast, § 72-16A-14.9 provides that "*[r]eceipts* from *selling* tangible personal property . . . to the United States or any agency or instrumentality thereof . . . may be *deducted* from gross receipts." N.M. STAT. ANN. § 72-16A-14.9 (Supp. 1976-77) (current version at N.M. STAT. ANN. § 7-9-54 (1978)) (emphasis added).

The district court correctly identified the tax issue concerning the suppliers as one involving "the deduction provision" of the gross receipts tax. United States v. New Mexico, 455 F. Supp. 993, 995 (D. N.M. 1978), *rev'd*, 624 F.2d 111 (10th Cir. 1980), *aff'd*, 455 U.S. 720 (1982). The Tenth Circuit also identified this issue as concerning a "tax deduction." 624 F.2d at 114. Despite the fact that the Supreme Court referred to a "sales tax" and failed to distinguish between exemptions and deductions, this lack of technical accuracy does not affect the outcome of the case. The constitutional issues depend on the activities of the contractors. *See* 455 U.S. at 733-44.

11. *Id.* at 728. The United States also claimed that it must, "as a matter of constitutional law, . . . be permitted to intervene in any New Mexico administrative proceeding involving the tax status of the three corporations." 624 F.2d at 113. The Tenth Circuit agreed. *Id.* at 121. This issue was not discussed, however, in the Supreme Court's decision. *See* 455 U.S. at 720.

12. 455 F. Supp. 993 (D. N.M. 1978).

13. 624 F.2d 111 (10th Cir. 1980).

14. 455 U.S. at 730.

15. 17 U.S. (4 Wheat) 316 (1819) ("[T]he power to tax involves the power to destroy.").

16. 455 U.S. at 730-31.

17. *Id.* at 730-33. The Court stated that this field of law has been "one that has been marked from the beginning by inconsistent decisions and excessively, delicate distinctions." *Id.* at 730.

18. *Id.* at 733.

19. *Id.* at 735.

20. *Id.* at 736. Prior cases discussing agency relationships included: United States v. Boyd, 378 U.S. 39 (1964); United States v. Township of Muskegon, 355 U.S. 484 (1958); Alabama v. King & Boozer, 314 U.S. 1 (1941); James v. Dravo Contracting Co., 302 U.S. 134 (1937). These cases, however, "fail[ed] to speak with one voice on the relevance of traditional agency rules in determining the tax-immunity status of federal contractors." 455 U.S. at 732-33.

21. *Id.* at 737.

corporations with specially created and closely limited governmental relationships.[22] Furthermore, the governmental relationships were established to make a profit.[23] The fact that the property being used was for the government's benefit was irrelevant[24] since the government did not have an ownership interest.[25]

Having determined that the contractors were independent taxable entities for purposes of the use tax, the Court concluded that the contractors were also subject to the gross receipts tax on the funds advanced by the United States.[26] Furthermore, the Court concluded, "[i]f receipt of advanced funding is coextensive with status as a federal instrumentality, virtually every federal contractor is, or could easily become, immune from state taxation."[27]

Finally, the Court examined whether vendors selling supplies to the contractors must pay gross receipts on the proceeds of such sales. The Court called this issue "a more complex problem . . . [for] it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the purchase, as to make the sale . . . a sale to the United States."[28] The Court emphasized, however, that the contractors here made purchases in their own names without prior governmental approval for each purchase. Also, the contractors did not inform the suppliers that the government had an independent interest in the purchase of the property. Furthermore, the government disclaimed any intention of designating the contractors as purchasing agents.[29] The fact that *title* passed directly from the suppliers to the government was not controlling, "so long as the purchasing entity in this role as a purchaser is sufficiently distinct from the Government."[30] Thus, because the contractors were independent entities, the vendors could not escape the gross receipts tax on the proceeds from sales to the contractors.[31]

It is clear that the Supreme Court granted certiorari to attempt to clarify state taxation of federal contractors. It remains to be seen, however, if this opinion will send American courts "in an entirely unwavering line"[32] with future decisions.

Sharon K. Tarr

22. *Id.* at 740.
23. *Id.* at 739.
24. *Id. See also* United States v. Boyd, 378 U.S. 39 (1964).
25. 455 U.S. at 740. *See also* First Agricultural Bank v. State Tax Comm'n, 392 U.S. 339, 354 (1968) (Marshall, J., dissenting).
26. 455 U.S. at 741.
27. *Id.* The Court stated in its discussion of the advanced funds issue that "incurring obligations to achieve contractual ends is not significantly different from using property for the same purposes." *Id.* It is not clear what this statement means, especially in light of the Tenth Circuit's discussion that advanced funding had surface appearances of giving the contractors the power to pledge the credit of the United States. 624 F.2d at 119.
28. 455 U.S. at 741-42.
29. *Id.* at 743.
30. *Id. See also* Alabama v. King & Boozer, 314 U.S. 1, 13 (1941).
31. 455 U.S. at 743.
32. *Id.* at 732.

II. *UNITED STATES v. SECURITY INDUSTRIAL BANK*—AFFIRMED

United States v. Security Industrial Bank[1] was a consolidation of seven cases from the United States Bankruptcy Courts for the districts of Kansas and Colorado.[2] In each case creditors had acquired valid liens on personal property of the debtor. The debtor claimed that the liens could be avoided under the exemption provisions of the Bankruptcy Reform Act[3] (Reform Act) and the creditors claimed that their liens were created before the Reform Act became effective and were therefore not subject to discharge.[4] The Tenth Circuit Court of Appeals[5] affirmed the Bankruptcy Court decisions[6] upholding the creditors' liens. The Supreme Court unanimously affirmed.[7]

A. *Background*

The Reform Act represents the first major change in the bankruptcy laws in over forty years. Under the new Act, the debtor is allowed certain exemptions which permit him to retain property after discharge is granted.[8] Specifically, section 522[9] allows the debtor to exempt certain household items and to avoid the fixing of a non-possessory, non-purchase money security interest in some of those items.

In *Security Industrial Bank*, each creditor had acquired a non-possessory, non-purchase money security interest prior to the Reform Act's effective date

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1. 103 S. Ct. 407 (1982), *aff'g*, Rodrock v. Security Indus. Bank, 642 F.2d 1193 (10th Cir. 1981).

2. Three cases were consolidated at the Bankruptcy Courts. The remaining four cases were then appealed directly to the Tenth Circuit where they were consolidated. The seven cases were: Jackson v. Security Indus. Bank, 4 Bankr. 293 (D. Colo. 1980) (Stevens v. Liberty Loan Corp. was consolidated with *Jackson* in the Bankruptcy Court); Rodrock v. Security Indus. Bank, 3 Bankr. 629 (D. Colo. 1980) (Krenzel v. Security Indus. Bank was consolidated with *Rodrock* in the Bankruptcy Court); Hoops v. Freedom Fin., 3 Bankr. 365 (D. Colo. 1980); Schulte v. Beneficial Fin. of Kan., Inc., No. 79-11745 (Bankr. D. Kan. Oct. 27, 1980) (Hunter v. Beneficial Fin. of Kan., Inc., was consolidated with *Schulte* in the Bankruptcy Court).

3. *Bankruptcy Reform Act* of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-151326 (Supp. IV 1980)).

4. 103 S. Ct. at 409.

5. Rodrock v. Security Indus. Bank, 642 F.2d 1193 (10th Cir. 1981), *aff'd*, 103 S. Ct. 407 (1982).

6. Although the Tenth Circuit Court of Appeals affirmed all judgments, it did not affirm on the grounds used in the two Kansas cases.

7. 103 S. Ct. 402 (1982). Justice Rehnquist delivered the opinion of the Court. Justice Blackmun concurred, joined by Justices Brennan and Marshall. Prior to this decision, there was general disarray in the lower courts. *Compare* Paden v. G.E.C.C. Consumer Discount Co., 10 Bankr. 206 (E.D. Pa. 1981) and Campbell v. Afco Fin. Serv. Co., 8 Bankr. 425 (S.D. Ohio 1981) (holding retroactive application constitutional) *with* Baker v. GFC Corp., 11 Bankr. 125 (W.D. Mo. 1981) and Woods v. Michigan Nat'l Bank, 9 Bankr. 325 (E.D. Mich. 1981) (holding retroactive application unconstitutional).

8. The federal exemptions were designed to permit individual debtors to enjoy a "fresh start" after bankruptcy. Formerly, exemptions were granted by each state's law and were excluded *ab initio* from the bankruptcy estate. Federal bankruptcy courts did not have jurisdiction to resolve disputes concerning exempt assets. If a state court upheld a lien on assets that were otherwise exempt, repossession could leave the debtor without assets for a fresh start. The Reform Act now includes exempt property *ab initio* in the estate and protects it from antecedent claims once exempted. Note, *Lien Avoidance Under § 522(f) of the Bankruptcy Code: Is Retrospective Application Constitutional?*, 49 FORDHAM L. REV. 615 (1981).

9. 11 U.S.C. § 522 (Supp. IV 1980).

of October 1, 1979.[10] The debtors filed for bankruptcy after the effective date and sought to avoid the liens under section 522(f).[11] The question presented in each case was whether section 522(f) should be retroactively applied, and if so, whether such a retroactive application would violate the Constitution.

B. *The Constitutional Question*

The Tenth Circuit Court of Appeals held that section 522 was intended to be retroactively applied,[12] and therefore, squarely faced the constitutional question. In deciding this issue, the Tenth Circuit held that retroactive application of section 522 would constitute a "taking" of the creditors' vested rights in the debtor's property in violation of the fifth amendment.[13]

The Tenth Circuit was influenced by *Louisville Joint Stock Land Bank v. Radford*.[14] In *Radford*, the Supreme Court declared unconstitutional under the fifth amendment, an amendment to the Bankruptcy Act which allowed a defaulting farm property mortgagor to retain ownership and possession of the farm, thereby divesting the mortgagee of its property rights in the security.[15] Despite a later Supreme Court decision casting doubt on the vitality of *Radford*,[16] the Tenth Circuit applied the case's fundamental premise: Congress may not completely take a creditor's rights and property for the benefit of a debtor.[17]

The Supreme Court's analysis of the constitutional issue was similar to the Tenth Circuit's. The Supreme Court first recognized the distinction between property rights and contractual rights.[18] Although Congress has the constitutional authority to retroactively impair contractual obligations,[19] additional difficulty arises when Congress seeks to impair a property interest.

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10. 103 S. Ct. at 409.

11. 11 U.S.C. § 522(f) (Supp. IV 1980) reads in pertinent part as follows:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is
>
> (1) a judicial lien; or
>
> (2) a non-possessory, nonpurchase-money security interest in any
>
> (A) Household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

12. Rodrock v. Security Indus. Bank, 642 F.2d 1193 (10th Cir. 1981), *aff'd*, 103 S. Ct. 407 (1982).

13. 642 F.2d at 1196. The fifth amendment provides that: "No person shall be . . . deprived of . . . property, without due process of law, nor shall private property be taken . . . without just compensation." U.S. CONST. amend. V.

14. 295 U.S. 555 (1935).

15. *Id.* at 602.

16. *See* Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 443 (1937), where the Court upheld a law that merely postponed a mortgagee's right to foreclose on a mortgagor's property upon default.

17. Additionally, the Court noted that the situation in *Radford* was not even as extreme as the situation presented in *Security Industrial Bank*. In *Radford*, the mortgagee still realized some value for his mortgage interest. 642 F.2d at 1197 n.4.

18. 103 S. Ct. at 410.

19. U.S. CONST. art. I, § 8, cl. 4. *See* Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902).

The creditors' interests in this case were property rights[20] and Congress may not, even under its bankruptcy powers,[21] impair such an interest without violating the fifth amendment.[22]

Unlike the Tenth Circuit Court of Appeals, however, the Supreme Court used the above discussion to point out the prudence of avoiding the constitutional issue and proceeded to decide the case on statutory grounds.[23] This, the Court pointed out, was an application of the "cardinal principle" that if possible a statute should be construed in order to avoid constitutional questions.[24] The result, however, was the same as that reached by the Tenth Circuit.

C. *Retroactivity—The Statutory Question*

As noted above, the Tenth Circuit Court of Appeals, before reaching the constitutional question, held that section 522 was intended to be retroactively applied.[25] This decision was based on legislative history and statutory construction. The effective date of the Reform Act was October 1, 1979.[26] The Reform Act provided that as of that date the former Bankruptcy Act was repealed,[27] and all proceedings initiated on or after that date were to be governed by the new Act.[28] In a case filed on or after October 1, 1979, if the Reform Act does not apply to a creditors' interests which came into existence prior to October 1, 1979, then there would be no bankruptcy law governing their interests at all. The Tenth Circuit held that such a "statutory gap" was not intended by Congress.[29]

The Supreme Court acknowledged this argument but thought the analysis inadequate. The Court stated that the liens exist under state law independently of the Reform Act. Thus, it is not true that there would be no law governing liens perfected prior to October 1, 1979.[30]

The Court then relied on legislative history to hold that section 522(f) was intended to be prospectively applied.[31] It was pointed out that prelimi-

20. The government, arguing in favor of retroactive application of § 522, contended that the creditors' rights in the debtor's property were so insubstantial that it did not amount to a full property interest. Justice Rehnquist stated that the decisions in *Radford* and *Armstrong v. United States*, 364 U.S. 40 (1960), militated against such a proposition. 103 S. Ct. at 411.

21. U.S. CONST. art. I, § 8.

22. The Court also pointed out that a taking under the fifth amendment may involve more than the government acquiring property for itself. 103 S. Ct. at 412.

23. "The foregoing discussion satisfies us that there is substantial doubt whether the retroactive destruction of the appellees' liens, in these cases comports with the fifth amendment. We now consider whether, as a matter of statutory construction, § 522(f)(2) must necessarily be applied in that manner." *Id.*

24. *Id.*

25. *See supra* note 12 and accompanying text.

26. 11 U.S.C. § 101 (Supp. IV 1980).

27. *Id.*

28. *Id.*

29. 642 F.2d at 1196. Bankruptcy Court Judge Glen E. Keller, Jr., in a well-reasoned opinion, rejected "as a mere play on words," an argument by the United States that § 522(f) would not operate retroactively if applied to pre-enactment security interests because it simply acts prospectively on previously acquired security interests. Hoops v. Freedom Fin., 3 Bankr. 635, 637 (Bankr. D. Colo. 1980).

30. 103 S. Ct. at 412-13.

31. *Id.* at 414 (citing H.R. 31, 94th Cong., 1st Sess., § 10-103(a) (1975), *reprinted in Bank-*

nary drafts of the savings clause expressly required retroactive application.[32] During the House hearings in 1976, however, a consultant to the Bankruptcy Commission suggested certain exceptions to retroactive application or a "separability clause" to avoid and lessen the impact of constitutional challenges to the Act.[33] Although the consultant raised no significant constitutional arguments against retroactive application of federal exemptions,[34] the Court reasoned that Congress, by dropping the express language requiring retroactivity, had supplied some evidence of its intent to have the Act applied prospectively.[35]

Further, the Court pointed out the basic principle that statutes are presumed to operate prospectively only.[36] This principle applies to bankruptcy statutes affecting property rights.[37] Considering the legislative intent the Court found favoring prospective application, it was unwilling to construe section 522(f) as an exception to this general rule.

D. *Consequences*

The Supreme Court's holding undoubtedly has the same result as the Tenth Circuit's holding—it maintains creditors pre-Reform Act liens. However, in its overzealous desire to avoid the constitutional question, the Court provides a classic example of result-oriented analysis. By resting its decision on the failure of Congress to adopt express language requiring retroactivity[38] it is evident that many possible indications of congressional intent were not considered.

First, numerous substantive and editing changes were made by the congressional staff, including the collection of all transition provisions in a separate title.[39] The express language of the preliminary drafts to which Justice Rehnquist makes reference may have been altered for the sake of clarity, brevity, and organization, rather than deleted to demonstrate intent.[40]

Second, many constitutional problems concerning retroactivity of the particular provisions were addressed by rewriting those particular provisions[41] and by evincing intent favoring separability.[42] Because a congressional choice to address a matter in one part of the statute and not in

ruptcy Act Revision: Hearings on H.R. 31 & 32 before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975), n.4 app., at 320-21)) [hereinafter *Bankruptcy Act Revision*].

32. *Id.*

33. *Id.* (citing *Bankruptcy Act Revision*, *supra* note 31, at 2066-67 (statement of William Plumb, Jr.)).

34. *Id.*

35. *Id.* *See also* 1 COLLIER ON BANKRUPTCY ¶ 7.12 (15th Ed. 1982); Note, *supra* note 8, at 624.

36. 103 S. Ct. at 413.

37. *Id.* (citing Holt v. Henley, 232 U.S. 367 (1914)).

38. *See supra* notes 35-37 and accompanying text.

39. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 944 (1979).

40. Congress worked on the proposed legislation for two years, during which time countless drafting changes were made. *Id.* at 945-57.

41. The consultant expressed concern over § 4-405(b), which eliminated state recognized priorities in marital property interest for creditors. Note, *supra* note 8, at 624.

42. *Id.* at 625.

another is presumed to be intentional,[43] the alteration of some substantive provisions precludes the inference of a general prohibition against retroactivity.

Finally, even after the deletion of the express language, statements made on the floor of the House and Senate,[44] as well as in the House report, evidenced clear congressional intent to apply the Act retroactively. Thus, the Court has virtually ignored the overwhelming evidence that Congress intended section 522 to be applied retroactively.[45] Although the Court's desire to avoid the constitutional question is admirable,[46] it must not selectively review legislative history. If the Court can ignore clear statements of congressional intent to obtain a satisfactory outcome, its power will be expanded immeasurably.

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III. *ESPINOSA V. RUSK*—AFFIRMED

In *Espinosa v. Rusk*[1] the Supreme Court, by memorandum opinion, affirmed a Tenth Circuit decision[2] which held that an ordinance regulating solicitation by charitable organizations had been unconstitutionally applied.[3] The case involved the annual fund drive of the Seventh Day Adventist Church. An Albuquerque ordinance regulated and required licensing of solicitation by charitable groups, but provided exemptions for religious groups if the solicitation was for "evangelical, missionary or religious but not secular purposes."[4] Some of the money raised was used to provide food, clothing, and shelter to those in need.[5] Because the ordinance defines secular as "relating to affairs of the present world, such as providing food, clothing and counseling," the city determined that the church's fund drive

43. United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

44. Note, *supra* note 8, at 625.

45. The concurring opinion also makes reference to this point. 103 S. Ct. at 415 (Blackmun, J., concurring). The emphasis of Blackmun's concurring opinion is twofold: 1) Were there no authority to control the case, the constitutional issue should be addressed and resolved in favor of the debtor, but 2) under the authority of Holt v. Henley, 232 U.S. 367 (1914), the bankruptcy laws must be construed so as to confine their effect to property rights established after they were passed.

46. This decision could conceivably pose problems for Congress when it responds to the Supreme Court's recent decision in Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 102 S. Ct. 2858 (1982). *Northern Pipeline* essentially held that Congress had unconstitutionally granted Article III powers to the Bankruptcy Courts, which were held to be Article I courts. Congress must now enact legislation curing this defect. In order to avoid challenges to Bankruptcy Court actions taken prior to this congressional enactment, the legislation must necessarily be retroactive. In light of the Supreme Court's reluctance to interpret legislation in this manner, Congress must take steps to *clearly* show that retroactive application was intended.

1. 102 S.Ct. 2025 (1982), *aff'g*, 634 F.2d 477 (10th Cir. 1980).

2. 634 F.2d 477 (10th Cir. 1980), *aff'd*, 102 S. Ct. 2025 (1982).

3. 634 F.2d at 478.

4. *Id.* at 479.

5. *Id.* at 479 n.1.

included secular activities. Therefore the church was required to comply with the city's ordinance. Compliance included filing an application, paying a twenty-five dollars fee, providing details of the fund drive, and making financial disclosures. The church challenged the constitutionality of the city's action by filing suit for injunctive relief.[6] The Tenth Circuit court upheld the trial court's decision to enjoin permanently the city from enforcing the ordinance against the church,[7] citing the holding of the landmark first amendment case of *Cantwell v. Connecticut*.[8]

In *Cantwell* the Supreme Court struck down the conviction of several Jehovah's Witnesses for soliciting funds without a license. A statute allowed a licensing official to determine who would be permitted to engage in solicitation based on *his* view of what constitutes a "religious cause." The officials' decision as to whether a cause was religious was viewed itself as a religious test. The statute requiring this test was therefore found to be a denial of liberty protected by the first amendment and included in the liberties protected under the fourteenth amendment.[9]

The city of Albuquerque argued that its ordinance, unlike the one in *Cantwell*, does not result in a prohibition of the right to solicit but merely imposes regulations to prevent fraud in the solicitation of funds.[10] Moreover, it was argued the ordinance did not require a determination as to what was religious as did the statute in *Cantwell*.[11]

Rejecting this argument, the Tenth Circuit stated: "The setting up of a city agency to make distinctions as to that which is religious and that which is secular so as to subject the latter to regulation is necessarily a suspect effort."[12] As in *Cantwell*, the officials in *Espinosa* were called upon to ascertain and determine whether the proposed solicitations were for religious purposes. This type of discretion vested in an official was found to violate the principles of the free exercise of religion.[13] It is the very attempt at defining "religious" and "secular" which the courts find objectionable, not just that an ordinance might express an anti-religious object.[14]

Judge Barrett dissented, stating that the Supreme Court has recognized that a certain amount of entanglement between church and state is inevitable.[15] This issue has been addressed in a series of cases involving the establishment clause, and Judge Barrett believed that the free exercise issue in *Espinosa* deserved a similar approach. Judge Barrett would pose the issue as: "Does the Albuquerque ordinance challenged here impose an *undue, excessive restraint* upon the Seventh Day Adventist Church's religious activity . . . by requiring a prior application for a permit to solicit for funds intended for

6. *Id.* at 479.
7. *Id.* at 480.
8. 310 U.S. 296 (1940). In this decision the Court held the free exercise clause applicable to the states through the fourteenth amendment.
9. 634 F.2d at 481.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. 634 F.2d at 482 (Barrett, J., dissenting).

'secular activities?' "[16] He thought the ordinance constitutional because the city's interest in protecting the community from fraudulent solicitations by regulating "activities overwhelmingly secular in nature" was not an onerous burden on the free exercise of religious organizations.[17]

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16. *Id.* at 483 (emphasis in original).
17. *Id.*