CONSTITUTIONAL LAW*

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JUSTICIABILITY

Any discussion of developments in constitutional law must begin with the threshold "principle of first importance":[1] the article III limits on federal courts to consider and decide "cases and controversies."[2] The constitutional limits on the role of the federal judiciary are three-dimensional. First, the judicial review power of the federal judiciary courts *qua* courts is limited to a consideration of "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[3] Second, the power of judicial review of the federal courts is also defined by "the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[4] Third, the federal power of judicial review is restrained by the dynamics of the federal system itself and is self-restrained when the court declines to proceed or abstains though it has jurisdiction under the Constitution and the enabling statutes.[5] The power of judicial review of the federal courts is thus circumscribed along three axes: judicial tradition, separation of powers and federalism. During the survey period, the court charted its way along these

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* The author thanks Ms. Judy L. Coleman, J.D. 1981, Texas Tech University School of Law, for her research assistance.

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1. C. WRIGHT, LAW OF FEDERAL COURTS 17 (3d ed. 1976). *See generally* P. BATOR, D. SHAPIRO, P. MISHKIND, H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1-243 (2d ed. 1973).

2. U.S. CONST. art. III, § 2, cl. 1. *See generally* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

3. Flast v. Cohen, 392 U.S. 83, 94-95 (1968). *See* text accompanying notes 7-63 *infra*.

4. *Id. See* text accompanying notes 64-80 *infra*.

5. *See generally* WRIGHT, *supra* note 1, at 218-36. *See* text accompanying notes 81-137 *infra*.

three contours of justiciability.[6]

Standing and Mootness

As a court *qua* court, the federal court must consider the threshold concerns of standing and mootness. "Standing" is the analytical facet of the justiciability doctrine which measures whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[7] The inquiry is focused on the individual, "on the *party* seeking to get his complaint before a federal court and not on the *issues* he wishes to have adjudicated."[8] Conceding the correctness of Mr. Justice Douglas's caveat that "[g]eneralizations about standing to sue are largely worthless as such,"[9] the Supreme Court has nevertheless divided standing into two basic inquiries. First, the court must determine "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."[10] Second, the court must determine "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[11]

The personal standing cases decided during the survey period centered on the first principle of standing, the requirement of an injury in fact. The court concluded that the requisite injury in fact was present in two of three cases. In the first case parents and black children who had been among the original plaintiffs in a ten year old desegregation suit,[12] and who had filed a motion to obtain additional relief deemed necessary to accomplish the previously ordered[13] dismantling of racial discrimination, had standing.[14] These plaintiffs possessed "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends

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6. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 52-56 (1978).
7. Sierra Club v. Morton, 405 U.S. 727, 731 (1972).
8. Flast v. Cohen, 392 U.S. 83, 99 (1968) (emphasis added).
9. Association of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970).
10. *Id.* at 152.
11. *Id.* at 153.
12. *See* Tasby v. Estes, 342 F. Supp. 945 (N.D. Tex. 1971).
13. *See* Tasby v. Estes, 412 F. Supp. 1192 (N.D. Tex. 1976).
14. Tasby v. Estes, 643 F.2d 1103, 1105 (5th Cir. 1981). The plaintiffs lost on the merits. *Id.*

for illumination of difficult constitutional questions."[15] More significantly, the plaintiffs would not be required to reestablish their standing each time they sought such additional relief.[16] In the second case a husband had standing to seek federal declaratory and injunctive relief challenging a requirement of state community property law despite a subsequent legislative change which had the effect of abrogating the challenged rule.[17] While " '[a] hypothetical threat is not enough,' "[18] a challenger to a state practice need only establish "a realistic danger of sustaining a direct injury from its application."[19] The dispute was justiciable for the husband once he demonstrated that application of the abrogated common law rule was "not an unrealistic possibility" due to the uncertain scope of the abrogating statute enacted during the pendency of the divorce proceedings.[20] A third plaintiff, a former police officer, did not have personal standing to challenge department regulations which were not asserted as a basis for his own discharge.[21] Since he had suffered no injury in fact from the challenged regulation which had not been applied to him, the former police officer's standing was not established by the mere existence of the regulations.[22] Thus, in the personal standing cases the court seized on the injury in fact concept to assure requisite adverseness and personal interest which are central to a traditional judicial resolution.

The general rule of representative standing is that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might be taken as applying to other persons or other situations in which its application might be unconstitutional."[23] The nearly-swallowing exceptions to this rule often allow a third party standing to raise others' rights based on the factual significance of the relationship between the third party representative and those represented, the ability of

15. *Id.* (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

16. *Id.* at 1105-06.

17. Ziegler v. Ziegler, 632 F.2d 535 (5th Cir. 1980).

18. *Id.* at 538 (quoting United Public Workers v. Mitchell, 330 U.S. 75, 90 (1947)).

19. Ziegler v. Ziegler, 632 F.2d 535, 538 (5th Cir. 1980).

20. *Id.* The plaintiff was denied immediate relief through application of the abstention doctrine. *See* text accompanying notes 110-137 *infra.*

21. Smith v. Price, 616 F.2d 1371, 1379-80 (5th Cir. 1980). The plaintiff lost on the merits of his wrongful discharge suit once the court concluded that he was constitutionally fired based on his involvement in gun play, his neglect of duties and failure to report the theft of his gun. *Id.*

22. *Id.*

23. United States v. Raines, 362 U.S. 17, 21 (1960).

the third party representative to provide the adverseness necessary for judicial resolution, and the likelihood that the rights of those not before the court will otherwise be lost.[24] During the survey period the court handed down a significant decision for the law of representative standing.

In *Church of Scientology v. Cazares*,[25] the plaintiff Church sued the Mayor of Clearwater, Florida, under the Civil Rights Act,[26] alleging that he had, under color of state law, deprived the Church of its civil rights by interfering with its right to free exercise of religion.[27] When it was announced that the plaintiff Church would be using a certain hotel as a training facility, the defendant Mayor became an outspoken critic of the Church. Plaintiff Church claimed interference with its free exercise right by the defendant Mayor's pattern of conduct which allegedly included making false and defamatory remarks which poisoned community sentiment, inducing other community clergy to shun the Church, inducing municipal and state officials to harass the Church, inducing civil organizations and community leaders to shun the Church, and inducing the local media to publish only inaccurate and adverse information about the Church.[28] On appeal the Fifth Circuit reversed the district court and held that the plaintiff had standing to protect the civil rights of its members.[29]

The district court had reasoned that there were no rights involved which could not be asserted by an individual member of the Church and no unusual circumstances were alleged which necessitated representative standing.[30] The Fifth Circuit concluded this

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24. *See* Note, *Standing to Assert Constitutional* Jus Tertii, 88 HARV. L. REV. 423, 441 (1974). *See also generally* Sedler, *Standing to Assert Constitutional* Jus Tertii *in the Supreme Court*, 71 YALE L.J. 599 (1962).

25. 638 F.2d 1272 (5th Cir. 1981).

26. 42 U.S.C. § 1983 (Supp. III 1979).

27. U.S. CONST. amend. I provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." More accurately, the alleged violation was of the fourteenth amendment insofar as due process incorporates the free exercise clause. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940). A second count of the complaint sounded in common law defamation and was grounded on diversity of citizenship. 638 F.2d at 1275 n.2.

28. 638 F.2d at 1276.

29. *Id.* at 1278-80. Because the court held that the plaintiff Church had representative standing on behalf of its adherents, the issue of whether it could assert a corporate right to free exercise was reserved. *Id.* at 1280-81 n.7. The same issue was left unresolved by the en banc court in Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 313 (5th Cir. 1977) (en banc).

30. 638 F.2d at 1276. The district court also concluded that the Civil Rights Act did

was an unduly narrow approach to representative standing. First, Supreme Court precedents made clear that there is no requirement of "unusual circumstances" for a corporation to sue to protect the rights of its members, once it is recognized that the organization and its members are identic and the organization itself likely will be adversely affected by the challenged action.[31] Second, the fact that there were no rights which could not be asserted by individual members of the Church was deemed irrelevant so long as the Church met the standing criteria.[32] Third, consistent with prior Fifth Circuit precedent, it was not necessary that the complaint specifically state that the Church sought to represent its members, for it was obvious that such was the plaintiff Church's role.[33] For an association to be allowed representative standing three elements must be satisfied: (1) the members themselves would have personal standing to sue; (2) the interests sought to be protected are germane to the very reason for the organization's existence; and (3) neither the claim the organization asserts nor the relief requested necessitates participation by individual members.[34] Only the third element seemed to trouble the court. Recognizing that "a free exercise claim is 'one that ordinarily requires individual participation,' "[35] the court concluded that the third requirement was satisfied because the challenged activity affected the entire membership of the plaintiff Church in exactly the same way, and the Church was itself inhibited in its collective free exercise, including use of its property.[36]

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not protect a corporation's free exercise right. *Id.*

31. *Id.* at 1278. In 1958 the Supreme Court concluded that the NAACP had standing to resist exposure of the NAACP's state membership lists. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

32. 638 F.2d at 1277 (citing Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 342 (1977)).

33. 638 F.2d at 1277-78. *See also* CORE v. Douglas, 318 F.2d 95, 102 (5th Cir. 1963).

34. 638 F.2d at 1279.

35. *Id.* at 1280 (quoting Harris v. McRae, 448 U.S. 297, 321 (1980)).

36. 638 F.2d at 1280. The court thus distinguished Harris v. McRae, 448 U.S. 297 (1980). The court emphasized that in *Harris* only an undetermined percentage of the organization's membership had a personal stake in the controversy. This seems to confuse the first requirement that members have personal standing with the third requirement that neither the claim nor the relief requested requires participation of individual members. The Supreme Court rejected representative standing in *Harris* because "participation of individual members . . . [was] essential to a proper understanding and resolution of their free exercise claims." *Id.* at 321. In the instant case the court seemed to assert the plaintiff Church's own free exercise claim as a reason for allowing representative standing yet pointedly declined to decide the general issue of institutional rights. 638 F.2d at 1280-81 n.7. *See* note 29 *supra*.

Other standing decisions during the survey period further defined the scope of representational standing by making marked distinctions between personal and representative standing.[37]

In *O'Hair v. Hill*,[38] famous atheist Madalyn Murray O'Hair[39] and the Society of Separationists, Inc., aimed a complex series of constitutional attacks at a provision of the Texas Constitution which guaranteed that no office holder would be excluded because of religious sentiments, as long as the officer acknowledged a personal theism.[40] Neither O'Hair individually nor the Society representatively alleged any kind of injury. A mere allegation that the provision was in violation of the establishment clause of the first amendment was deemed simply "inadequate."[41] The court opined that both O'Hair personally and the Society representatively had standing to challenge the same provision under the equal protection clause of the fourteenth amendment, because O'Hair had in fact been excluded and members of the Society would be subject to future exclusion from jury service.[42] Neither O'Hair nor the Society had standing to enjoin the payment of salaries or the holding of further elections until the state constitutional provision was ruled unconstitutional. The charge that plaintiffs could be barred

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37. Three other decisions merit brief mention. Phillips v. Joint Leg. Comm., 637 F.2d 1014, 1026 n.20 (5th Cir. 1981) (class representatives who themselves had college degrees lacked standing to challenge an employer's educational requirement of a college degree); Johns v. Department of Justice, 624 F.2d 522, 524 (5th Cir. 1980) (neither couple with physical custody of child who allegedly was kidnapped nor natural mother sufficiently represented child's interest to have standing); Appling County v. Municipal Elec. Authority, 621 F.2d 1301, 1307 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980) (neither county nor its individual citizens and taxpayers had standing to represent unspecified good faith purchasers of county bonds).

38. 641 F.2d 307 (5th Cir. 1981).

39. Ms. O'Hair first reached national prominence as a successful petitioner in the companion case to School District v. Schemp, 374 U.S. 203 (1963), which held public school programs of voluntary Bible reading violated the establishment clause.

40. TEX. CONST. art. 1, § 4 provides: "No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being."

41. 641 F.2d at 310.

42. *Id.* "People excluded from juries because of [unconstitutional reasons] are as much aggrieved as those indicted and tried under [such] a system . . . . Once the State chooses to provide . . . juries . . . it must hew to . . . constitutional criteria in . . . the selection of membership . . . ." Carter v. Jury Comm'n, 396 U.S. 320, 329-30 (1970) (footnotes omitted). *See also* Ciudadanos Unidos De San Juan v. Hidalgo County Grand Jury Comm'rs, 622 F.2d 807, 815 (5th Cir. 1980). O'Hair and the Society had standing to seek an injunction against any further seating of juries due to the unconstitutional refusal to allow them and other atheists to serve. The court, however, deemed abstention proper. 641 F.2d at 312-13.

from, or denied compensation for, public office was deemed entirely too speculative absent some allegation of a desire or plan to seek such office.[43] And since the Society would not itself suffer any injury in fact in regard to civil and criminal proceedings pending against O'Hair, there was simply no basis for allowing the Society represenative standing.[44]

A second decision involving the doctrinal distinction between personal standing and representative standing included another famous personality. In *Federal Election Commission v. Lance*,[45] Lance resisted an administrative subpoena to appear and produce documents through a constitutional assault on the Federal Corrupt Practices Act.[46] Lance attacked the entire Act as facially overbroad and invoked the principle that an administative subpoena will be judicially enforced only incident to " 'a lawfully authorized purpose, within the power of Congress to command.' "[47] If the Act is facially unconstitutional, Congress could not authorize its enforcement by the agency.[48] Treating the Act as severable, the en banc court concluded that Lance only had standing to challenge that part of the Act which may have been violated.[49] The en banc court dispatched Lance's argument that his injury in fact under the particular portion qualified him to mount an attack on the entire Act. Lance was not seeking representative standing but rather argued the Act's overbreadth. The distinction is significant. A party claiming representive standing alleges personal injury as well as injury

43. 641 F.2d at 312.

44. *Id.* at 310-12. The abstention doctrine played a significant role in the disposition of the appeal. *See* text accompanying notes 110-137 *infra*.

45. 635 F.2d 1132 (5th Cir. 1981) (en banc). A three judge panel concluded that the Federal Election Campaign Act, 2 U.S.C. §§ 437h(a), 441b (1976 & Supp. II 1979), required that since the appeal raised a constitutional issue it had to be submitted to the en banc court. FEC v. Lance, 617 F.2d 365, 374 (5th Cir. 1980). The en banc court agreed. FEC v. Lance, 635 F.2d 1132, 1136-37 (5th Cir. 1981) (en banc). *See generally* California Medical Ass'n v. FEC, 641 F.2d 619 (9th Cir. 1980). The investigation out of which the case arose involved Mr. T. Bertram Lance's efforts to win the governorship of Georgia, which came before he gained national prominence as a brief-tenured Director of the Office of Management and Budget under President Carter.

46. 2 U.S.C. § 441b (1976 & Supp. III 1979). This provision is now part of the Federal Election Campaign Act, 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979). *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 788 n.26 (1978).

47. 635 F.2d at 1138 (quoting Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186, 209 (1946)).

48. 635 F.2d at 1139. Lance based his constitutional challenge on First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) and Buckley v. Valeo, 424 U.S. 1 (1976).

49. 635 F.2d at 1140.

to third persons whose rights ought to be considered.[50] By contrast, in a first amendment facial overbreadth challenge to a statute, the party claims that while a narrowly drawn statute could constitutionally prohibit the conduct involved, the challenged statute fatally includes constitutionally protected activity. In such a situation the party before the court has been injured in fact only by being denied a right to be prosecuted under a narrowly drawn statute.[51] Lance was not permitted to lay such a constitutional claim because of the severability and consequent narrowing of the Act and because the court was convinced that the *raison d'etre* of the overbreath doctrine, that the mere existence of the overbroad law will "chill" the exercise of third persons' rights, did not apply to the Act which specifically provided for a declaratory challenge to test its constitutionality.[52]

The second doctrine which limits the judicial review power of the federal courts *qua* courts is mootness. In contrast to the standing inquiry, the mootness focus is on the sequence of events. Rooted at once in the article III "case or controversy" requirement and in classic notions of judicial self-restraint, the mootness doctrine is based on a concern for the existence of the legal controversy; in a moot case "there is no subject-matter on which the judgment of the court can operate."[53] During the period surveyed the court decided two significant appeals involving the doctrine of mootness.

The plaintiff in *Familias Unidas v. Briscoe*[54] was an unincorporated organization of Mexican-American students and adults formed to air grievances and seek reform of a Texas city's public schools. Having become frustrated by the response of the school officials, plaintiff's members took steps to boycott the schools. School officials responded by invoking a state statute to compel disclosure of the names of all the officers and members of the or-

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50. *See* text accompanying note 34 *supra*.

51. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 79-80 (1978) [hereinafter cited as CONSTITUTIONAL LAW]. *Cf.* Smith v. Price, 616 F.2d 1371, 1380 (5th Cir. 1980).

52. 2 U.S.C. § 437h (Supp. III 1979); 635 F.2d at 1141. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973). The court also relied on the separation of powers notion that administrative subpoena proceedings be limited forums. *See* FTC v. Texaco, 555 F.2d 862, 873 (5th Cir. 1977). Lance lost on the merits of his narrowed claim. 635 F.2d at 1141-42.

53. *Ex parte* Baez, 177 U.S. 378, 390 (1900). Of course, if a once substantial constitutional claim becomes moot during the litigation, the federal court may still have pendent jurisdiction over a related statutory claim which remains valid. *See* Silva v. Vowell, 621 F.2d 640 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 941 (1981).

54. 619 F.2d 391 (5th Cir. 1980).

ganization.[55] When the county judge ordered the disclosure, the organization sued in federal court, seeking declaratory, injunctive and damage relief. Before any response was made to the disclosure order, the boycott ended and the county judge withdrew the disclosure demand. Thereafter, school officials formally decided against future invocations of the disclosure statute. Still the plaintiff organization pressed for federal relief. The withdrawal of the disclosure order and the assurance that no further requests would be made under the statute rendered the request for injunctive relief moot. "The test of mootness in a case for injunctive relief is whether the injury is continuing or is likely to be repeated."[56] Because the statute had been applied to the organization which allegedly had suffered damage from lost membership and support, the underlying controversy was not moot.[57]

The second significant mootness decision during the survey period was *Ciudadanos Unidos v. Hildalgo County*.[58] The plaintiffs filed civil actions seeking to establish that Mexican-Americans, women, the young and the poor had been excluded from state grand juries unconstitutionally.[59] The court concluded that the plaintiffs presented a live case or controversy even though selection of each grand jury list was a distinct act performed by an autonomous county commission.[60] Allegations of a ten year pattern of discrimination were not overcome with any showing on the part of defendants that there was "no reasonable expectation that the wrong will be repeated."[61] Because the selection scheme provided pronounced opportunities for continuing such alleged discriminations, the election of a successor key official and legislative amendments did not moot the lawsuit.[62] The court seemed preoccupied with preventing the defendants from "avoid[ing] suit by a mere temporary change of practice, after which they would be 'free to return to [their] old ways.' "[63]

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55. TEX. EDUC. CODE ANN. tit. 1, § 4.28 (Vernon 1972).

56. *See* Southwestern Bell Tel. Co. v. Communications Workers, 454 F.2d 1333, 1334 (5th Cir. 1971), *quoted in* Familias Unidas v. Briscoe, 544 F.2d 182, 187 (5th Cir. 1976).

57. 619 F.2d at 397-98.

58. 622 F.2d 807 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1479 (1981).

59. *Id.* at 810. While the opinion blended standing and mootness, the real concern was the continued existence of the controversy. *See id.* at 815 n.17.

60. *Id.* at 820-22.

61. *Id.* at 825 (quoting United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953)).

62. 622 F.2d at 822-25. The legislative changes were deemed inconsequential to the issue of mootness.

63. *Id.* at 825 (quoting United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953)).

Advisory Opinions, Political Questions and Ripeness

The principles which coalesce in the notion of separation of powers also provide threshold limits on the federal power of judicial review.[64] Three of these principles, the ban on advisory opinions, the political question doctrine and the requirement of ripeness, drew the attention of the court during the survey period.

The most significant underpinning of the ban on advisory opinions is that their issuance would so enlarge the sphere of judicial review that the separation of powers would be violated. Relying on the fundamental notion that "the federal courts do not decide abstract, hypothetical, or contingent questions," the court refused to render an advisory opinion in *Halder v. Standard Oil Co.*[65] Too hypothetical was a franchisee's concern that if the state condemned the parcel of land involved, and if compensation included payment for loss of business opportunity or good will, and if the franchisor did not fairly apportion the compensation, then the franchisee would be injured.[66] The court declined to render an advisory opinion on "mere prediction."[67]

The court applied the political question doctrine in disposing of the appeal in *O'Hair v. Hill.*[68] The plaintiffs challenged a provision of the Texas Constitution under the guaranty clause of the Constitution.[69] The court simply invoked the political question doctrine to dismiss the challenge, citing *Luther v. Borden.*[70] This is curious because from 1849, when *Luther v. Borden* was decided, until now, the guaranty clause has been considered not to be "a repository of judicially manageable standards which a court could utilize independently in order to identify a state's lawful government."[71]

The last-considered principle of justiciability, which rests on

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64. *See, e.g.*, Federal Election Comm'n v. Lance, 617 F.2d 365, 368-69 (5th Cir. 1980), *submitted to en banc court*, 635 F.2d 1132, 1136-38 (5th Cir. 1981) (limited role of the federal courts in administrative investigations).

65. 642 F.2d 107, 110 (5th Cir. 1981).

66. *Id.* The franchisee sued under the Petroleum Marketing Practices Act of 1978, 15 U.S.C. § 2801-2841 (1976 & Supp. III 1979), which was a congressional effort to increase a petroleum industry franchisee's bargaining strength. 642 F.2d at 109-10.

67. 642 F.2d at 109 n.1. Chief Judge Godbold specially concurred to emphasize the narrow holding of prematurity. *Id.* at 112.

68. 641 F.2d 307 (5th Cir. 1981).

69. U.S. CONST. art. IV, § 4.

70. 48 U.S. (7 How.) 1 (1849).

71. Baker v. Carr, 369 U.S. 186, 223 (1962).

the separation of powers in our federal government, is ripeness. The doctrine of ripeness is based on a concern for the fundamental "nature of the judicial process,"[72] *i.e.*, the institutional role of the federal judiciary.[73] Somewhat analogous to mootness, which involves a suit filed "too late," ripeness involves a case brought "too early."[74] The ripeness doctrine is even more analogous to the ban on advisory opinions which prohibits abstract or hypothetical declaratory judgments; while the latter is retrospective in the sense that the requisite adversary case or controversy has failed to materialize, the ripeness doctrine is prospective in emphasizing that future events might create or destroy the justiciability of the dispute.[75]

In *Federal Election Commission v. Lance*,[76] the en banc court quoted the general rule for ripeness: "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[77] Lance argued, *inter alia*, that the Federal Election Commission's investigation of his 1974 election under statutory authority enacted in 1975 and 1976 violated the ex post facto clause.[78] The en banc majority held that this argument was too uncertain and contingent on future events.[79] The record had not matured to include an administrative finding that no improprieties had occurred after the statutory enactments. Lance's own unsworn assertions that such were the facts did not place a court determination on firm judicial ground beyond thin speculation.[80]

Eleventh Amendment and Abstention

Federalism is the third major grouping of principles of justiciability which circumscribe the power of judicial review of the

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72. K. DAVIS, ADMINISTRATIVE LAW TEXT § 21.01, at 396 (3d ed. 1972).
73. TRIBE, *supra* note 6, at 60.
74. CONSTITUTIONAL LAW, *supra* note 51, at 64.
75. TRIBE, *supra* note 6, at 61.
76. 635 F.2d 1132 (5th Cir. 1981) (en banc). *See* text accompanying notes 45-52 *supra*.
77. *Id.* at 1138 (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937)).
78. U.S. CONST. art. I, § 9, cl. 3.
79. 635 F.2d at 1139. Four dissenting judges agreed with Lance on the ex post facto claim. 635 F.2d at 1143. (Coleman, C.J., dissenting).
80. *Id.* at 1138-39. In addition the statutory penalties included criminal and civil sanctions, the latter of which would be beyond the scope of the ex post facto clause. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

federal courts. In two principal areas, the interpretation of the eleventh amendment and the application of the abstention doctrines, the federal courts are restrained by the constitutional dynamics of the federal system itself and by principles of self-restraint inherent in the system.[81]

The eleventh amendment[82] does not act as a grant of immunity to the states. The states are not exempted from the limits of federal law but are still suable for actions within its coverage only in state courts.[83] While the eleventh amendment case law is well-developed and quite complicated, five basic inquiries are inevitable in cases which raise an issue of coverage.[84] The survey period saw a representative sample of cases.

First, the amendment expressly bars suits by citizens of other states and foreign nationals and impliedly bars suits by citizens of the defendant state.[85] Thus, a Wisconsin resident could not sue the State of Louisiana[86] and a Texas plaintiff's suit against Texas would likewise be barred.[87] Indeed, such "eleventh amendment rights of a state are sufficiently jurisdictional to be asserted for the first time on appeal."[88]

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81. During the survey period the court reaffirmed related precepts which help demarcate federal and state court realms. "[B]ecause federal courts are courts of limited jurisdiction, due regard for the constitutional allocation of powers between the state and federal systems requires a federal court scrupulously to confine itself to the jurisdiction conferred on it by Congress and permitted by the Constitution." *In re* Carter, 618 F.2d 1093, 1098 (5th Cir. 1980). The wavering of the line is illustrated with one example. While the general rule has been that federal courts will decline jurisdiction over domestic relations, the federal courts have always reviewed constitutional issues which arise in a domestic context. Rowell v. Oesterle, 626 F.2d 437, 438 (5th Cir. 1980). There are, of course, also due process restrictions on the federal and state courts. *See, e.g.*, Bankhead Enterprises, Inc. v. Norfolk & W. Ry., 642 F.2d 802 (5th Cir. 1981); Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375 (5th Cir. 1980); Southwest Offset, Inc. v. Hudco Publ. Co., 622 F.2d 149 (5th Cir. 1980); Sumrall v. Moody, 620 F.2d 548 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1733 (1981).

82. U.S. CONST. amend. XI was adopted in response to Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

83. CONSTITUTIONAL LAW, *supra* note 51, at 48.

84. In resolving issues under the Eleventh Amendment we should ask five basic questions: (1) is the plaintiff one to whom the Amendment applies? (2) is the suit truly against the state? (3) is the suit seeking relief in a manner that is barred by the Amendment? (4) has the state waived its immunity? (5) is there a congressional statute which can override the immunity in this area?

Id. at 50.

85. Hans v. Louisiana, 134 U.S. 1 (1890).

86. Dagnall v. Gegenheimer, 631 F.2d 1195, 1196 (5th Cir. 1980).

87. Downing v. Williams, 624 F.2d 612, 625 (5th Cir. 1980), *vacated on other grounds*, 645 F.2d 1226 (5th Cir. 1981).

88. 631 F.2d at 1196.

Second, the suit must actually be against the state, that is, the state must be the real party in interest.[89] The jurisdictional bar has been interpreted to also bar attempts at circumvention by suing a "governmental unit or individual, which stands in the shoes of the state."[90] To make this determination "a court must examine the relationships and duties created by state law as to the institution or individual involved."[91] In *Downing v. Williams*,[92] whether a state mental health and mental retardation facility was a state instrumentality for eleventh amendment purposes was so complex an issue on which the parties had not been heard that the court remanded the issue to the district court.[93] Suits against the private defendants in their individual capacity, however, were not deemed barred by the eleventh amendment despite the state's indemnity statute. The indemnity statute was deemed only an agreement between the state and the individuals. The court reasoned that to hold otherwise would always allow the state to claim immunity for individuals sued in their private capacity.[94]

Third, the suit must seek relief in a manner which is barred by the eleventh amendment. At one time the bar was interpreted to prohibit "all suits in which plaintiffs sought to restrain or to compel the action of state officials performing official duties imposed by constitutional state laws."[95] Subsequent refinements of the doctrine narrowed the bar to

> "suits 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury,' . . . '[that are] the necessary result of compliance with decrees which by their terms [are] prospective in nature' at least . . . where the very controversy is a result of our federal system."[96]

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89. *See* Lincoln County v. Luning, 133 U.S. 529 (1890).

90. Downing v. Williams, 624 F.2d 612, 625 (5th Cir. 1980) (citing Edelman v. Jordan, 415 U.S. 651 (1974) and *In re* Ayers, 123 U.S. 443 (1887)).

91. Downing v. Williams, 624 F.2d 612, 626 (5th Cir. 1980) (citing Hander v. San Jacinto Jr. College, 519 F.2d 273 (5th Cir. 1975)).

92. 624 F.2d 612 (5th Cir. 1980).

93. *Id.* at 626.

94. *Id. See* Scheuer v. Rhodes, 416 U.S. 232 (1974).

95. Lummis v. White, 629 F.2d 397, 401 (5th Cir. 1980) (citing Worcester County Trust Co. v. Riley, 302 U.S. 292, 296-300 (1937)).

96. Lummis v. White, 629 F.2d 397, 401-02 (5th Cir. 1980) (citations omitted) (quoting California v. Texas, 437 U.S. 601, 616 (1978) (Powell, J., concurring) wherein was quoted Edelman v. Jordan, 415 U.S. 651, 663, 667-68 (1974)). In *Lummis* the court was guided by the views of four justices in concluding that Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937), had been eroded. 629 F.2d at 401-02. *See* text accompanying note 95 *supra*.

Thus, the eleventh amendment did not bar an administrator of an estate, who was threatened with assessment and collection of death taxes by two states, from bringing a statutory interpleader action for a determination of the decedent's domicile.[97]

Fourth, the state may waive its eleventh amendment protection. The waiver may be express as through a blanket statute or in individual actions by an authorized official.[98] Whether such a waiver is valid is a question of state law.[99] When an attorney for a state agency had no authority under state law to waive the state's eleventh amendment protection, the bar could be raised even after the state had sought a favorable verdict and lost before the jury.[100] Even an implied waiver is possible.[101] Indeed, the Fifth Circuit held in *Familias Unidas v. Briscoe*[102] that "states may be considered to have waived their immunities and consented to such suits in federal court through their ratification of the fourteenth amendment."[103]

Finally, there may be a congressional statute which overrides the immunity.[104] For example, the states' immunity "must necessarily be understood to have been modified by the dictates of the subsequently enacted Fourteenth Amendment."[105] Nevertheless, Congress must make it "unmistakably clear, either in statutory language or in legislative history, that it purposefully intends to make the states amenable to private damages actions under the

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97. Lummis v. White, 629 F.2d 397, 402 (5th Cir. 1980). In a second case the costs of notice to class members was deemed so ancilliary to the prospective relief granted against the state as to be allowable under the eleventh amendment. Silva v. Vowell, 621 F.2d 640, 652-54 (5th Cir. 1980). Although the court rejected the argument, it did entertain a curious cost/benefit argument in which the state urged that the expenses of such a notice were so excessive as to engage some sort of extraordinary protection under the eleventh amendment.

98. Such a waiver must go beyond merely allowing suits in courts which otherwise have jurisdiction. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).

99. *Id.*

100. Dagnall v. Gegenheimer, 631 F.2d 1195, 1196 (5th Cir. 1980). The court recognized the inequitable scenario that had the state prevailed it would have claimed it had consented to the suit. Still, the state law and the eleventh amendment compelled such a result. *Id.*

101. *See* Parden v. Terminal R.R., 377 U.S. 184 (1964); Petty v. Tennessee-Missouri Bridge Comm'n 359 U.S. 275 (1959).

102. 619 F.2d 391 (5th Cir. 1980).

103. *Id.* at 405 (citing Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1078 (5th Cir. 1979)).

104. CONSTITUTIONAL LAW, *supra* note 51, at 53. *See generally* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203 (1978).

105. 619 F.2d at 405 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1975)).

particular statute in question."[106] While the Civil Rights Act of 1871[107] was enacted to enforce the fourteenth amendment, the court in *Familias Unidas* held that neither the statutory language nor the legislative history satisfied the test.[108] Under this statute the state could not be held liable even for nominal damages.[109]

Federalism is also the operative policy underlying the various abstention doctrines. The decisions of the Supreme Court have established three general categories of abstention, and the Fifth Circuit decided appeals in each category during the survey period.[110]

The original abstention case which gave its name to the first category was *Railroad Commission v. Pullman Co.*[111] There the plaintiff railroad company challenged an order of the state railroad commission, claiming that the order was unauthorized under state law and violated the Federal Constitution. Since it did not have to reach the constitutional issue of whether the order was beyond the commission's authority, the Supreme Court withheld decision pending a state court proceeding which would construe the state law.[112] Two requirements must be satisfied for a *Pullman* abstention: (1) a central issue of state law involved must be unsettled, and (2) there must be a likelihood that one possible determination of the state law issue would obviate the decision of a federal constitutional issue in the case.[113]

The court agreed that *Pullman* abstention was appropriate in two cases decided during the survey period. In the first, *Palmer v. Jackson*,[114] a group of attorneys brought an action challenging a one-time fee assessment imposed on attorneys in the state to pay

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106. 619 F.2d at 405 (citing Edelman v. Jordan, 415 U.S. 651, 672-73 (1974)).

107. 42 U.S.C. § 1983 (Supp. III 1979).

108. 619 F.2d at 405 (citing Quern v. Jordan, 440 U.S. 332, 339 (1979) and Alabama v. Pugh, 438 U.S. 781, 782 (1978)).

109. 619 F.2d at 405.

110. Perhaps significant and worth noting is that during the survey period the court did not apply two other related categories of abstention. Despite its crushing docket the court did not abstain merely to serve its own convenience. *See* WRIGHT, *supra* note 1, at 227. A fifth category of abstention, which fallows the federal court to stay its hand in private diversity litigation to avoid having to decide difficult questions of state law, was also not used during the survey period. United Services, Inc. v. Delaney, 328 F.2d 483 (5th Cir. 1964), *cert. denied*, 377 U.S. 935 (1965).

111. 312 U.S. 496 (1941). *See generally* Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

112. 312 U.S. at 501-02.

113. Palmer v. Jackson, 617 F.2d 424, 428 (5th Cir. 1980).

114. *Id.*

for a new state bar building, under multiple provisions of state law and the Federal Constitution.[115] The shotgun backfired when the court concluded that the unresolved and unclear issues of state law they raised fulfilled the first requirement of *Pullman* abstention.[116] The plaintiffs admitted that their suit raised numerous unsettled issues of state law. Nevertheless, they urged nonabstention because the state court which would decide the unsettled state law issues was a party to the litigation. Thus, there was no state forum which could impartially adjudicate the state law issues. The court rejected this argument on the basis of state case law which made clear that the state's courts often reviewed court-adopted rules in light of constitutional and statutory measures.[117] The prior administrative involvement of the state supreme court was deemed insufficient to prevent the state court from performing its role in developing state law.[118] The second requirement of *Pullman* abstention was also satisfied. Plaintiffs' challenges on the special assessment under the due process and equal protection clauses would be rendered moot by a determination that the assessment was unauthorized or illegal under state law.[119] Therefore, abstention was proper.[120] Consistent with the procedure of abstention generally, the plaintiffs would be free to sue in state court and raise all their state law and constitutional law issues, or expressly reserve the federal issues for federal court resolution after the state court proceedings.[121]

In *Ziegler v. Ziegler*,[122] the court was faced with a state statute which had not been construed by the state courts and was amena-

115. *Id.* at 427-28.

116. Unsettled issues of state law included (1) the validity of the encumbrance on state property; (2) the legality of the fee assessment; (3) whether failure to pay the assessment would result in disbarment; and (4) whether the bar's arrangement complied with the state constitution and applicable bar regulations. *Id.* at 428-29.

117. *Id.* at 429-30. *See* Cameron v. Greenhill, 582 S.W.2d 775 (Tex. 1979).

118. 617 F.2d at 430.

119. The plaintiffs' first amendment free association challenge to compulsory bar membership would also be either avoided or materially changed. *Id.* at 431. *See* Harrison v. NAACP, 360 U.S. 167, 177 (1959). It was not a valid basis for refusing abstention, in part, because the merits appeared foreclosed by Lathrop v. Donohue, 367 U.S. 820 (1961) (plurality opinion).

120. While the general procedure is for the federal court to stay further action but retain jurisdiction, because of a wrinkle in the Texas Declaratory Judgment Law, the case was properly dismissed without prejudice. 617 F.2d at 431 n.11. *See* Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975).

121. 617 F.2d at 432 (citing England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964)).

122. 632 F.2d 535 (5th Cir. 1980).

ble to one constitutional construction, with a second construction which would raise serious constitutional issues. Seeking to avoid the peculiar situation of considering whether the statute was unconstitutional under the second construction when the state courts could later give it the first constitutional construction, the court concluded abstention was appropriate.[123] Such a postponement of federal jurisdiction, especially in the area of domestic relations law involved in the case, would avoid "unnecessary constitutional decisions and . . . promot[e] harmonious federal-state relations."[124] One final factor swept into the calculus. The argument for *Pullman* abstention was made even more compelling by the existence of a state action pending which was likely to resolve the state law issues. The delay factor of commencing another state court proceeding, itself a factor often militating against abstention, was thus minimized.[125]

In a third appeal the court affirmed the district court's declination to abstain.[126] The *Pullman* abstention requirements were not satisfied in the class action to challenge the constitutionality of the Mississippi procedures for civil commitment. The federalism-based reluctance to inject an unnecessary constitutional ruling into an area of unsettled state law was absent.[127] The first element of *Pullman* abstention was not present since the state statutory provisions were not ambiguous and their operation in practice was clear.[128]

The second type of abstention takes its name from *Burford v. Sun Oil Co.*[129] The Supreme Court in *Burford* held that the federal court should have dismissed the suit because the issues revolved around a highly specialized and complicated state regulatory system.[130] *Burford* abstention is now required when "there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar."[131] In *Appling County v.*

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123. *Id.* at 538-39.
124. *Id.* at 539.
125. *Id. See* Baggett v. Bullitt, 377 U.S. 360 (1964).
126. Chancery Clerk v. Wallace, 646 F.2d 151 (5th Cir. 1981).
127. *Id.* at 155.
128. *Id.*
129. 319 U.S. 315 (1943).
130. *Id.*
131. Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 814 (1976).

Municipal Electric Authority,[132] the county and its citizens and taxpayers brought suit against the owners of a nuclear power plant to collect additional *ad valorem* taxes. The Fifth Circuit affirmed in a single sentence opinion the holding of the district court that the federal courts lacked jurisdiction over the relationships involved.[133]

Of the third category of abstention, one prominent federal court expert has observed: "There is no more controversial, or more quickly changing, doctrine in the federal courts today . . . ."[134] Often referred to as "Our Federalism," the doctrine is identified with the Supreme Court's decision in *Younger v. Harris*.[135] The basic notion of *Younger* abstention is that a federal court will stay its hand where "absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings."[136] In each of three cases in which the *Younger* abstention doctrine was invoked, the court declined to apply it. In all three cases the reason was the same: the threshold requirement of a pending state proceeding was not satisfied so there was no referent for federal deference.[137]

COMMERCE CLAUSE

During the survey period the court had occasion to apply general notions of the commerce clause power. In *Scott v. Moore*,[138] a construction company and two of its employees sued two unions and individual union members, alleging that the defendants had conspired to deprive plaintiffs of equal protection and their privileges and immunities by planning and executing an attack on plaintiffs' construction site. The defendants argued that, even if

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132. 621 F.2d 1301 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980).

133. *Id.* at 1302.

134. WRIGHT, *supra* note 1, at 229.

135. 401 U.S. 37 (1971).

136. Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 816 (1976). For a detailed exposition of this volatile doctrine *see generally* 17 C. WRIGHT, A. MILLER, E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4251-4255, at 533-87 (1978).

137. Davis v. Page, 640 F.2d 599, 601-02 (5th Cir. 1981); Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1037 (5th Cir.), *prob. juris. noted*, 49 U.S.L.W. 3863 (1980); Let's Help Florida v. McCrary, 621 F.2d 195, 199 (5th Cir.), *appeal docketed*, 49 U.S.L.W. 3467 (1980). *But see* Fitzgerald v. Peek, 636 F.2d 943 (5th Cir. 1981).

138. 640 F.2d 708 (5th Cir. 1980).

the Ku Klux Klan Act of 1861[139] was intended to provide a civil remedy for a wholly private conspiracy of the kind alleged, Congress lacked the power to enact legislation of such breadth. The court held that the commerce clause empowered Congress to reach the defendants' conduct.[140]

During the survey period the court thrice wrestled with the so-called "dormant" commerce clause which requires a judicial determination of the extent of permissible state regulation of interstate commerce in the absence of federal legislation. Because the commerce clause is an affirmative grant of power to Congress, the doctrine developed to limit state interference with interstate commerce. It is based on "negative implications," *i.e.*, by interpreting what Mr. Justice Jackson called the "great silences of the Constitution."[141] Thus, the federal judicial role in confining economic localism is directly implicated by the rationale of the commerce clause "to create and foster a common market among the states."[142]

In *Louisiana Dairy Stabilization Board v. Dairy Fresh Corp.*,[143] the plaintiff Board appealed from a judgment invalidating a state regulation insofar as it affected dairy products processed, sold and delivered out-of-state by nonresident processors.[144] In 1974 Louisiana enacted the Dairy Stabilization Law which itself made no distinction between in-state and out-of-state processors.[145] Passed as a comprehensive regulation of the dairy industry to protect producers, processors and distributors, the legislation sought to ensure against price wars, unfair competition and disruptive trade practices through a comprehensive scheme of licensing

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139. 42 U.S.C. § 1985 (1976).

140. 640 F.2d at 724. The court avoided the plaintiffs' suggested fourteenth amendment basis as "fraught with uncertainty." *Id.* at 725. Equally unsupportable on the record were the two sources of power relied on in a leading Supreme Court case, the thirteenth amendment and the right to travel. *Id.* at 724-25. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971).

141. H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 535 (1949). In contrast the states are expressly forbidden to interfere with foreign commerce. U.S. CONST. art. I, § 10, cl. 2.

142. CONSTITUTIONAL LAW, *supra* note 51, at 244. *See* Service Machine & Shipbuilding Corp. v. Edwards, 617 F.2d 70, 73 (5th Cir. 1980).

143. 631 F.2d 67 (5th Cir. 1980).

144. The Board had sought a declaratory judgment pertaining to its powers to regulate two nonresident companies. The defendant companies won a counterclaim based on the commerce clause. Louisiana Dairy Stabilization Bd. v. Dairy Fresh Corp., 476 F. Supp. 416 (M.D. La. 1979).

145. LA. REV. STAT. ANN. §§ 40:931.1-.19 (West 1977 & Supp. 1981).

and regulation.[146] The district court found that the defendants completed the processing of the products sold to Louisiana retailers in states other than Louisiana and that the sale and delivery of the products took place outside the state. The products were then imported and resold in the state by the retailer.[147] The Board contended that the defendant processors had to be licensed which involved a three cents per hundredweight assessment and a detailed set of requirements covering record keeping, payment and credit arrangements, delivery methods, and sales techniques.[148] The Board's effort to regulate these defendants in such a manner was held to violate the commerce clause, under the basic rule that a statutory purpose or effect which seeks to insulate state producers from competitive interstate commerce unreasonably burdens the flow of interstate commerce.[149] In response to the Board's contention that it did not fix prices but only imposed the assessment and other requirements as incidents of its antitrust efforts, the court invoked the seminal Supreme Court decision in *Baldwin v. G.A.F. Seelig, Inc.*,[150] which held invalid a New York effort to fix minimum dairy prices. While the state had the power to regulate interstate activities to protect producers, processors and distributors, it could not project its regulation beyond its borders. Louisiana's invocation of the antitrust talisman was deemed no more significant than was New York's effort in *Baldwin* to enforce dairy regulations purposed to protect public health and safety.[151] The court followed the teachings of *Baldwin* in rejecting the antitrust distinction, for the argument would prove too much in that it would justify virtu-

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146. *See* 631 F.2d at 68.

147. Under previous legislation the Louisiana Milk Commission, which preceded the Board, sought to set retail prices. A supermarket retailer, recognized as something of a New Orleans institution, sought to circumvent the regulation by purchasing dairy products processed out-of-state for importation into and resale in Louisiana. *See* Schwegmann Bros. Giant Supermarkets v. Louisiana Milk Comm'n, 365 F. Supp. 1144 (M.D. La. 1973) (three-judge court), *aff'd*, 416 U.S. 922 (1974). After Schwegmann successfully challenged the application of the regulation to such an arrangement on the basis of the commerce clause, the deal was struck with the defendants in the instant case. Louisiana Dairy Stabilization Bd. v. Dairy Fresh Corp., 476 F. Supp. 416, 418 (M.D. La. 1979). Extensive litigation with the state health agency ended in an order to permit the importation and resale. Schwegmann Bros. Giant Supermarkets v. Edwards, 323 So. 2d 810 (La. App. 4th Cir.), *writ denied*, 326 So. 2d 503 (La. 1976). In 1976 Louisiana abolished the Commission and created the Board that was given broad regulatory powers which did not include fixing prices.

148. 631 F.2d at 68.

149. *Id.* at 69.

150. 294 U.S. 511 (1935). *See also* H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949).

151. 631 F.2d at 69. The fact that the Louisiana scheme did not set prices was not deemed a reason for not applying the *Baldwin* rule. *Id.*

ally all trade barriers erected against incoming commerce.[152]

The issue in *Smith v. Department of Agriculture*[153] was whether a farmers' market was an economist's market. The State of Georgia operated a farmers' market at which those with state licenses could rent space to sell their produce. Certain locations were more desirable because they provided better protection from the elements, superior produce displays, and greater accessibility. The plaintiff, a resident of Alabama, had sold produce at the market for twenty years. Booth assignments were made irrespective of residency until 1973 when the Georgia Department of Agriculture adopted a rule of assignment based solely on state residency, with the avowed purpose of providing a competitive advantage for Georgia farmers. The majority framed the threshold issue to be whether Georgia was acting in a proprietary or a regulatory capacity, distilling a distinction from recent Supreme Court decisions between the state as a market participant and as a market regulator.[154] The majority concluded that Georgia was acting as a market regulator which then subjected the residency regulation to commerce clause scrutiny.[155] Under traditional commerce clause analysis the regulation was found wanting.[156] The dissenting judge was convinced that the state was operating in a proprietary role in the market for booths and not the market for produce.[157] Booth assignment thus was not regulation of a market in produce or in booths, but merely the state's participation in the farmers' market or booth business. As a proprietor, the dissent reasoned, the state

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152. *But cf.* Breard v. Alexandria, 341 U.S. 622 (1951) (legitimate state purpose may be served with least restrictive means when intrastate benefit outweighs interstate burden).

153. 630 F.2d 1081 (5th Cir. 1980).

154. *Id.* at 1083.

155. *Id.*

156. Given the avowed purpose of protecting in-state farmers, the state's burden was "virtually insurmountable." *Id.* at 1084. The three-pronged inquiry considers:

(1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) whether the statute serves a legitimate local purpose; and, if so,

(3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma, 441 U.S. 322, 336 (1979), *quoted in* 630 F.2d at 1084. The party challenging the statute must demonstrate discrimination against interstate commerce. Once that burden is satisfied, the state must justify the discrimination by showing the effectiveness of the statute and the absence of nondiscriminatory means to serve the local interest. *See* 441 U.S. at 336.

157. 630 F.2d at 1088 (Randall, J., dissenting). *See also id.* at 1086 (Gee, J., concurring).

could deal in its booths almost as it liked without violating the commerce clause.[158]

The third dormant commerce clause decision, *Service Machine & Shipbuilding Corp.*,[159] held a worker registration ordinance invalid under the commerce clause.[160] Because the ordinance required registration of nonresident applicants seeking their first job and did not require registration of similar resident applicants, the ordinance discriminated against interstate commerce in favor of local residents.[161] While crime control was deemed a legitimate local purpose,[162] such a scheme was not justified as an efficient or the most efficient means of serving that local purpose since a scheme requiring all first time applicants would be more efficient and not discriminatory.[163] Under the lesser standard applicable,[164] balancing the perceived benefits against the burdens on commerce, the ordinance fell under its own weight. The putative benefits included deterring criminals from relocating in the parish and facilitating apprehension of those undeterred. The many impediments to personal mobility as an incident of interstate commerce included highly detailed revelations of personal information and a

158. *Id.* at 1088 (Randall, J., dissenting); *id.* at 1086 (Gee, J., concurring).

159. 617 F.2d 70 (5th Cir. 1980). The focus was on the dormant commerce clause since Congress had not exercised its power to preempt the area of crime control. Even in this area Congress has exercised some commerce clause power. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971).

160. The commerce clause goes beyond state statutes to reach local ordinances. 617 F.2d at 73 (citing Dean Milk Co. v. Madison, 340 U.S. 349 (1951)).

161. Registration was a detailed and cumbersome procedure imposed on employers of itinerant laborers, defined as those who traveled into the parish seeking employment and residents of the parish who sought to change employment. 617 F.2d at 72. Registration included fingerprinting, photographing the subject, disclosure of personal information and payment of a fee. *Id.* at 71-72 n.2.

162. *Id.* at 74. The parish had concluded that rapid population growth and a large influx of industry with an immigration of transient laborers had boosted the local crime rate. *Id.* at 71.

163. *Id.* at 75.

164. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), described the balancing as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found then the question becomes one of degree. And the extent of that burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted). City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). The second analysis differs from the first analysis only in that the former defers more to local interest by not assuming a discrimination against interstate commerce.

fee which disproportionately burdened the poor laborer and the employer with numerous employees. The court was convinced that a less intrusive scheme was possible.

SUBSTANTIVE DUE PROCESS

Ever since substantive due process has been characterized by near complete judicial deference to the legislative process, statutes have been upheld for "virtually no substantive reason at all . . . except where constitutional provisions much more explicit than due process were in jeopardy."[165] While the standard may have some content, its application has been substanceless due process. No citation of authority is necessary; the bold black letter corollary to the constitutional standard has been that when a substantive due process argument is raised, the court will defer to the judgment of the state legislature[166] and Congress.[167] Although the surveyed term generally followed this corollary, there were a few notable exceptions.

In a series of rather routine substantive due process decisions, the court upheld the following acts as rational: the imposition of a strict liability, civil monetary penalty under the 1972 amendments to the Federal Water Pollution Control Act[168] upon the owner of a facility which discharged gasoline into navigable waters, even though the discharge resulted solely from the acts of an unknown third person;[169] application of the Mississippi Business Sign Statute[170] which authorized creditors of an improperly disclosed principal or partner to execute and sell business property used to transact business;[171] the application of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act,[172] ex-

165. TRIBE, *supra* note 6, at 450-51 (citing Ferguson v. Skrupa, 373 U.S. 726 (1963)).

166. U.S. CONST. amend. XIV. *See, e.g.*, Bruneau's, Inc. v. Nichols, 642 F.2d 146 (5th Cir. 1981); Anderson v. Winter, 631 F.2d 1238 (5th Cir. 1981); Oster v. City of New Orleans, 631 F.2d 71 (5th Cir. 1980); Mitchell v. Board of Trustees, 625 F.2d 660 (5th Cir. 1980); Davidson v. Georgia, 622 F.2d 895 (5th Cir. 1980).

167. U.S. CONST. amend. V. *See, e.g*, United States v. Coastal States Crude Gathering Co., 643 F.2d 1125 (5th Cir. 1981); Travelers Ins. Co. v. Marshall, 634 F.2d 843 (5th Cir. 1981).

168. Federal Water Pollution Control Act Amendments of 1972, § 2, 33 U.S.C. § 1321 (1976 & Supp. III 1979).

169. United States v. Coastal States Crude Gathering Co., 643 F.2d 1125 (5th Cir. 1981).

170. MISS. CODE. ANN. § 15-3-7 (1972).

171. Bruneau's, Inc. v. Nichols, 642 F.2d 146 (5th Cir. 1981).

172. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, §

tending employee benefits coverage to deaths causally unrelated to previous maritime injury, to impose liability on an insurance carrier covering the employer at the time of a preamendment injury;[173] the Mississippi dual retirement system for state employees so far as it provided greater benefits for officers of the State Highway Safety Patrol than for agents of the State Bureau of Narcotics;[174] a New Orleans ordinance, governing licensing and operation of massage parlors, which detailed recordkeeping requirements, hours of business, administrative inspections and coverage exemptions;[175] application of a local Mississippi school board rule which mandated automatic expulsion of any student who brought a weapon to school;[176] and the procedures for administering the Georgia Bar Examination.[177] More intriguing are the two decisions in which the court declared legislation invalid under the due process clause.

In *Harper v. Lindsay*,[178] the court handled a complex due process challenge to a comprehensive set of county regulations for massage parlors.[179] The court gave short shrift to plaintiffs' arguments that the pursuit of a legitimate business was a fundamental right and thus required a compelling state interest to justify its regulation. Such a theory of strict scrutiny was seen as nothing more than an attempt to resurrect the long-discredited concept of substantive due process and violated the "well established rule that state regulations of business or industry are to be reviewed under the less exacting 'rational basis' standard."[180] The court eas-

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5, 33 U.S.C. §§ 901-950 (1976 & Supp. III 1979).

173. Travelers Ins. Co. v. Marshall, 634 F.2d 843 (5th Cir. 1981). Such retrospective legislation, although not favored, is not per se unconstitutional. *Id.* at 846 (citing Stephens v. Cherokee Nation, 174 U.S. 445 (1899), and Blount v. Windley, 95 U.S. 173 (1877)). Its retroactive quality subjected the legislation to a somewhat heightened level of scrutiny. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976).

174. Anderson v. Winter, 631 F.2d 1238 (5th Cir. 1980).

175. Oster v. City of New Orleans, 631 F.2d 71 (5th Cir. 1981). *See also* text accompanying notes 178-184 *infra*.

176. Mitchell v. Board of Trustees, 625 F.2d 660 (5th Cir. 1980).

177. Davidson v. Georgia, 622 F.2d 895 (5th Cir. 1980).

178. 616 F.2d 849 (5th Cir. 1980).

179. The regulations were adopted pursuant to a Texas legislative authorization. TEX. REV. CIV. STAT. ANN. art. 2372v, § 2(a) (Vernon Supp. 1980-1981). The scope of the legislative delegation was considered to include such regulations. 616 F.2d at 852-54. Neither party appealed the district court's holding that the ordinance banning heterosexual massage was beyond the legislative delegation. *Id.* at 853. *See* Harper v. Lindsay, 454 F. Supp. 597, 607-09 (S.D. Tex. 1978).

180. 616 F.2d at 854 (quoting Pollard v. Cockrell, 578 F.2d 1002, 1012 (5th Cir. 1978)). *Contra,* Corey v. City of Dallas, 352 F. Supp. 977 (N.D. Tex. 1972), *rev'd on other grounds,*

ily conceived of a rational relation between the identified, actual[181] purpose of the ordinance, as an exercise of the police power to protect community health, welfare and morals by controlling massage parlors, and each particular[182] regulation.[183] Regulations requiring proof of identification and records of patrons' comings and goings would prevent minors from patronizing such establishments and inhibit adult patrons from soliciting illicit sex. The requirement that masseurs and masseuses wear white clothing served ends of health and sanitation. Various provisions applying to entrances, exits and locks would allow for administrative inspections, discourage illicit behavior and aid fire escape. Regulations of hours and outside premises would maintain neighborhood character. The regulation requiring a six-inch by six-inch unobstructed opening on all interior doors, however, was found arbitrary and unreasonable and hence unconstitutional. The provision did not secure free passage, facilitate fire escape or protect against foul play. The court could conceive of no rational justification of this requirement. Suggesting that patrons were entitled to a "reasonable amount of privacy," the court concluded that the requirements served no valid state interest.[184]

The second recognized substantive due process denial came in *Aladdin's Castle, Inc. v. City of Mesquite*,[185] which involved the fundamental right to play "Space Invaders."[186] The plaintiff owned and operated a chain of family amusement centers and sought to open a center in the defendant city. The defendant city had enacted an ordinance prohibiting children under the age of seventeen from playing coin-operated games unless accompanied by a parent or legal guardian.[187] The court reversed the district court[188] and

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492 F.2d 496 (5th Cir. 1974). *See generally* McCloskey, *Economic Due Process and The Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

181. *See* 616 F.2d at 869 (Vance, J., concurring). *But see* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

182. *See* 616 F.2d at 869 (Vance, Jr., concurring).

183. *Id.* at 855-57. The court depended in large measure on its prior opinion in Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978), which upheld a very similar ordinance.

184. 616 F.2d at 855. The majority used the privacy concern to support an irrationality conclusion. *Id.* Judge Vance, concurring, concluded the same regulation was unconstitutional for failing a strict scrutiny engaged by the ordinance's abridgement of the patrons' fundamental right of privacy. *Id.* at 869.

185. 630 F.2d 1029 (5th Cir. 1980).

186. "Space Invaders" is a type of trademarked, electronic, coin-operated game. Of course, the broader issue was whether playing such games is a fundamental right.

187. The ordinance was actually reenacted after the city leaders changed their minds about repealing an earlier version because of a concern that plaintiff had connections with

held that the ordinance violated the due process clause.[189] Initially assuming that the rational basis test was the appropriate standard, the court first identified two legitimate public purposes within the contemplation of the police power: the prevention of truancy and exposure to corrupting influences. Second, the court analyzed the under-seventeen ban to determine whether this regulation rationally served these two legitimate purposes. The absolute ban on all persons under seventeen including those not obliged to attend school[190] was held to be "patently irrational."[191] Therefore, the ordinance satisfied the test for irrationality: " 'patently useless in the service of any goal apart from whim or favoritism.' "[192] The complete bar included after school hours and nonschool days. The court was convinced that the community leaders' disapproval of such activities was so served but not the interest in preventing truancy.[193] The record was "entirely devoid of evidence" that persons under seventeen years of age were exposed to corrupt influences at such establishments.[194] The defendant city thus had failed to demonstrate any particular need for the absolute ban. The court reasoned that corrupt individuals were drawn to such amusement centers not by the machines but by the gathering of potential young victims. The ordinance would not prevent exposure to corrupting influences since they would follow the youths to other congregating sites. Only a complete ban on all youthful congregation would frustrate the undesirables' efforts at youth corruption.

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organized crime. The dealings between the plaintiff and the defendant city are detailed in the court's opinion. *Id.* at 1032-35. The court suggested that "there are limits on the powers of municipalities to induce businessmen to expend vast sums of money, then, without any changed circumstances, to enact legislation which destroys the value of that expenditure." *Id.* at 1044. The court concluded with an erudite discourse on the role of government *vis-a-vis* individual autonomy which reads like a constitutional sermon to government officials on "the right to be let alone— the most comprehensive of rights and the right most valued by civilized men." *Id.* at 1046 (emphasis deleted) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

188. *See* Aladdin's Castle, Inc. v. City of Mesquite, 434 F. Supp. 473 (N.D. Tex. 1977).

189. The court concluded that due process was denied under the United States and Texas Constitutions. U.S. CONST. amend. XIV; TEX. CONST. art. I, § 19. The analysis was the same under both. 630 F.2d at 1039-40 n.14.

190. *See* TEX. EDUC. CODE ANN. §§ 21.032-.033 (Vernon 1972 & Supp. 1980).

191. 630 F.2d at 1039.

192. *Id.* (quoting Michelman, *Politics and Values or What's Really Wrong with Rationality Review?* 13 CREIGHTON L. REV. 487, 499 (1979)).

193. This analysis is somewhat analogous to the requirement of least restrictive means to effect a legitimate purpose which applies to fundamental rights. *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

194. 630 F.2d at 1040.

The court continued that "[e]ven if the challenged ordinance had a rational basis and a legitimate purpose, we would nevertheless be compelled to strike it down."[195] A right of association in such a social context as was involved in the case, among the youths themselves and not between malefactor and youth, was distilled from Supreme Court[196] and Fifth Circuit precedent.[197] Although the ordinance was aimed at "nonassociational evils," because it affected a fundamental right, the ordinance would have had to serve a compelling state interest by the narrowest means which minimized the interference with the protected activity.[198] The court recognized a legitimate state interest in protecting youths from "unhealthy influences" even by regulating constitutionally protected conduct.[199] The broader state interest in protecting children, however, applies only when the "special circumstance of youth creates a unique danger to minors which presents the state with an interest in regulating their activities that does not exist in the case of adults."[200] Three reasons mandating such a state interest were identified: (1) the peculiar vulnerability of children; (2) the inability of children to exercise mature judgment in a critical decision; and (3) the importance of preserving the parental role in child-rearing.[201] As to the first reason there was no peculiar vulnerability, in the sense of a physical, mental or moral threat, presented by coin-operated amusement. To merely suggest that minors were free to express their views in school on controversial public issues[202] and to secure abortions without parental consent[203] but not free to decide whether to drop a quarter in a slot was enough for the court to overcome the second reason. The third reason worked against the ordinance because such a decision was for parents, and parents who allowed their children coin-operated

195. *Id.* at 1041.

196. *Id.* (citing Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974), wherein was quoted Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas J., dissenting)).

197. 630 F.2d at 1042 (citing Sawyer v. Sandstrom, 615 F.2d 316 (5th Cir. 1980) and Robinson v. Reed, 566 F.2d 911 (5th Cir. 1978)).

198. Having concluded that the ordinance was without a rational basis the outcome under the strict scrutiny test was preordained. *See* text accompanying notes 190-194 *supra*.

199. 630 F.2d at 1042. That children's rights were involved did not alone diminish the constitutional protection involved. Rather, the state's interest was heightened. *See generally Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1358-77 (1980).

200. 630 F.2d at 1042.

201. *Id.* at 1043 (citing Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion)).

202. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

203. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

amusement were burdened by the accompaniment provision. There was therefore no compelling state interest to justify the ordinance's interference in youths' free association.[204] The ordinance also swept too broadly, for children could be shielded from undesirable influences by less drastic means such as criminalizing the illicit conduct and its solicitation.[205] Substantive due process was denied.

PROCEDURAL DUE PROCESS

Survey decisions in procedural due process tracked familiar paths. Several particular applications, however, are worth noting here. Government, state or federal, may not deprive "any person of life, liberty or property without due process of law."[206] Procedural due process simply is fair procedure, *i.e.*, what "process" is "due." Unlike substantive due process and other substantive constitutional guarantees, the judicial evaluation focuses on the decision-making process wholly apart from the fairness of the underlying rule being applied. The procedural due process protection has two components. The court must first determine when government has deprived an individual of "life, liberty or property," and, second, determine whether the process afforded in the deprivation was adequate.

A person's "liberty" includes the full range of activity and autonomy afforded constitutional protection. "[T]o determine whether due process requirements apply in the first place . . . [the court] must look not to the 'weight' but to the *nature* of the interest at stake . . . to see if the interest is within the Fourteenth Amendment's protection."[207] The nature of the interest is the complete creation of the state. Because a state practice, regulation, rule or statute is unlikely to label the interest "liberty," the court must further focus on the substances of the state action. During the survey period the court concentrated on several examples. A plaintiff's allegation that his daughter and son-in-law secured his involuntary commitment at a mental hospital implicated a liberty interest in freedom from physical restraint.[208] A teacher may have a liberty

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204. 630 F.2d at 1042-44.

205. *Id.* at 1042.

206. U.S. CONST. amends. V & XIV, § 1.

207. Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 841 (1977) (emphasis in original) (quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972)).

208. Dahl v. Akin, 630 F.2d 277, 279 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1977

interest in his standing in the community and in being free from the stigma or disability caused by a school board's public criticism and false information contained in a reprimand letter.[209] A parent's liberty interest in family integrity and autonomy was recognized in a child dependency proceeding which would transfer custody to the state until terminated by the court or the child reached the age of eighteen.[210] Even in an environment of diminished liberty, visitation rights once given to convicted prisoners could not be withheld as punishment without procedural due process, and pretrial detainees had a liberty interest in guaranteed reasonable visitation privileges.[211] Likewise, once a state created a parole system for its prisoners, even such a limited liberty must be guarded by procedural due process.[212]

One of the most difficult problems in the procedural due process area is defining "liberty" and "property." Traditional forms of real and personal property clearly are within the constitutional notion of property; difficult assessments must be made, however, for less tangible forms such as government benefits and employment. The framework for analysis is that there must be more than an abstract desire or a unilateral expectation; property is a legitimate claim of entitlement not created by the Constitution but stemming from some independent source.[213] Decisions during the survey period provide a flavor of the concept of property for due process purposes. A conflict between the plaintiffs' claim to an unencumbered title and a town's arguable easement created in plaintiffs a significant property interest.[214] A widow's community property interest in a vehicle forfeited because it was used in her husband's unlawful transactions entitled her to procedural due process.[215] A former AFDC recipient had a property interest in past-due support

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(1981). *See also* Addington v. Texas, 441 U.S. 418 (1979).

209. Swilley v. Alexander, 629 F.2d 1018, 1022 (5th Cir. 1980).

210. Davis v. Page, 640 F.2d 599, 602 (5th Cir. 1981) (en banc). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Wisconsin v. Yoder, 406 U.S. 205 (1972).

211. Jones v. Diamond, 636 F.2d 1364, 1377 n.12 (5th Cir. 1981) (en banc). *See also* Bell v. Wolfish, 441 U.S. 520 (1979); Wolff v. McDonnell, 418 U.S. 539 (1974).

212. Parker v. Cook, 642 F.2d 865, 867-68 (5th Cir. 1981). *See also* Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979); Morrissey v. Brewer, 408 U.S. 471 (1972).

213. *See* Board of Regents v. Roth, 408 U.S. 564 (1972).

214. McCulloch v. Glasgow, 620 F.2d 47, 50 (5th Cir. 1980).

215. United States v. One 1977 Cherokee Jeep, 639 F.2d 212, 213 (5th Cir. 1981). *See also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (upheld application of forfeiture statutes to innnocent owners).

obligations collected after termination of benefits.[216] A father involuntarily committed by his daughter was deprived of property by her commitment action and guardianship appointment over his property.[217] Without alleging "any 'independent source such as state statutes or [other] rules,' " a high school student did not have a property interest in a particular program of college preparatory courses she merely desired.[218]

Property claims often arise in the context of public employment. The property interest involved is in continued employment. This area points out the federalism tensions involved: "While the State may define what is and what is not property, once having defined those rights the Constitution defines due process . . . ."[219] As in any other property interest, the legitimate claim to continued employment must be derived from a source independent of the fourteenth amendment, such as contract or federal, state or local law.[220] Thus, the "creative mechanism" itself defines and limits the property interest.[221] For example, the creative mechanism may define the employment as being at will or as being terminable only for cause; the former will not but the latter will create a property interest.[222] Within the public employment context, the issue of whether a property interest exists in continued employment is entirely fact-bound.

Marrero v. City of Hialeah[223] was the most significant survey decision defining liberty and property.[224] Municipal police officers and a local prosecutor executed a warrant authorizing a search for stolen items in a jewelry store owned and operated by the plaintiffs. After the initial searchers could not identify any of the items listed on the warrant, several victims of recent local robberies were

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216. *See* Seagraves v. Harris, 629 F.2d 385 (5th Cir. 1980).

217. Dahl v. Akin, 630 F.2d 277, 279 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1977 (1981).

218. Arundar v. Dekalb County School Dist., 620 F.2d 493, 494 (5th Cir. 1980). *See also* Goss v. Lopez, 419 U.S. 565, 572-73 (1975).

219. Thompson v. Bass, 616 F.2d 1259, 1265 (5th Cir.), *cert. denied*, 101 S. Ct. 399 (1980) (quoting Arnett v. Kennedy, 416 U.S. 134, 185 (1974) (White, J., concurring in part and dissenting in part)).

220. McMillian v. Hazelhurst, 620 F.2d 484, 485 (5th Cir. 1980). *But see* Bell v. Wolfish, 441 U.S. 520, 580 (1979) (Stevens, J., dissenting).

221. American Fed. of Gov't Emp. v. Stetson, 640 F.2d 642, 645 (5th Cir. 1981).

222. Thompson v. Bass, 616 F.2d 1259, 1265 (5th Cir. 1980).

223. 625 F.2d 499 (5th Cir. 1980).

224. Because the focus of this article is on procedural due process in noncriminal cases, deprivations of life, liberty and property as criminal sanctions are not considered here.

brought to the store. Only one victim identified one bracelet as stolen, whereupon the plaintiffs were arrested for receipt of stolen property and almost the entire stock of the store was seized. All the local television stations covered these events, and the prosecutor announced to the media that $75,000 in stolen jewelry had been seized along with the plaintiffs. Soon after the raid the police department announced on local radio and in local newspapers that much stolen property had been recovered and that all recent robbery victims should come to the police station to claim jewelry they could identify. A state court judge granted plaintiffs' motion to suppress and returned all of the seized inventory except the one bracelet. Plaintiffs subsequently sued the city and prosecutor for willfully and knowingly violating the fourth and fourteenth amendments. They alleged that their business and personal reputations were destroyed and that they had been deprived of their right to earn a livelihood without due process of law. The key issue was whether the claim of injury to plaintiffs' personal and business reputations was a deprivation of a liberty or property interest protected by the Constitution.[225]

The court's consideration of the question began with an interpretation of *Paul v. Davis*,[226] the seminal Supreme Court precedent. The police had included Davis's name and photograph in a flyer circulated to eight hundred local merchants identifying him as an "active shoplifter." Davis had been charged with shoplifting more than a year earlier and had not been tried when the flyer circulated; shortly thereafter the charge was dismissed. Davis sued and asserted that his future employment opportunities and his shopping with local merchants were impaired. The Supreme Court, however, held that Davis's interest in his "reputation alone" was neither liberty nor property sufficient to invoke the procedural guarantees of the fourteenth amendment.[227] The *Marrero* court emphasized the two-tiered analysis applied by the Supreme Court in *Paul v. Davis*. First, the Supreme Court held that reputation standing alone was not a liberty interest created by federal law.[228] Rather, a federally recognized liberty interest included only a stigma to one's reputation incident to either some specific constitu-

225. 625 F.2d at 512-19.
226. 424 U.S. 693 (1976).
227. *Id.* at 712.
228. 625 F.2d at 512 (citing 424 U.S. at 700-02).

tional guarantee or some "more tangible" deprivation.[229] Second, the Supreme Court held that under the applicable state law, reputation was not a liberty or a property interest. Therefore, any injury inflicted by the police flyer could not constitute an unconstitutional state deprivation of that interest.[230] As interpreted in *Marrero*, the narrow holding of *Paul v. Davis* was that "no liberty or property interest is infringed when the *only* loss suffered at the hands of the government is damage to personal reputation if personal reputation is not recognized by the relevant state law as a liberty or property interest."[231] Given this narrow reading, *Paul v. Davis* became a precedent for a fourfold distinction in *Marrero*: (1) the *Marrero* plaintiffs alleged that an unconstitutional search and seizure violative of the fourth amendment caused injury to their personal and business reputations directly implicating a constitutionally created liberty;[232] (2) applicable Florida law recognized business reputation or goodwill as a tangible legal guarantee of present enjoyment which was a state law-created property interest;[233] (3) the alleged defamatory statements resulted in injury to both the *Marrero* plaintiffs' personal and business reputations, and to the protected property interest in goodwill;[234] (4) the alleged defamatory statements resulted in injury to both the *Marrero* plaintiffs' personal and business reputations plus a more tangible injury arising out of the allegedly unconstitutional search and seizure.[235] The court thus pointed the way around *Paul v. Davis*.

Once it is determined that an interest of constitutional magnitude is involved, a person may be legally deprived of that interest only by government action which provides due process. Determining just what process is due is an exercise in situational ethics on the constitutional level. The Supreme Court has determined that the specific dictates of due process are determined in any given case by considering three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the

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229. 625 F.2d at 513. This is the so-called "stigma plus" approach. *See id.* n.17.

230. *Id.* at 513 (citing 424 U.S. at 711-12). The Kentucky law of tort protected Davis's interest in reputation. 424 U.S. at 711-12.

231. 625 F.2d at 513 (emphasis in original).

232. The damage to reputation was thus seen as an element of the damages from the invalid search. *Id.* at 513-14.

233. *Id.* at 514-15.

234. *Id.* at 515-16.

235. *Id.*

probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and adminitrative burdens that the additional or substitute procedural requirement would entail."[236]

For a short while the most noteworthy procedural due process development during the survey period came in *Davis v. Page*.[237] On rehearing en banc, the majority[238] held that in a state adjudication of child dependency involving the possibility of prolonged and indefinite deprivation of parental custody due process required that "an indigent parent be offered counsel and that counsel be provided unless a knowing and intelligent waiver is made."[239] A post-survey Supreme Court decision has replaced this absolute rule with the more traditional case-by-case due process approach.[240]

FIRST AMENDMENT

Overbreadth, Vagueness, and Least Restrictive Means

Three general principles of first amendment jurisprudence, the doctrines of overbreadth, vagueness and least restrictive means,

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236. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See also* Mackey v. Montrym, 443 U.S. 1 (1979); Dixon v. Love, 431 U.S. 105 (1977).

237. 640 F.2d 599 (5th Cir. 1981) (en banc).

238. A thirteen-judge majority was opposed by an eleven-judge minority which joined in Judge Brown's dissenting opinion. *Id.* at 605 (Brown, J., dissenting).

239. *Id.* at 604. *Compare* Rowell v. Ortelere, 626 F.2d 437 (5th Cir. 1980) (routine private litigation between parents over child custody did not require appointment of counsel for indigent parent).

240. The en banc court's course marked an abrupt departure from Supreme Court decisional law. The Supreme Court has often observed that the "right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Goldberg v. Kelly, 397 U.S. 254, 268-70 (1970) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)). Yet the high Court had never applied a per se rule of procedural due process to require appointment of counsel for indigents in noncriminal proceedings. Instead, in noncriminal procedural due process the determination whether to appoint counsel for an indigent was left to a case-by-case analysis. Wolff v. McDonnell, 418 U.S. 539 (1974); Boldberg v. Kelly, 397 U.S. 254 (1970).

The en banc court's novel approach, however, was short-lived. One month after the survey period ended, *Davis* was effectively overruled when the Supreme Court decided Lassiter v. Department of Social Services, 101 S. Ct. 2153 (1981). Applying the three factors described above for evaluating what process is due and the same analysis the en banc court had used in *Davis* the Supreme Court reached the opposite conclusion and rejected an absolute right to appointed counsel in parental status termination proceedings in favor of a case-by-case decision by the trial court subject to appellate review. The Supreme Court reasoned that a presumption arose that an indigent litigant was entitled to appointed counsel only when, if defeated, the litigant would be deprived of physical liberty.

drew the court's attention during the survey period. Closely related, the three doctrines are often considered together in deciding a first amendment case and distinctions among the three are sometimes blurred.

In *Shamloo v. Mississippi State Board of Trustees*,[241] Iranian students who had been subjected to disciplinary action by a state university for participating in demonstrations supporting the new government in their country challenged the university's regulations governing demonstrations. The relevant university regulation provided for approval of "activities of a wholesome nature."[242] The court held the requirement that an activity be "wholesome" before it was subject to approval was unconstitutionally vague. First, different university officials could and did attach different meanings to the words which allowed for arbitrary and discriminatory application.[243] Second, the regulation was not specific enough to give fair warning; a college student would have much difficulty in determining whether a proposed activity was prohibited, unwholesome conduct.[244]

The second noteworthy overbreadth and vagueness decision was *Reeves v. McConn*.[245] A municipal ordinance regulating operation of sound amplification equipment was challenged as being overbroad and vague.[246] At the outset the court noted important

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241. 620 F.2d 516 (5th Cir. 1980).

242. *Id.* at 519.

243. *Id.* at 523-24.

244. *Id.* The approach the court adopted in evaluating university regulations was to consider "whether the *college students* would have any 'difficulty in understanding what conduct the regulations allow and what conduct they prohibit.' " *Id.* at 524 (emphasis added) (quoting Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1004 (5th Cir. 1975)).

245. 631 F.2d 377 (5th Cir. 1980).

246. The operative part of the ordinance provided:

(b) The use of sound amplification equipment outside of buildings, or other enclosed structures within the city, except on residential property, is subject to the following regulations:

(1) The operation of sound amplifying equipment is prohibited Monday through Saturday within the downtown business district. A permit must be obtained for the operation of such equipment in these areas on Sundays. Any such Sunday permit shall state the business district to which same applies and shall be valid for only one day. Each separate Sunday must have a separate permit. Provided, however, that the provisions of this section shall not apply to parade permits which have been obtained from city council.

(2) The operation of sound amplifying equipment is prohibited between the hours of 7:00 p.m. and 10:00 a.m. daily, and further prohibited on Sunday between 10:00 a.m. and 1:00 p.m.

(3) The sounds amplified shall not be obscene or slanderous.

limits on the two doctrines. Only if the challenged portion of the ordinance would not allow a limiting, constitutional construction and the alleged overbreadth was both real and substantial would the particular provision be held invalid. The general due process-vagueness standard was heightened, and the statute more strictly construed, since the alleged inhibition was in the domain of free speech.[247] With these two notions in mind, the court considered each specific provision of the challenged ordinance.

The city argued two justifications for the subparagraph 1 prohibition of all sound amplification in the downtown business district except for certain hours on Sunday: first, the law would prevent disruption of normal business activity and, second, it would prevent unsafe distractions for pedestrians and drivers. The court held the subparagraph overly broad because there was "probably no more appropriate place for reasonably amplified free speech," and the two proper ends could be served by a more tailored ordinance.[248] Thus, subparagraph 1 unnecessarily reached protected speech. Subparagraph 2 prohibited all sound amplification between 7:00 p.m. and 10:00 a.m. and between 10:00 a.m. and 1:00 p.m. on Sundays. The city urged this was a reasonable regulation for "preserving the tranquility of Sunday morning for religious services and of the evening, night, and early morning hours for rest, quiet

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(4) The sound amplifying equipment on a sound truck shall not be operated unless the truck is moving at a speed of at least ten (10) miles per hour, except when the sound truck is stopped or impeded by traffic. When the sound truck is stopped by traffic, the sound amplifying equipment shall not be operated for longer than one minute at each such stop.

(5) The operation of sound amplifying equipment is prohibited within one hundred (100) yards of any hospital, school, Church or courthouse.

(6) The volume of sound amplified shall be controlled so that it is not unreasonably loud, raucous, jarring, disturbing or a nuisance to persons within the area of audibility.

(7) No sound amplifying equipment shall be operated with an excess of twenty (20) watts of power in the last stage of amplification.

In May 1978, the City Council made the following addition to subparagraph 5:

(5) The operation of sound amplifying equipment is prohibited . . . within fifty (50) yards of any public or private residential structure. For the purposes of this ordinance, "public or private residential structure" shall mean any structure wherein a person or persons reside, either temporarily or permanently, including but not limited to single family and multi-family residences, apartments, duplexes, condominiums, motels, hotels, boarding houses, and rooming houses.

Id. at 380 n.1 (quoting HOUSTON, TEX., CODE OF ORDINANCES § 29-6 (1976)).

247. 631 F.2d at 383 (citing Hynes v. Mayor and City Council of Oradell, 425 U.S. 610 (1976)).

248. 631 F.2d at 384.

reflection, and family togetherness."[249] The government's interest in protecting individuals' rights to home privacy, however, is greatly diminished when the individual goes to public places.[250] Because the city failed to narrow the regulation as to situs or time, the prohibition was overbroad in its reach.[251] Subparagraph 5 of the ordinance prohibited sound amplification within a certain distance of residences, schools, courthouses, hospitals and churches. Unlike subparagraph 2, location was the sole criterion and time was not considered. While the court recognized a state interest in preserving privacy and efficiency of operation, the provision swept too broadly by including protected activity which took place at a time or in a manner which did not interfere with the character of the particular interest sought to be statutorily safeguarded.[252]

Subparagraphs 4, 6, and 7, which required sound trucks to move at a speed of at least ten miles per hour unless stopped in traffic and to cease broadcasting one minute after stopping, also were held overbroad because they reached beyond that which actually created or imminently threatened disruption or traffic hazards. Subparagraph 6 required the volume of sound amplification to be controlled so as not to be "unreasonably loud, raucous, jarring, disturbing, or a nuisance to persons within the area of audibility." The court easily approved against a claim of vagueness the terms "unreasonably," "nuisance," "loud," "raucous" and "jarring" because, although abstract, the terms "have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."[253] The remaining language in the subsection, "disturbing . . . to persons within the area of audibility," was upheld only with the expectation that a state court would interpret the term objectively to mean "actual or imminent interference with . . . 'peace or good order.' "[254] Subparagraph 7 established a maximum wattage. The district court invalidated this provision because a regulation keyed to decibels at the point of hearing would have been a more precise measure of disruptiveness. While agreeing that the decibel measure was a less restrictive means of regulation, the Fifth Circuit noted that the rec-

249. *Id.*

250. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California, 403 U.S. 15 (1971).

251. 631 F.2d at 384-85.

252. *Id.* at 385.

253. Id. at 386 (citing Kovacs v. Cooper, 336 U.S. 77, 79 (1949)).

254. 631 F.2d at 386 (citing Grayned v. Rockford, 408 U.S. 104, 109-12 (1972)).

ord disclosed that the small gain in precision was more than offset by administrative inconvenience in enforcement. Administrative convenience was recognized as a relevant consideration in judging the reasonableness of the regulation. The court did strike the provision, however, as being overbroad in that the record indicated sound amplified in excess of the watt limit was not necessarily disruptive.

Subparagraph 3 prohibited the amplification of the "obscene or slanderous." The court held the obscenity provision not unconstitutionally overbroad, drawing an analogy to the broadcast media for which the Supreme Court has tolerated closer regulation.[255] Nor was the provision vague.[256] The term "slanderous" in subparagraph 3 was deemed both vague and overbroad because a speaker would be in doubt whether speech about public figures and officials would be protected.[257]

The third related decision was *Aladdin's Castle, Inc. v. City of Mesquite*.[258] The ordinance, which restricted operation of coin-slot amusement devices, was deemed vague, overbroad and not the least restrictive means. The ordinance, *inter alia*, permitted the police chief to make a licensing denial recommendation based on an applicant's "connections with criminal elements."[259] Because the nature of the improper association was unspecified and the officials were given no guidance in deciding the quality or quantity of negative relationships, the ordinance failed the vagueness test.[260] Because such an ordinance attached serious consequences which would deter protected associations, the ordinance was overbroad as well.[261] Finally, the ordinance failed the less-drastic-means test because nonassociational conduct regulations could serve the purpose of assuring that proper and suitable persons operated such establishments.[262]

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255. *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

256. *See* Hamling v. United States, 418 U.S. 87, 110-14 (1974).

257. *See* Gerty v. Robert Welch, Inc., 418 U.S. 323 (1974).

258. 630 F.2d 1029 (5th Cir. 1980). *See* text accompanying notes 185-205 *supra*.

259. *Id.* at 1034 n.6 (quoting Mesquite, Tex., Ordinance 1103).

260. 630 F.2d at 1037-38. *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939), in which a vague reference to "member of any gang" was held unconstitutional.

261. *See* Sawyer v. Sandstrom, 615 F.2d 311, 316 (5th Cir. 1980) ("right to freely associate is not limited to those associations which are 'political in the customary sense' but includes those which 'pertain to the social, legal and economic benefit' ").

262. 630 F.2d at 1042.

Government Employment

The Supreme Court has recognized that the government's interest in regulating the first amendment activity of its employees is different from the regulation of citizens generally. Ordinarily, the government as an employer may not coerce its employees to compromise their beliefs or place otherwise unconstitutional conditions upon government employment. The government employee, however, does not enjoy an absolute protection which outweighs any government interest.[263]

In *Williams v. Board of Regents*,[264] a university police officer alleged that he had been dismissed impermissibly following his disclosure of an alteration of a university accident report made to protect a local official. The defendants sought to establish a *Pickering* defense[265] of the necessity for maintaining discipline and harmony in such a quasi-military organization.[266] The court recognized a need for police discipline approaching its importance in the military[267] and appreciated the resultant disruption and disharmony such a disclosure would bring. While the aegis of the first amendment is not dependent upon the "social worth" of the expression,[268] the nature of the speech is considered relevant to the

263. *See generally* Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968).

264. 629 F.2d 993 (5th Cir. 1980).

265. In Pickering v. Board of Educ., 391 U.S. 563 (1968), the Supreme Court struck a balance between the interest of the citizen-employee in the exercise of a constitutional right and the interest of the goverment-employer in efficiently accomplishing public service through its employees. When the citizen-employee's interest is fundamental, government interests to be balanced include: (1) the need for maintaining discipline by immediate superiors or harmony among coworkers; (2) the employee's position necessitates "personal loyalty and confidence"; (3) the need for confidentiality is great; (4) the activity impedes the employee's proper performance; (5) the government's difficulty of effectively countering false accusations; (6) the statements are so without foundation as to call into question the employee's competence; (7) the appropriateness of the time, manner and place of the activity; and (8) the public's interest in having the challenged activity performed. An employee of the government establishes a constitutional violation by meeting three requirements. First, the activity involved was constitutionally protected. Second, the activity involved was a substantial factor in the government's decision to impose a sanction. Third, the same sanction would not have been imposed, in any event, had the activity involved not occurred.

266. The district court had ruled, as a matter of law, that the defense was unavailable and the evidence, therefore, inadmissible. FED. R. EVID. 401. 629 F.2d at 1002. The Fifth Circuit consistently has recognized such a defense when supported in the record. *See, e.g.*, Lindsey v. Board of Regents, 607 F.2d 672 (5th Cir. 1979); Garza v. Rodriguez, 559 F.2d 259 (5th Cir. 1977); Abbot v. Thetford, 534 F.2d 1101 (5th Cir. 1976) (en banc).

267. *See* Parker v. Levy, 417 U.S. 733 (1974).

268. *See* Chicago v. Mosley, 408 U.S. 92, 96 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969).

Pickering balance.[269] Because the falsification of the document involved a betrayal of public trust and because the plaintiff, as the officer on duty was himself implicated, the *Pickering* defense was not available to frustrate the claim of an innocent and perhaps praiseworthy employee. The balance was struck in favor of the plaintiff employee.

In *Van Ooteghem v. Gray*,[270] the plaintiff was an assistant county treasurer who was dismissed because of a dispute over his decision to address the county commissioner's court on the subject of civil rights of homosexuals. On appeal the majority considered the *Pickering* balance to have been refined to require a compelling state interest for the government-employer's regulation of an employee's protected speech.[271] Under this approach, the government-employer would have to establish that the regulation of speech was necessary to avoid a material and substantial interference with the government operation. The imposition of a restricted work schedule which led to the employee's dismissal was not so justified. The only disturbance resulting from plaintiff's outspokenness was some distress among his co-workers which was deemed insignificant. Because the plaintiff's protected speech was a substantial factor in his dismissal, the balance in favor of the employee meant his claim was valid.[272]

The special concurring opinion questioned the majority's conclusion that *Pickering* had been refined into a compelling state interest standard.[273] Instead, the distinction was made between, on the one hand, restraints on public employees' rights of belief and association which required a compelling state interest and, on the other hand, restraints on public employees' rights to free speech which required a *Pickering* balancing.[274] Such an approach was deemed more consistent with Supreme Court precedent,[275] prop-

269. 629 F.2d at 1003.

270. 628 F.2d 488 (5th Cir. 1980), *cert. dismissed*, 101 S. Ct. 203 (1981).

271. *Id.* at 492-93.

272. A dismissal substantially based on protected activity will go unremedied unless there is proof that "but for" the protected activity the dismissal would not have occurred. *Id.* at 493 (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

273. 628 F.2d at 497-500 (Reavely, J., specially concurring). *See also* Bickel v. Burkhart, 632 F.2d 1251, 1255 n.8 (5th Cir. 1980).

274. 628 F.2d at 498-99.

275. *Id.* at 498 (distinguishing Branti v. Finkel, 445 U.S. 507 (1980), Elrod v. Burns, 427 U.S. 347 (1976) and Buckley v. Valeo, 424 U.S. 1 (1976) from Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979), Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), and Pickering v. Board of Educ., 391 U.S. 563 (1968)).

erly cognizant of a constitutional hierarchy of first amendment rights,[276] and as not imposing a nearly insurmountable burden on the government as employer. It remains to be seen whether future *Pickering*-type speech issues will be decided under the compelling state interest requirement or the balancing approach.[277]

In *Davis v. Williams*[278] and *Bickel v. Burkhart*,[279] the court, sitting en banc and in panel, upheld the facial validity and application of fire department rules which regulated the free speech of fire fighters.[280] At issue was a so-called "catch-all" provision which prohibited public employees from engaging in conduct prejudicial to good order. In *Davis* the en banc court applied a *Pickering* balance to conclude that the regulation did not unconstitutionally intrude on protected first amendment activity on its way to upholding its facial validity.[281] In *Bickel* the panel concluded that a claim could be predicated on employer action short of termination such as a denial of promotion.[282] Easily satisfied were the requirements that the alleged protected activity was a substantial and motivating factor in the challenged denial and the employee would have been promoted "but for" his speech. In *Bickel* the employee had been critical of the department at a meeting with the fire chief and the fire chief's superior, raising the government's need for harmony and discipline. Because the speech, set in time, place and manner context, was consistent with the purpose of the meeting, to air grievances, it was deemed constitutionally protected. The court thus recognized that private as well as public speech of government employees was protected.[283]

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276. According to the concurring judge, the rights of belief and association are "the most preferred of the preferred rights" and do not have the potential for interference that speech has in the employment context. 628 F.2d at 499.

277. Acknowledging the "existence of some dispute," a subsequent panel did not need to decide which was the correct standard. Bickel v. Burkhart, 632 F.2d 1251, 1256 n.8 (5th Cir. 1980) (speech satisfied both standards). Seemingly the rule of interpanel accord would require later decisions to follow the *Van Ooteghem* majority. *See* Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit, 35 S.W.L.J. 687, 720-24 (1981).* Initial indications suggest, however, that the distinction has gone unnoticed and the balancing approach has been applied in speech cases. *See, e.g.*, Smalley v. Eatonville, 640 F.2d 765 (5th Cir. 1981); Williams v. Board of Regents, 629 F.2d 993 (5th Cir. 1980).

278. 617 F.2d 1100 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 937 (1981).

279. 632 F.2d 1251 (5th Cir. 1980).

280. While the regulations were from different departments, they were identical. *Id.* at 1254-55.

281. 617 F.2d at 1102 n.2 & 1104-05.

282. 632 F.2d at 1255 n.6. *See also* Stone v. Board of Regents, 620 F.2d 526 (5th Cir. 1980).

283. 632 F.2d at 1256 (citing Givhan v. Western Line Consol. School Dist., 439 U.S.

During the survey period the court decided another *Pickering*-type case in the important subcategory of patronage, which was recently described by the Supreme Court.[284] Five former deputies sued the county sheriff and alleged that patronage unconstitutionally motivated their discharge in *Tanner v. McCall*.[285] The case did not involve either the wholesale discharge of out-party employees or the dismissal of such employees who were without in-party sponsorship.[286] Instead, party affiliation was only tangentially relevant. Plaintiffs alleged that they were not reappointed either because of their support for the defeated incumbent or because the newly-elected sheriff wished to hire his own political supporters. The plaintiffs' proof was found wanting because the facts did not support their claim that retention or appointment coincided with support and loyalty for an individual politician rather than a political party.[287] Because the evidence did not support plaintiffs' claim, the court did not have to decide the extent to which the Constitution protected against such requirements of loyalty to an individual.[288]

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410 (1979)). *See also* Janusaitis v. Middlebury Volunteer Fire Dept., 607 F.2d 17 (2d Cir. 1979).

284. *See generally The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 186-96 (1976). The patronage decisions have been somewhat controversial. *See generally* Loughney v. Hickey, 635 F.2d 1063, 1064 (3d Cir. 1980) (Aldisert, J., concurring).

285. 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1975 (1981).

286. The court thereby distinguished Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980). In *Elrod* the Supreme Court had applied the *Pickering* analysis to partisan dismissals of sheriffs' office employees and required a compelling state interest to outweigh the employees' associational rights:

> [I]f conditioning the retention of public employment on the employee's support of the in-party is to survive consitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

427 U.S. at 363 (footnote omitted). In *Branti* the Supreme Court found unconstitutional a planned termination of assistant public defenders solely because they had not been sponsored by the in-party. However, an exception was noted: "[I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." 445 U.S. at 517.

287. "[T]he objective manifestations [did] not supply inferences that rise to the level of proof of a subjective intent of political animus." 625 F.2d at 1193. It was clear to the court that the same decision would have been made regardless of the plaintiff's constitutionally protected conduct. *Id.* at 1190-96.

288. *Id.* at 1190. *See* Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

Defamation

Since the Supreme Court has brought the law of defamation within the scope of the Constitution when the defamed person is a public official[289] or an all-purpose public figure[290] or a limited-purpose public figure,[291] libel and slander actions have an important first amendment dimension. During the survey period the court considered the various defendant categories and the concomitant degree of first amendment protection of the defamer.

No survey decision involved a plaintiff who was a public official, although public figures were involved in several cases. Because "the question of public figure status is pervasive," the court exhorted an early determination in such cases.[292] Persons who assume "roles of especial prominence in the affairs of society" are public figures.[293] While "[s]ome occupy positions of such persuasive power and influence that they are deemed public figures for all purposes," it is "[m]ore commonly . . . public figures [who] have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[294] The four survey defamation appeals suggest the breadth of the public figure category which included: the Church of Scientology of California,[295] the Secretary-Treasurer of the International Brotherhood of Teamsters,[296] a husband who was a former collegiate and professional athlete and a wife who had gained considerable media exposure during an earlier entertainment career and a romance with Elvis Presley even though she no longer was involved in either the career or the romance,[297] and the owners of a city ambulance service.[298]

There must be a defamation, and the constitutional require-

289. Rosenblatt v. Baer, 383 U.S. 75 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

290. Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967).

291. Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

292. Miller v. Transamerican Press, Inc., 621 F.2d 721, 724 (5th Cir.), *modified on rehearing*, 628 F.2d 932 (5th Cir. 1980) (per curiam), *cert. denied*, 101 S. Ct. 1759 (1981).

293. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

294. *Id. See also* Curtis Publ. Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

295. Church of Scientology v. Cazares, 638 F.2d 1272, 1286 (5th Cir. 1981).

296. Miller v. Transamerican Press, Inc., 621 F.2d 721, 722 (5th Cir. 1980).

297. Brewer v. Memphis Publ. Co., 626 F.2d 1238, 1240 (5th Cir. 1980).

298. Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980) (stipulation), *cert. denied*, 101 S. Ct. 869 (1981).

ment is that the falsehood is factual as opposed to mere opinion.[299] In *Church of Scientology v. Cazares*,[300] the mayor's references to the Church as a gung-ho group, associated with a mass-murderer, having armed guards, and a "rip-off" commercial operation were not defamatory when measured in context.[301] In *Brewer v. Memphis Publishing Co.*,[302] a newspaper item allegedly stating that the plaintiff husband had been divorced and cuckolded was defamatory under applicable state law.[303] Under the constitutional test, however, where the husband and wife plaintiffs are both public figures, the statement must be shown to have been made with "actual malice," defined as knowing falsehood or reckless disregard of truth or falsity.[304] The focus of actual malice is not on whether the publisher acted unreasonably or with ill will, but rather on defendant's subjective state of mind. There must be clear and convincing evidence that the defendant knew the statement was false or in fact entertained real doubt as to its authenticity.[305] In the instant case the evidence was found insufficient to warrant this conclusion.[306] Because of the highly particularized nature of this issue and the scope of appellate review, however, the answer to this inquiry is completely fact-bound.[307]

Discovery in these cases also raises constitutional issues. In *Miller v. Transamerican Press, Inc.*,[308] a libel plaintiff who was a public figure sought disclosure of a confidential source for the alleged defamatory article. The court considered the issue triangulated by three rulings of the Supreme Court: (1) a public figure can recover in a defamation case only upon a showing of actual malice;[309] (2) reporters in grand jury proceedings must disclose the

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299. Church of Scientology v. Cazares, 638 F.2d 1272, 1286-89 (5th Cir. 1981); Brewer v. Memphis Publ. Co., 626 F.2d 1238, 1244 (5th Cir. 1980).

300. 638 F.2d 1272 (5th Cir. 1981).

301. *Id.* at 1286-89.

302. 626 F.2d 1238 (5th Cir. 1980).

303. *Id.* at 1244. *But see id.* at 1260-61 (Godbold, J., specially concurring).

304. *See, e.g.*, Herbert v. Lando, 441 U.S. 153 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

305. *See* Herbert v. Lando, 441 U.S. 153 (1979); St. Amant v. Thompson, 390 U.S. 727 (1968).

306. 626 F.2d at 1247-60.

307. *Compare* Brewer v. Memphis Publ. Co., 626 F.2d 1238 (5th Cir. 1980), *with* Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), *and* Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980).

308. 621 F.2d 721 (5th Cir. 1980).

309. Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967).

identities of confidential sources unless the process is abused;[310] and (3) there was "no First Amendment privilege against discovery of mental processes . . . for . . . determining whether malice existed."[311] The court concluded that a plaintiff in a libel suit could compel disclosure of the confidential source upon a showing of substantial evidence that (1) the statement was defamatory; (2) reasonable efforts to uncover alternative sources were unsuccessful and no other reasonable source existed; and (3) knowledge of the identity of the informant was essential to prepare and present the law suit.[312] Having satisfied these essentials, the plaintiff was entitled to learn the identity of the confidential source.

Free Association

The first amendment right to free association was the touchstone for two significant decisions during the survey period.[313] *Let's Help Florida v. McCrary*[314] involved a state statute which restricted the size of contributions to a single political committee in a referendum election.[315] Although protected under the first amendment as an incident of free association, political contributions are not as protected as campaign expenditures since contribution limits merely require that funds be generated from a large number of people and do not directly limit political communication.[316] Nevertheless, a state must establish "a sufficiently important interest and emplo[y] means closely drawn to avoid unnecessary abridgment of associational freedoms."[317] The court drew a distinction between contributions to candidates and contributions supporting either side of a referendum issue. A state's substantial interest in preventing the actual, or even apparent, corruption of candidates through dependence on large contributions is simply not present in a referendum election.[318] The state argued that re-

310. Branzburg v. Hayes, 408 U.S. 665 (1972). Since *Branzburg* involved the criminal process, arguably a lesser state interest is balanced against a claim of privilege in a defamation civil suit.

311. 621 F.2d at 725 (citing Herbert v. Lando, 441 U.S. 153 (1979)).

312. 628 F.2d 932 (5th Cir. 1980) (per curiam), *modifying on rehearing*, 621 F.2d 721 (5th Cir.).

313. Free association also played a significant role in Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980). *See* text accompanying notes 258-262 *supra*.

314. 621 F.2d 195 (5th Cir. 1980).

315. FLA. STAT. ANN. § 106.08(1)(d) (West Supp. 1980) ($3,000 maximum).

316. 621 F.2d at 199 (citing Buckley v. Valeo, 424 U.S. 1, 21-22 (1976)).

317. 621 F.2d at 199 (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

318. 621 F.2d at 200. *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 790-91 (1978);

strictions on the size of contributions promoted a policy of disclosure by preventing large donors from funneling large sums through a committee. While this was an important state interest, it was poorly served by the contribution restriction which unnecessarily infringed on association, because such limits merely provided an incentive to organize multiple committees in the same referendum. Because of the abridgement of free association, the statute was held violative of the first and fourteenth amendments.[319]

The second free association decision came in *Familias Unidas v. Briscoe*.[320] At issue was a state statute which empowered a county judge to exact public disclosure of membership and other information concerning organizations considered to be engaged in activities designed to interfere with the peaceful operation of the public schools.[321] The fundamental right to associate for the purpose of "advancing ideas and airing grievances" contains an element of privacy.[322] Compulsory disclosure of organizational membership often frustrates free association by leading to such disincentives as threats and actual reprisals.[323] Recognizing this reality, the Supreme Court generally requires a showing that such compulsory disclosures be substantially related to a compelling state interest[324] and satisfy the least restrictive means test.[325] The Supreme Court had held that the preservation of peaceful and undisrupted schools was indeed a compelling state purpose,[326] and, further, as limited to organizations "engaged in activities designed to hinder, harass, or interfere with"[327] the schools, the disclosure was substantially related to the state's purpose. Nonetheless, in *Familias Unidas* the statute was held to unnecessarily invade free association rights. To reach this result, the Fifth Circuit panel had to distinguish a line of Supreme Court cases which upheld analo-

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C & C Plywood Corp. v. Hanson, 583 F.2d 421, 424-25 (9th Cir. 1978).

319. 621 F.2d at 201.

320. 619 F.2d 391 (5th Cir. 1980).

321. Tex. Educ. Code Ann. § 4.28 (Vernon 1972).

322. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-62 (1958); Ealy v. Littlejohn, 569 F.2d 219 (5th Cir. 1978).

323. *See* Gibson v. Florida Leg. Invest. Comm., 372 U.S. 539, 544 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

324. Gibson v. Florida Leg. Invest. Comm., 372 U.S. 539, 546 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963).

325. Buckley v. Valeo, 424 U.S. 1 (1976); NAACP v. Alabama *ex. rel.* Flowers, 377 U.S. 288 (1964).

326. Grayned v. City of Rockford, 408 U.S. 104 (1972).

327. 619 F.2d at 399.

gous disclosure requirements and recognized disclosure and resultant public scrutiny as legitimate means to deter groups from illegal activities.[328] One distinction was that under the challenged statute disclosure and public recrimination would be felt by the unknowing and passive member to whom the school disruption interest is irrelevant. The line of cases distinguished, however, sometimes considered this development an unfortunate but unavoidable cost of serving the important state interest.[329] The court perceived two critical distinctions which helped it to avoid these precedents. First, the organizations, in the distinguished cases, the Communist Party and the Ku Klux Klan, had a history and tradition of unlawful tactics. Under the challenged statute, organizations which might be required to disclose membership may be unknown quantities so that a passive, unknowing member of an otherwise benign organization could be the object of recriminations once some other members independently interfered with the schools.[330] Second, the disclosure requirement itself was different. The distinguished cases had involved statutes designed to deter future conduct by disclosure at a time when limiting disclosure to only the dangerous members was impossible. The challenged statute in *Familias Unidas*, on the other hand, deterred the unwanted activity not so much by exposure, but by the threat of exposure should the organization interfere with the schools. After the organization was so tainted, some members would have differentiated themselves as knowing and active supporters. Therefore, to hold disclosure and reprisal over the head of all members, active and passive, knowing and unknowing, unnecessarily infringed on free association.[331]

Religion Clauses

Finally, the first amendment's religion clauses attracted brief attention from the court. In *EEOC v. Mississippi College*,[332] a

328. *See* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Uphaus v. Wyman, 360 U.S. 72 (1959); New York *ex rel.* Byrant v. Zimmerman, 278 U.S. 63 (1928).

329. *See* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Uphaus v. Wyman, 360 U.S. 72 (1959); New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928).

330. 619 F.2d at 401 (citing Gibson v. Florida Leg. Invest. Comm., 372 U.S. 539, 547 n.2 (1963)).

331. The statute was held facially invalid. 619 F.2d at 402. *See also* text accompanying notes 54-57 *supra*.

332. 626 F.2d 477 (5th Cir. 1980).

white female filed a charge with the EEOC against a college owned, controlled and operated by a religious institution, alleging discrimination towards blacks. The first amendment issues presented were whether application of Title VII to the college violated the two religion clauses.

The prohibition on the congressional establishment of religion involves three elements: (1) whether there is a secular purpose behind the statute; (2) whether the primary effect of the statute neither advances nor inhibits religion; and (3) whether the statute results in "an excessive government entanglement with religion."[333] The third element was the only one arguably applicable. "Excessive entanglement" is, in turn, divided into three elements: (1) the character and purpose of the institution benefited; (2) the nature of the government aid; and (3) the resultant relationship between the government and the religious institution.[334] While traditional establishment clause cases consider legislation that benefits religion, the same establishment clause policy against excessive entanglements applies to burdensome measures such as were urged concerning the application of Title VII.[335] The court found that in *Mississippi College* the character and purpose of the educational religious institution were purely sectarian. Additionally, the burden to be imposed on the college of nondiscrimination by sex or race would not necessarily interfere with efforts at recruiting faculty with appropriate religious values. And finally, the resulting relationship between the EEOC and the college would be narrowed by the charge of the agency. Since no religious tenets required sex or race discrimination, the second and third elements outweighed the first. Hence, the application of Title VII did not run afoul of the establishment restriction.[336]

The court next turned to the free exercise clause. The Supreme Court has identified three factors in determining whether a government action restrains a sincerely held religious belief: (1) the severity of the impact upon the exercise of the belief; (2) whether there is a compelling government interest justifying the encroachment; and (3) the extent to which requiring a religious exemption

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333. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

334. *Id.* at 615.

335. *Compare* Committee for Public Educ. and Rel. Liberty v. Regan, 444 U.S. 646 (1980) *with* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

336. 626 F.2d at 486-88.

would frustrate the state from achieving its purpose.[337] The first factor had already been discounted in analyzing the establishment clause claim. While enforcement proceedings with all their restraints could have a severe impact on the institution, the impact on the religious beliefs involved was minimal. Second, the court recognized a compelling government interest in eliminating discrimination.[338] Third, the court reasoned that religious employers, while comparatively small in number, played so significant a role in the economy that a religious exemption was unworkable. Therefore, the free exercise clause was not violated by application of Title VII.[339]

EQUAL PROTECTION

The fourteenth amendment's equal protection clause "embodies the fundamental principle of American constitutionalism that the state must govern impartially."[340] During the survey period the court evaluated claims along the entire equal protection spectrum. The treatment here seeks merely to sample the Fifth Circuit's work product.

Reasonableness Standard

No legislation applies to all people and treats them identically; all statutes classify or discriminate by imposing and excusing burdens or providing benefits for some and not others. The issue then becomes: When do such classifications or discriminations violate the equal protection clause? All persons need not be treated identically; equal does not mean the same, and not all discriminations are invidious. Just as in issues of substantive due process, reasonableness is usually enough.[341] If a distinction is made between similarly situated individuals, the classification or discrimination must be fair and must be reasonably related to a legitimate purpose behind the statute. "A state violates the Equal Protection Clause when it irrationally treats differently those similarly situated or

337. *Id.* at 488 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

338. 626 F.2d at 488 (citing Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 323 (5th Cir. 1977) (en banc) (Goldberg, J., specially concurring), *cert. denied*, 434 U.S. 1063 (1978)).

339. 626 F.2d at 488-89.

340. Anderson v. Winter, 631 F.2d 1238, 1240 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 941 (1981).

341. *See* text accompanying notes 165-205 *supra*.

when it irrationally treats similarly those people situated differently."[342] A state regulation in social and economic matters does not violate equal protection "merely because the classifications made . . . are imperfect."[343] As an example, under this traditional standard the court upheld a state's dual retirement system which provided more liberal retirement and disability benefits to highway safety patrol officers than to agents of the bureau of narcotics even assuming that the latter faced equal or greater on-the-job danger, which was the professed state rationale.[344] Such an underinclusive measure was not unconstitutional just because it did not extend benefits as far as the rationale would allow. A state was not required to "choose between attacking every aspect of a problem or not attacking the problem at all."[345]

A state law may be fair on its face, however, and be so unequally applied that equal protection is violated.[346] Such was the case in *Ziegler v. Jackson*.[347] A character standard required that an applicant for the state police academy "never [have] been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude."[348] Already employed and scheduled to enter the academy, plaintiff was convicted of two misdemeanors, presenting a firearm and criminal provocation. When he was not permitted to attend the academy, plaintiff made an equal protection attack, not on the face of the character standard, but on its application. He established that the character standard had not prohibited admission to the academy of three other individuals who had been convicted of assault and forgery. While these crimes necessarily involved force and moral turpitude, the two crimes he was convicted of did not.[349] In the absence of any rational justification for the differential treatment,[350] the court held that plaintiff

342. Silva v. Vowell, 621 F.2d 640, 647 (5th Cir. 1980).
343. Dandridge v. Williams, 397 U.S. 471, 485 (1970).
344. Anderson v. Winter, 631 F.2d 1238 (5th Cir. 1980).
345. *Id.* at 1241 (citing Dandridge v. Williams, 397 U.S. 471, 486-87 (1970)).
346. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
347. 638 F.2d 776 (5th Cir. 1981).
348. *Id.* at 777.
349. Presenting a firearm was defined in ALA. CODE § 13-6-126 (1975) as mere: "present[ing] at another person any gun, pistol or other firearm, whether loaded or unloaded, or any Roman candle." Crimial provocation was defined in ALA. CODE § 13-1-50 (1975) as: "by words, signs or gestures, provok[ing] or attempt[ing] to provoke another to commit an assault or an assault and battery upon him, such other person having then and there the ability to commit such assault or assault and battery." *See* 638 F.2d at 777 nn.1 & 2.
350. The court did not rely on an invidious discrimination rationale. Nevertheless, racial overtones were suggested. The court did mention that plaintiff was black and the dep-

had been denied equal protection.[351]

Strict Scrutiny

The second tier of the traditional equal protection analysis requires the court to apply a strict scrutiny to classifications which either infringe on a fundamental right or discriminate between persons, with regard to any right, upon a suspect basis. For example, the court applied a strict scrutiny in *Helms v. Jones*,[352] a case testing a state statute which made the crime of child abandonment a misdemeanor if the offense occurred within the state and a felony if the abandoning parent left the state or abandoned the child after leaving the state.[353] Since the additional risk imposed on abandoning parents leaving the state infringed on the fundamental right to travel, the strict scrutiny test required a compelling state justification.[354] The state argued that the greater difficulty in gaining extradition of felons and the cost of state support for abandoned children compelled the classification. Deemed only broadly conclusory by the court, these arguments were found insufficient to justify the encroachment on a fundamental right in part because the state had enacted the Uniform Reciprocal Enforcement of Support Act which served these same ends.[355] Since the Act protected these interests, there was no compelling need for the challenged statute, and the classification denied equal protection.[356]

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uty with whom he had the criminal provocation was white as were two of the three individuals who were allowed to be police officers despite their convictions. 638 F.2d at 778-79 nn.7 & 8. Such a discrimination, if actual, would have made the decision more consistent with the mainstream of cases. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

351. 638 F.2d at 779.

352. 621 F.2d 211 (5th Cir. 1980).

353. GA. CODE ANN. § 74-9902 (Supp. 1981).

354. Interstate travel is a recognized fundamental right. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

355. GA. CODE ANN. § 99-9A (Supp. 1981).

356. 621 F.2d at 212-13. Also of some significance was the admitted failure of the state to effect enforcement of the challenged statute. *Id.* at 213 n.7. Alternatively, the court also recognized that the challenged statute violated the less drastic means rule. *Id.* at 213. The Supreme Court reversed shortly after the survey period, reasoning that since the misdemeanor of abandonment had occurred before the defendant left the state, his right to travel was diminished and fleeing the state aggravated the offense. The state was permitted to treat the entire sequence as a more serious offense. Once the interference with the right to travel was deemed not to have encroached on a fundamental right and the state applied the statute to all residents equally, the Supreme Court upheld the statute under the equal protection clause on the basis of the state's offered rationales. Jones v. Helms, 405 U.S. 977 (1981).

Along with the right to travel, the right to vote is deemed fundamental for equal protection purposes. Because the franchise protects many other political and civil rights, the Supreme Court generally has imposed a strict scrutiny on impairments of this right.[357] During the survey period the Fifth Circuit has failed to overcome a self-confessed "initial perplexity"[358] in the so-called voting dilution cases.[359] Recent Supreme Court developments have left the court "adrift on uncharted seas with respect to how to proceed."[360] As the survey period ended, the court was still dead-in-the-water.[361]

The court considered several restrictions on candidacy during the survey period. The right to be a candidate is not itself fundamental. Candidacy regulations must still accord with general constitutional protections such as due process and equal protection as well as with specific and fundamental individual rights such as the right to vote and the right to associate, which may be indirectly affected. In light of these multiple constitutional overlays, the Fifth Circuit has amalgamated a wide variety of alternative tests into one balancing test. The court performs a pragmatic balancing of the burdens on candidates and voters, the interests of the government, and the practicality that alternative means would satisfy the government interest more efficiently and with less encroachment on individual interests.[362] Applying this pragmatic approach during the survey period, the court upheld a state's requirement of a larger number of signatures on an independent candidate's petition to be placed on a statewide ballot than was required from an independent candidate for president.[363] A statewide requirement that candidates for sheriff have a high school diploma or its recognized equivalent satisfied the balancing test as not unduly burdening the candidate who had adequate opportunity to obtain a certif-

357. *See* Kramer v. Union School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

358. Corder v. Kirksey, 639 F.2d 1191, 1195 (5th Cir. 1981).

359. Along with the fourteenth amendment equal protection clause, the fifteenth amendment also protects against voting abridgement "on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV.

360. City of Mobile v. Bolden, 446 U.S. 55, 103 (1980) (White, J., dissenting).

361. *See generally* Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981) for an account of recent developments. *See also* Corder v. Kirksey, 639 F.2d 1191 (5th Cir. 1981); McMillan v. Escambia, 638 F.2d 1239 (5th Cir. 1981).

362. Woodward v. Deerfield Beach, 538 F.2d 1081, 1082 n.1 (5th Cir. 1976).

363. Wilson v. Firestone, 623 F.2d 345 (5th Cir. 1980), *cert. denied*, 449 U.S. 984 (1981). The same statute had been summarily approved in Beller v. Askew, 403 U.S. 925 (1971). *See also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).

icate nor the ability of any cognizable group to seek office.[364] In a third case the court turned away an equal protection broadside attack on a state's election code governing election organization, nominating signatures, filing deadlines and write-in procedures because the court was convinced of the overall, genuine open quality of the system for candidates and voters alike.[365] In another case a candidate for office and several of his supporters alleged that the ballots were improperly counted and the candidate's opponent erroneously declared the winner. The court held that such an alleged local maladministration was not a violation of equal protection absent evidence of an intention to dilute the vote of the candidate's supporters or deprive the affected voters of their right to vote.[366]

In addition to classifications affecting individual rights, the equal protection guarantee also provides a constitutional measure for classifications which discriminate on the basis of group traits. During the survey period the Fifth Circuit decided noteworthy appeals involving racial, alienage, and gender categories.

Within the context of racial discrimination, no area of the law has generated stronger feelings than desegregation of public schools. For its role in this effort the Fifth Circuit has been called the "greatest of all civil rights tribunals."[367] During the survey period the court's treatment of school desegregation issues was limited almost exclusively to consideration of remedies.

The most noteworthy school desegregation decision during the survey period was *Lee v. Lee County Board of Education*.[368] On appeal the court affirmed the district court's denial of the government's motion for interdistrict relief. The starting point for considering the appropriateness of an interdistrict remedy is the Supreme Court's 1974 decision in *Milliken v. Bradley*.[369] The Su-

364. Goforth v. Poythress, 638 F.2d 27 (5th Cir. 1981).

365. McCrary v. Poythress, 638 F.2d 1308 (5th Cir. 1981). *See also* Jenness v. Fortson, 403 U.S. 431 (1971).

366. Gamza v. Aguirre, 619 F.2d 449 (5th Cir. 1980). The court referred the plaintiffs to available state remedies. *Id.* at 454.

367. Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 MERCER L. REV. 1149 (1981). "The Fifth Circuit led the way in the doctrinal development of all of the major civil rights issues: jury selection, public accommodations, voting rights and school desegregation. But it was in school desegretation that the problems were the most difficult and the opposition the most persistent." *Id.* at 1150-52. *See generally* F. READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978).

368. 639 F.2d 1243 (5th Cir. 1981).

369. 418 U.S. 717 (1974).

preme Court in *Milliken* reviewed a comprehensive plan involving fifty-four contiguous districts in order to desegregate the Detroit school district. The wide-reaching remedy was based on the district court's pragmatic conclusion that an intradistrict remedy could not achieve desegregation and that although there was evidence of *de jure* segregation only in the Detroit district, the state legislature and the state board of education had contributed to the situation so the suburban districts, as part of the state system, could be brought in to remedy the problem. The Supreme Court reversed and held that a record establishing *de jure* segregation only in the city could not support a remedy extending beyond the city limits. A remedy in a school desegregation suit should only "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[370] The plaintiffs had not proven that the suburban districts had violated their rights nor that the Detroit district's segregative acts had harmed suburban students. The Supreme Court also rejected as too tenuous the district court's agency and vicarious liability theories of statewide involvement. Finally, based on an expressed respect for the tradition of local control of education, the Supreme Court emphasized that the district lines matched jurisdictional limits and that there had been no showing of segregative line drawing. *Milliken* established that for an interdistrict remedy to be valid there must be proof that "there has been a constitutional violation within one district that produces a significant segregative effect in another district."[371] Specific proof that "racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation" would include a showing that the "racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or [that] . . . district lines have been deliberately drawn on the basis of race."[372] Applying this standard to *Lee*, the Fifth Circuit majority held that interdistrict relief was inappropriate.[373] After very carefully tracing the history of the three districts in the county, the court rejected the government's contention that they were effectively one school system. In terms of what the court called "areas . . . essential to the autonomy of a school district,"

370. 639 F.2d at 1253 (quoting 418 U.S. at 746).

371. 418 U.S. at 745.

372. *Id.* at 744-45.

373. Judge Tuttle agreed on the applicable standard but disagreed with the majority's conclusion that the facts did not satisfy it. 639 F.2d at 1271 (Tuttle, J., dissenting).

such as political authority, finances, curriculum and general administration, the three districts had separate school boards, tax rates, curricula, faculty and administrators. The three were "bona fide, independent school districts," and thus *Milliken* controlled.[374] Responding to the government's contention that the *Milliken* test was satisfied by an interdistrict transfer plan used to maintain racial segregation, the court found no evidence that the transfer program had a substantial direct and current segregative effect in perpetuating a predominately one race school, which resulted from a demographic pattern which, in turn, was not necessarily the result of the transfer rule.[375] Even the continued acceptance of transfers from the county districts to the city district was not considered to have the necessary significant, interdistrict segregative effect since only a handful of students were involved.[376] Finally, the court held that subsequent annexations by the city of its own independent school district were not shown to have been a racially motivated redrawing of boundaries.[377]

In a controversial decision the court considered the second equal protection category of alienage and the rights of aliens. The court in *Doe v. Plyler*[378] considered the application of a state statute denying free public education to children based on their status as undocumented Mexican aliens.[379] Supreme Court precedent has made it clear that fourteenth amendment due process extends to legal and illegal aliens residing in the United States[380] and that the equal protection clause protects legal aliens residing in the country.[381] The issue the court considered, for which there was no de-

374. *Id.* at 1256.

375. *See* Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 429 U.S. 1074 (1977); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975).

376. The majority disagreed with the dissent that a violation of the so-called *Singleton* student-transfer rule included in a desegregation order would alone support an interdistrict remedy. *Compare* 639 F.2d at 1261-67 *with id.* at 1272.

377. *Id.* at 1269.

378. 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 101 S. Ct. 2044 (1981).

379. TEX. EDUC. CODE ANN. tit. 2, § 21.031(c) (Vernon Supp. 1980-1981 provided:

> The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

380. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

381. Wong Wing v. United States, 163 U.S. 228 (1896); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

finitive Supreme Court answer, was whether the equal protection clause extended to illegal aliens in this country. Preserving the symmetry of the precedents, the court answered the question affirmatively.[382] To reach this result, the court relied on Supreme Court dictum,[383] and the logic of the fourteenth amendment. Since the due process clause applied to illegal aliens, the court saw no reason to conclude that the equal protection clause did not. The state could not muster a plausible argument in favor of a contrary result, and since a contrary result would be untenable, the court concluded that the fourteenth amendment meant what it said. Having decided that illegal aliens were protected by the equal protection clause, the court next considered what standard of review was applicable. While strict scrutiny would be required if the state were discriminating between aliens and others,[384] the statute in question made another discrimination. School-aged citizens and lawful aliens were one group guaranteed public education, while everyone else, including illegal aliens, was in a second group not guaranteed public education.[385] The court concluded that "although a statute that discriminates against some, but not all, legal aliens on the basis of some characteristics of alienage is subject to strict scrutiny, a statute that discriminates in favor of all legal aliens is not per se subject to [strict] judicial review."[386] In any event, because the statue was deemed irrational, it failed the minimal equal protection standard.[387] The state's contention that it was

382. 628 F.2d at 454. *Cf.* Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975).

383. "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' Those provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments.

628 F.2d at 455 (citations omitted) (quoting Wong Wing v. United States, 163 U.S. 228, 238 (1896), wherein was quoted Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

384. 628 F.2d at 457. The court emphasized the alienage classification aspect of equal protection after "declin[ing] to find that complete denial of free education to some children is not a denial of a fundamental right." *Id.* The Supreme Court recently has emphasized the importance of clearly defining the legislative categories. *See* Schweiker v. Wilson, 450 U.S. 221 (1981).

385. Of course, the statutory exclusion of out of state residents would not violate the equal protection principle because the protection of the law went only so far as the jurisdiction of the state. 628 F.2d at 457 n.24.

386. *Id.* at 458 n.25.

387. *Id.* at 458-61.

protecting against a devaluation of its citizens' and legal aliens' public education was not deemed sufficiently rational. "[A] state's desire to save money cannot be the basis of the total exclusion from public schools of a group of persons who are entitled to the equal protection of the laws of [the state] and who share similar characteristics with included children."[388] As a parting observation the court recognized the acute problem facing border states caused by the failure to enforce national immigration laws but concluded that the Constitution required affirmance of the district court's injunction against following the statute. The Supreme Court has noted probable jurisdiction in this case, so the issues may soon be reconsidered.[389]

During the survey period the court considered three gender-based equal protection cases. *In re Crist*[390] involved the constitutionality of section 17(a)(7) of the Bankruptcy Act of 1898.[391] The statute denied bankruptcy discharge "for alimony due to or become due, or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation."[392] On appeal it was argued that the gender-based discrimination passed constitutional muster as an attempt to alleviate "the disparity in economic condition between men and women caused by the long history of discrimination against women."[393] The court rejected this as an insufficient blanket justification of a government compensation interest, which automatically presumed that a woman had suffered some compensable discrimination.[394] The court also declined to reinterpret the statute in a gender neutral way by defining the term "wife" as spouse.[395] Instead, the statute was analyzed under equal protection as written.[396] Rather than de-

388. *Id.* at 459. The court rejected a distinction based on legal presence. *Id.* at 459-60.

389. 101 S. Ct. 2044 (1980).

390. 632 F.2d 1226 (5th Cir. 1980).

391. 11 U.S.C. § 35(a)(7) (1976). This section was modified and replaced subsequent to the suit by the Bankruptcy Reform Act of 1978, 11 U.S.C. § 523(a)(5) (Supp. III 1979).

392. 11 U.S.C. § 35(a)(7) (1976).

393. Califano v. Webster, 430 U.S. 313, 317 (1977). *See* Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

394. 632 F.2d at 1232. *See* Note, *Alimony Awards Under Middle-Tier Equal Protection Scrutiny*, 59 NEB. L. REV. 172 (1980).

395. 632 F.2d at 1232-33. This path was made "legally impassable" by the Supreme Court interpretation in Westmore v. Markhoe, 196 U.S. 68 (1904).

396. This has been the Supreme Court approach as well. *See* Califano v. Westcott, 443 U.S. 76 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

claring the statute a nullity and thereby deny its benefits to males and females, the court followed the Supreme Court's lead and extended the benefit to everyone.[397] While the statute as written provided females the benefit of nondischargeability of such debts owed by husbands, it did not do the same for those owed by wives. However, the equal protection clause required that the benefit be extended so that either a husband or a wife receiving alimony or maintenance could assert the nondischargeability of the obligation.

In another gender-based appeal, *Hester v. Harris*,[398] the court considered a presumption in the Social Security Act, namely that in a community property state the income from a trade or business other than a partnership was the husband's income, unless the wife exercised substantially all of the management and control of the business.[399] The husband thus was favored with the benefit of a statutory presumption that the business income was his, while the wife was burdened by having to rebut the presumption by showing she had exercised substantially all the control over the enterprise. The court deemed this an obvious violation of equal protection.[400]

Just as the standard for equal protection analysis of gender-based discriminations has changed over the last decade, during the survey period the court learned that a particular plaintiff's gender may change as well, leading to a fact situation suggestive of law school hypotheticals. In *Kirkpatrick v. Seligman & Latz, Inc.*,[401] a prospective transsexual had been terminated from his job when, on his physician's orders, he refused to dress in accordance with his biological gender. She[402] filed a suit after her sex reassignment process had been completed. Of course, the gender-based discrimination test applies whether the classification discriminates against males or females.[403] Kirkpatrick was claiming a discrimination against her as a male *and* female; she argued that she had been discriminated against as a transsexual woman. The court concluded that since the plaintiff was still a male when he started

397. 632 F.2d at 1234. *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Westcott, 443 U.S. 76 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

398. 631 F.2d 53 (5th Cir. 1980).

399. 42 U.S.C. § 411(a)(5)(A) (1976).

400. 631 F.2d at 55-56.

401. 636 F.2d 1047 (5th Cir. 1981). Suit was under 42 U.S.C. § 1985 (1976).

402. On the question of gender-reference, *see* 636 F.2d at 1048 n.1.

403. Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979); Craig v. Boren, 429 U.S. 190 (1976).

wearing female clothing, her employer's refusal to allow the cross dressing at that time did not discriminate against her as a female.[404]

CONCLUSION

It is important to note in closing that the constitutional decisions of the courts of appeals will continue to increase in number and importance as the burgeoning federal caseload grows. The scope and length of this article portrays the nearly impossible task confronting federal appellate courts. Faced with the reality that the court of appeals sits in most cases as both the appeal of right and the final review, these judges are becoming, if not less fallible, at least more final in the constitutional domain.[405] As this trend continues distinct principles of federal constitutional law will be developed by these regional supreme courts. Their holdings will become more and more important.

The significance of this development is highlighted in the present Symposium by a recent historic event in the history of our federal courts: the Fifth Circuit Court of Appeals Reorganization Act of 1980.[406] The division of the Fifth Circuit into the new Fifth Circuit, composed of the District of the Canal Zone, Louisiana, Mississippi and Texas, and the new Eleventh Circuit, composed of Alabama, Florida, and Georgia, raises many important questions for the new courts. Just how the precedents discussed here will fare in the two new courts is unclear.[407] As the jurisprudential autonomy of the courts of appeals increases, so do Congressional and judicial responsibilities involved in restructuring our federal courts.

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404. 636 F.2d at 1049-50. The court did not reach the question whether transsexuals were a suspect class, for fourteenth amendment purposes, because the complaint nowhere alleged a discrimination against transsexuals or plaintiff *qua* transsexual. Instead, the allegations were that her employer would not allow her to dress like a woman when she was still a man. The plaintiff apparently made no claim of violation of constitutional right of privacy notion of personal autonomy.

405. The paraphrase is borrowed from Mr. Justice Jackson's observation on the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953).

406. Pub. L. No. 96-452, 94 Stat. 1994 (1980).

407. *See generally* Baker, note 277 *supra*.