STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

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INTRODUCTION

These materials explore state and federal constitutional law developments over the past year. The first part of this survey examines state constitutional law cases, and the remaining materials focus on state and federal court cases that raise significant and recurring federal constitutional issues.

I. DEVELOPMENTS UNDER THE STATE CONSTITUTION

A. Parallel State Provisions Given Independent Significance

Following the invitation of Chief Justice Randall T. Shepard,[1] Indiana practitioners continue to invoke state constitutional provisions as a potential source for protecting civil liberties, and Indiana courts continue to refine their interpretation of these provisions. Much of the litigation this term focused on article I, section 23, the Equal Privileges Clause, article I, section 12, the "due course of law" guarantee, and article I, section 9, the Free Speech provision.

Indiana's "Equal Privileges and Immunities" clause provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."[2] In 1994, the Indiana Supreme Court in *Collins v. Day*,[3] held that federal equal protection analysis, with its emphasis on suspect classes and fundamental rights, does not apply to article I, section 23.[4] Looking to the purpose and intent of the framers, as well as early decisions interpreting this section, the court reasoned that the principal purpose of this anti-preference clause was to prohibit the state legislature from affirmatively granting any exclusive privilege or immunity—in particular to private commercial enterprises.[5] The Indiana Supreme Court set forth the following standard for determining whether classification schemes are valid: the disparate treatment must be "reasonably related to inherent characteristics which distinguish the unequally treated classes," and the "preferential treatment must be uniformly applicable and equally available to all persons similarly situated."[6] The court emphasized, however, that substantial deference must be given to the legislative

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1. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

2. IND. CONST. art. I, § 23.

3. 644 N.E.2d 72 (Ind. 1994).

4. *Id*. at 75.

5. *Id.* at 76-77.

6. *Id*. at 80.

judgment, which should be invalidated "only where the lines drawn appear arbitrary or manifestly unreasonable."[7] Applying this analysis, the court sustained an Indiana statute that excluded agricultural employers from worker's compensation coverage[8] because the plaintiffs failed to carry their burden "to negative every reasonable basis for the classification."[9]

Most attempts by Indiana litigants to invalidate state legislative enactments under section 23 have been unsuccessful in light of the highly deferential approach set forth by the supreme court in *Collins*. For example, in *Gambill v. State*,[10] the court upheld the validity of the verdict option of "Guilty but Mentally Ill,"[11] holding that the treatment accorded this class of people is reasonably related to the inherent characteristic shared by all in the class, namely mental illness.[12] Further, since it is "a pathway to treatment which is uniformly applicable and equally available to all persons who are found Guilty but Mentally Ill, the statute does not deny equal privileges within the meaning of article I, section 23.[13]

Contrary to this trend, two appellate courts have ruled that the occurrence-based statute of limitations in Indiana's Medical Malpractice Act[14] violates section 23. In *Martin v. Richey*,[15] plaintiffs challenged the medical malpractice statute of limitations, which differs from the general tort statute of limitations, because it provides that the statute begins to run at the occurrence of the alleged negligence rather than at the time the negligence is discovered.[16] The appellate court reasoned that medical malpractice victims are treated differently under this type of limitations period inasmuch as other tort victims enjoy a discovery-based statute of limitations, thus implicitly granting them a special privilege or immunity.[17] Although conceding that the classification scheme is "reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs,"[18] the classification failed Collins' requirement that the law apply equally to all persons who share the same inherent characteristics.[19] The court acknowledged that under article I, section 23, judges must accord considerable deference to the manner in which the Indiana legislature has balanced the competing interests.[20] Statutes come to the court with the

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7. *Id.*
8. IND. CODE § 22-3-2-9(a) (1993).
9. *Collins*, 644 N.E.2d at 81.
10. 675 N.E.2d 668 (Ind. 1996).
11. IND. CODE § 35-36-2-3 (1993).
12. *Gambill*, 675 N.E.2d at 677.
13. *Id.*
14. IND. CODE § 27-12-7-1 (1993).
15. 674 N.E.2d 1015 (Ind. Ct. App. 1997).
16. *Id.* at 1018.
17. *Id.* at 1022.
18. *Id.*
19. *Id.* at 1022-23.
20. *Id.* at 1021.

presumption of validity, requiring the challenger "to negative every conceivable basis" which might have supported the law.[21] The court ruled nonetheless that "the medical malpractice statute of limitations creates an unequal burden on victims of medical negligence, thereby implicitly granting a special privilege or immunity to victims of other torts."[22]

The court also held that the medical malpractice occurrence-based statute of limitations violates article I, section 12 of the state constitution, which requires that every person who is injured "shall have remedy by due course of law."[23] Looking again to the intent of the framers of the 1851 Constitution, the court reasoned that the purpose of this provision was to recognize the right of access to courts and the right to a complete tort remedy.[24] Further, the second clause of article I, section 12 emphasizes that "[j]ustice shall be administered freely . . . completely, and without denial."[25] This demonstrates that the framers did not wish to confer upon the Indiana legislature any sort of broad powers, "especially not broad powers to abrogate the common law right to a remedy for tortious injuries."[26] The court emphasized the responsibility of Indiana courts to conduct an independent constitutional analysis and noted that protections under the state constitution may be more extensive than those provided by its federal constitutional counterpart.[27] It concluded that the limitations provision contained in the malpractice statute was an unconstitutional abrogation of the right to a complete tort remedy guaranteed by article I, section 12.[28] Acknowledging the long line of cases previously sustaining these statutes as against a state constitutional challenge, the court reasoned that because of the substantial scholarly constitutional analysis that has emerged in recent years, it was not bound by the doctrine of stare decisis.[29]

In *Harris v. Raymond*,[30] another appellate court adopted the reasoning and holding of *Martin* regarding both state constitutional claims, and similarly held that the occurrence-based two-year statute of limitations in plaintiff's medical malpractice action was unconstitutional and that a discovery-based statute of limitations should apply equally to all medical malpractice claimants in the

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21. *Id*.

22. *Id.* at 1022.

23. IND. CONST. art. I, § 12.

24. *Martin*, 674 N.E.2d at 1025.

25. *Id.*

26. *Id.*

27. *Id*. at 1026; *see also* Valentin v. State, 685 N.E.2d 1100, 1102 (Ind. Ct. App. 1997) ("Indiana's double jeopardy analysis goes beyond the simple comparison of statutes called for under federal jurisprudence and the Indiana Supreme Court has found violations of Article I, § 14 where a single act constituted the basis for multiple punishments."); Ray v. State, 679 N.E.2d 1364, 1366 (Ind. Ct. App. 1997) (unlike the Eighth Amendment, section 17 provides a state constitutional right to bail, not just a guarantee against excessive bail).

28. *Martin*, 674 N.E.2d at 1026.

29. *Id.*

30. 680 N.E.2d 551 (Ind. Ct. App. 1997).

state.[31]

Other courts have not been as eager to adopt the *Martin* court's analysis. In *Johnson v. Gupta*,[32] the court sustained the occurrence-based statute of limitations.[33] As to article I, section 12, the court rejected the notion that this provision requires that every plaintiff have a remedy for injuries suffered.[34] To the contrary, it reasoned that the Indiana Constitution only prohibits the legislature from taking away vested property rights created by the common law, and that there is no vested property right in a remedy for a cause of action which has not accrued until after the time limitation has passed.[35] Further, according to a 1992 Indiana Supreme Court case, "the legislature has the power to modify or restrict common law rights and remedies in cases involving personal injury."[36] The Indiana legislature made a reasoned policy decision to ensure the availability of malpractice insurance for Indiana doctors and in turn medical services for Indiana residents: "[W]e find no compelling reason not to follow established precedent based upon sound analysis and reasoning. We reject the *Martin* Court's analysis of § 12 as unworkable."[37]

The court also rejected the equal privileges challenge. Applying the *Collins* analysis, it reasoned that the disparate treatment, which was "based upon the claimant's status as patients and the fact that the injuries arose from a breach of the duty owed by a health care provider," was in direct response to the "financial uncertainties in the health care industry."[38] Thus there was a reasonable relationship between the legislation and the inherent characteristics which distinguishes the class receiving the unequal treatment.[39] The second prong of *Collins* was also met because all persons within the class of malpractice claimants are treated the same.[40] The fact that those who do not discover the malpractice within two years are not allowed to proceed is not different treatment because all malpractice claimants have the same two years from the date of

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31. *Id*. at 552-53.

32. 682 N.E.2d 827 (Ind. Ct. App. 1997).

33. *Id.* at 829.

34. *Id.*

35. *Id.* at 830.

36. *Id.* (citing State v. Rendleman, 603 N.E.2d 1333, 1336 (Ind. 1992)); *see also* Prior v. GTE N., Inc., 681 N.E.2d 768, 775 (Ind. Ct. App. 1997) (legislature may abrogate or restrict common law right as part of the State's police power without violating article I, section 12 as long as the limitation is not arbitrary or irrational; clause of telephone carrier's tariff limiting carrier's liability for omitting commercial customer's name from telephone directories to refund of listing charges paid by customer did not deny customer meaningful remedy under section 12 because the legislature had the power to restrict customer's common-law right to bring a negligent action as a rational means of keeping carrier's costs to a minimum without charging its customers unreasonable rate).

37. *Johnson*, 682 N.E.2d at 830.

38. *Id.* at 831.

39. *Id.*

40. *Id.*

occurrence to file a claim: "The unequal results caused by the statute of limitations can be harsh, but that does not render it unconstitutional because the limitation is reasonable in light of other policy considerations."[41] In dissent, Judge Friedlander agreed with the *Martin* analysis as to the article I, section 12 claim and thus would hold the occurrence-based statute of limitations unconstitutional.[42]

In *McIntosh v. Melroe Co.*,[43] a similar constitutional challenge was made to the ten-year statute of repose in the Indiana Product Liability Act.[44] Relying on an earlier Indiana Supreme Court ruling on this issue, *Dague v. Piper Aircraft Corp.*,[45] the court rejected the article I, section 12 argument.[46] Although the opinion in *Dague* primarily addressed the "open courts" rather than the "remedy by due course of law" language of section 12, the court found *Dague's* deferential approach controlling.[47] As to the article I, section 23 claim, the plaintiffs argued that although the statute facially applies to all manufacturers, it grants manufacturers of durable goods an immunity not given to all other manufacturers since only durable goods remain in use long enough to satisfy the ten-year statute of repose. The court held that it need not even apply *Collins* to this claim, reasoning that the statute treats all manufacturers the same, i.e., if a non-durable good survives to be consumed or used more than ten years after delivery, the statute of repose would bar any action arising out of injuries caused by that product.[48] Although conceding that the statute of repose does treat classes of tort victims differently; the distinguishing feature, age of the product, is an inherent difference which justifies disparate treatment to prevent stale claims and skyrocketing insurance costs.[49] Further, the statute applies uniformly and equally to all persons injured by products more than ten years old, thus satisfying the second prong of *Collins*.[50]

A second area where the Indiana Supreme Court has charted a different course from federal constitutional analysis in interpreting a parallel state provision involves free speech rights. Article I, section 9 of the Indiana Constitution broadly guarantees free expression, but it also provides that speakers may be held accountable "for the abuse of that right."[51] In 1993, the court in

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41. *Id.*
42. *Id.* (Friedlander, J., dissenting).
43. 682 N.E.2d 822 (Ind. Ct. App. 1997).
44. IND. CODE § 33-1-1.5-5(b) (1993).
45. 418 N.E.2d 207 (Ind. 1981).
46. *McIntosh*, 682 N.E.2d at 825.
47. *Id.*
48. *Id.* at 826.
49. *Id.* at 826-27.
50. *Id.*
51. "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." IND. CONST. art. I, § 9.

Price v. State[52] held that pure political speech is a "core value."[53] The state cannot punish political speech, even in the context of resisting arrest, unless the political speech inflicts harm upon others "analogous to that which would sustain tort liability against the speaker."[54] In essence, no abuse of the right could be found unless the political speech causes private harm. Although Price's conduct in shouting profanities protesting the officer's arrest may have created a public disturbance, it did not rise above the level of a "fleeting annoyance" to the large group of "quarreling partygoers" who had congregated in this residential alley at 3:00 a.m. after a New Year's Eve party.[55] Thus, even if Price's speech could be deemed unprotected "fighting words" under First Amendment analysis, her conviction had to be overturned because of the state guarantee.[56]

A second area where free speech rights have been afforded greater protection than under the federal Constitution involves the law of libel. The United States Supreme Court in *New York Times v. Sullivan*[57] declared that where an elected public official sues a "citizen critic" of government for defamation, the First Amendment mandates that the official demonstrate actual malice in order to recover damages.[58] The Court reasoned that the "central meaning" of the First Amendment guaranteed the right of citizens to criticize their government.[59] Thus, unless the official proves the statement was made with knowledge that it was false or with reckless disregard of its falsity there could be no recovery.[60] The Court expanded *Sullivan* to include defamation directed at non-elected public officials[61] and private sector public figures,[62] suggesting that the content of the libel was more important than the status of the plaintiff/victim. Indeed, in a 1971 plurality opinion, the Court in *Rosenbloom v. Metromedia, Inc.*,[63] suggested that the actual malice privilege for speech would be extended to all matters of public interest.[64]

In 1974, the U.S. Supreme Court rejected the *Rosenbloom* plurality's approach, which made content of the defamation the critical factor. Instead, the Court held that because the reputational interests of private plaintiffs are

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52. 622 N.E.2d 954 (Ind. 1993).

53. *Id.* at 963.

54. *Id.* at 964.

55. *Id.* at 956, 964.

56. *Id.* at 964-65; *see also* Whittington v. State, 669 N.E.2d 1363, 1369 (Ind. 1996) (if speech is not political, and the burden of proof is on the claimant to establish this, the state is free to sanction it provided it reasonably concludes the expression is an "abuse" within the meaning of section 9).

57. 376 U.S. 254 (1964).

58. *Id.* at 280.

59. *Id.* at 274-80.

60. *Id.*

61. *See* Rosenblatt v. Baer, 383 U.S. 75 (1966).

62. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

63. 403 U.S. 29 (1971).

64. *Id.* at 52.

weightier, they should be permitted to recover upon a showing of mere negligence.[65] In *Gertz v. Robert Welch, Inc.*,[66] the Court in a 5-4 opinion found that private plaintiffs deserved greater protection and should not be held to the actual malice standard.[67] The Court reasoned that the private figure does not voluntarily enter the vortex of public controversy or debate, like public figures or public officials.[68] Further, the private plaintiff lacks the means of self-help access to the media available to the public victim.[69] However, expressing concern for self-censorship, the Court concluded that where the speech addresses matters of public interest, states cannot apply strict liability, but instead may impose liability only where negligence is established.[70] Further, while compensatory damages may be available based on a finding of negligence, the actual malice standard must still be met in order to recover punitive damages.[71]

Soon after *Gertz*, an Indiana appellate court rejected the U.S. Supreme Court's approach and determined that section 9 mandated more protection for allegedly libelous material. Favoring the *Rosenbloom* analysis, it held that private individuals who bring a libel action involving an event of general or public interests must prove that the defamatory falsehood was published with actual malice.[72] In 1990, another Indiana appellate court reiterated the rule that section 9 requires that interchange of ideas on all matters of public or general interest be unimpaired.[73] In short, section 9 creates a constitutional privilege regarding publication of all matters of general concern, regardless of whether the defamed party is a private or public individual.

Following this well-established case precedent, the Indiana Court of Appeals in *Journal-Gazette Co. v. Bandido's, Inc.*,[74] applied the actual malice standard and rejected a libel claim against a newspaper that allegedly "defamed" Bandido's restaurant by suggesting that rats had been discovered at its

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65. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

66. *Id.*

67. *Id.* at 343-44.

68. *Id.*

69. *Id.* at 344.

70. *Id.* at 346-48.

71. *Id.* at 349.

72. Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 58 (Ind. App. 1974).

73. *See* Near East Side Community Org. v. Hair, 555 N.E.2d 1324, 1328 (Ind. Ct. App. 1990); *see also* Moore v. University of Notre Dame, 968 F. Supp. 1330, 1336 (N.D. Ind. 1997) (because under Indiana law a private individual may recover for injury caused by defamation only if he can prove the publication was made with actual malice, it is unnecessary to determine whether former offensive line football coach at University was a public figure or private individual; further, coach failed to establish actual malice on the part of the University and head football coach as required to establish liability); Chang v. Michiana Telecasting Corp., 900 F.2d 1085, 1087 (7th Cir. 1990) ("[n]o Indiana court has disagreed with *Aafco*, and four years ago we took *Aafco* to be the established law of Indiana").

74. 672 N.E.2d 969 (Ind. Ct. App. 1996), *vacated by* 690 N.E.2d 1183 (Ind. 1997).

establishment in Indianapolis.[75] The jury had awarded significant damages ($985,000), but the appellate court determined that the record would not support a finding of actual malice. The sub-heading in an article that described closing the restaurant by the health board erroneously used the word "rat" instead of rodent. The court of appeals held that "[e]vidence of an extreme departure from professional journalistic standards, without more, cannot provide a sufficient basis for finding actual malice."[76] The court reasoned that while "the Journal may well have been extremely careless in printing the subheadline with the word 'rats', there is not sufficient clear and convincing evidence to demonstrate that the paper had knowledge that the headline was false or that the paper entertained serious doubts as to the truth of the headline."[77] Even though the evidence suggested that the Journal fell below reasonable journalistic standards and violated its own policy, this alone does not constitute actual malice.[78] The Indiana Supreme Court, which has never ruled on the issue, has accepted the parties' invitation to determine whether Indiana should join the vast majority of states who utilize a negligence standard, rather than an actual malice standard, when the victim of libelous material is a private individual.[79]

B. Provisions Unique to the State Constitution

In addition to the numerous provisions in the Indiana Constitution that parallel federal guarantees, there are several unique provisions that practitioners invoked this past year. In *Ratliff v. Cohn*,[80] Donna Ratliff, who set a fire that burned down her home and killed her mother and sister, was incarcerated at the Indiana Women's Prison even though she was only fourteen years old. Ratliff argued that article IX, section 2 of the Indiana Constitution, which states that, "[t]he General Assembly shall provide institutions for the correction and reformation of juvenile offenders," prohibits the incarceration of juveniles with adults.[81] The court noted that this provision was unique in that no analogue exists either in the U.S. Constitution or in any other state constitution.[82] The court emphasized the need for state courts to "give life to the unique provisions of its own constitution" so as not to deprive "the people of its state the double

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75. *Id.* at 972.

76. *Id*. (citing Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 665 (1989)).

77. *Journal-Gazette Co.*, 672 N.E.2d at 973.

78. *Id.*

79. Only Alaska, Colorado and New Jersey still use the "actual malice" standard for private victims of libel. *See* Gay v. Williams, 486 F. Supp. 12 (D. Alaska 1979); Diversified Management v. The Denver Post, 653 P.2d 1103 (Colo. 1982); Sisler v. Gannett Co., Inc., 516 A.2d 1083, 1095 (N.J. 1986).

80. 679 N.E.2d 985 (Ind. Ct. App. 1997), *vacated by* 693 N.E.2d 530 (Ind. 1998).

81. IND. CONST. art. IX, § 2.

82. *Ratliff*, 679 N.E.2d at 986.

security the nation's founding fathers intended to provide."[83] Further, the court noted that "the Indiana Constitution was framed to be strictly observed by all public officials and particularly by the courts as the guardians of the citizens' rights stated therein."[84]

Looking to the legislative history behind article IX, the court found that the intent of the framers was to abolish the practice of incarcerating juveniles with adult offenders by requiring the general assembly to provide separate institutions for the correction and reformation of juvenile offenders.[85] In fact, the first Indiana statute providing for the waiver of juvenile offenders into adult criminal courts specifically stated that juvenile offenders would be incarcerated separately from adult offenders. It was not until 1979 that the legislature repealed the statutory requirement that juvenile offenders be incarcerated separately.[86] Based on its interpretation of the constitution, the court mandated Ratliff's transfer to an appropriate rehabilitative juvenile treatment facility.[87] A petition to transfer was granted and the Indiana Supreme Court heard argument on December 9, 1997, on the constitutionality of incarcerating minors in adult prisons.[88] At the time of the hearing, there were eighty-eight inmates under eighteen who, unlike Ratliff, have been confined to Indiana's adult prisons.[89]

Other challenges under "unique" state constitutional provisions fared less well. For example, Indiana litigants unsuccessfully invoked article IV, section 22,[90] which prohibits the general assembly from passing local or special laws, and article IV, section 23,[91] which provides that all laws must be "general, and of uniform operation throughout the State." Although literally these provisions might be viewed as imposing a fairly restrictive requirement on legislation, the Indiana Supreme Court has given the general assembly much leeway to enact "special" laws. In *Indiana Gaming Commission v. Moseley*,[92] the court emphasized that although the framers expressed a preference for general laws, at the same time they recognized that in many situations special laws may be necessary and that courts must grant a "high degree of deference to the legislature on section 23 questions."[93] The court's decision in *State v. Hoovler*[94]

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83. *Id.*

84. *Id.*

85. *Id.* at 987.

86. *Id.*

87. *Id.* at 988.

88. *Two Teens Going to Adult Prison*, GARY POST TRIB., Nov. 27, 1997, at B7.

89. *Id.*

90. There are 16 subject matters for which legislative authority regarding "special laws" is restricted, including crimes, misdemeanors, court practices, divorce, regulating county and township business, and tax assessment. IND. CONST. art. IV, § 22.

91. "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." *Id.* § 23.

92. 643 N.E.2d 296 (Ind. 1994).

93. *Id.* at 300 (The court sustained a riverboat gambling statute that allowed for a county-

reflects this deferential approach. The case involved an economic development income tax statute that effectively permitted only one county in the state to take advantage of an increased tax rate.[95] The special rate was available only to counties with a population of more than 129,000 but less than 130,600, thus essentially limiting application of the statute to Tippecanoe County, Indiana.[96] Previous cases had held that such population classifications may satisfy the "general law" mandate provided the terms of the statute permit other units to eventually qualify.[97] The majority in *Hoovler*, however, questioned this approach stating that, "the mere presence of a population restriction does not convert an otherwise special law into a general and uniform law."[98]

The court nonetheless found that this "special" law was constitutional, by looking beyond the statutory classification to "other circumstances surrounding" the enactment.[99] Tippecanoe County contained a landfill that the U.S. Environmental Protection Agency (EPA) determined was an environmental hazard.[100] Under federal Superfund legislation, Tippecanoe County had been identified as potentially responsible regarding the cost to clean up the landfill.[101] The Indiana Supreme Court noted the "staggering" nature of the liability, but also that the costs associated with determining the extent of the liability could be reduced substantially if the parties entered into a consent decree within a limited time period.[102] Without a statute allowing for an increase in tax rates, the county would lack the resources to enable it to enter into the consent decree and thus lose the opportunity to reduce the clean-up costs.[103] Because of these "other circumstances," the court concluded that "permitting increased taxes due to Tippecanoe County's unique exposure to Superfund liability is not a matter necessarily subject to a general law uniformly applicable in all counties."[104] Thus, the law was held not to violate article IV, section 23.

In *Indiana State Teachers Ass'n v. Board of School Commissioners*,[105] an

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wide vote in favor of riverboat gambling rather than a city-wide vote depending upon the number of inhabitants in the area). The court ruled that the population restrictions were reasonable and thus article IV had not been violated. *Id.* at 301.

94. 668 N.E.2d 1229 (Ind. 1996).

95. *Id.* at 1234.

96. *Id.*

97. *Id.* at 1233 n.3 (citing State Election Bd. v. Bartolomei, 434 N.E.2d 74, 76-78 (Ind. 1982)).

98. *Id.* Two justices concurred in the result but disagreed with this shift in position and would have held that population-based categories "fulfill the requirements for a valid general law." *Id.* at 1236 (Sullivan, J., and DeBruler, J., concurring).

99. *Id.* at 1234-35.

100. *Id.*

101. *Id.*

102. *Id.* at 1235.

103. *Id.*

104. *Id.*

105. 679 N.E.2d 933 (Ind. Ct. App. 1997).

appellate court applied *Hoovler* to a state statute, which provided for reformation of the Indianapolis Public Schools (IPS) and contained limitations on the subject matter of collective bargaining that affected IPS teachers.[106] Because, as in *Hoovler*, the law used a population classification which effectively meant that only Marion County and the Indianapolis Teachers Association were affected,[107] the court reasoned that this was a special law.[108] Nonetheless, the law was sustained because the legislature could have reasonably concluded that unique circumstances, namely low test scores, low attendance and the need for remedial education that existed in the Indianapolis Public Schools "could not be adequately addressed through a general law."[109] In short, the court has interpreted this section to preclude special laws but to allow the legislature to defend such laws whenever the subject matter "is not amenable to a general law of uniform operation throughout the state."[110]

The statute in question in *Indiana State Teachers Ass'n* was also challenged under article IV, section 19, which requires that laws be "confined to one subject and matters properly connected therewith."[111] The purpose of mandating that the subjects in a single statute be germane to each other is to prevent so-called "logrolling" legislation.[112] The court emphasized the general principle that Indiana courts will accord every reasonable presumption of validity to statutes, and the challenger must overcome that presumption by "clearly demonstrating the provision to be invalid."[113] Although acknowledging the importance of section 19, the court also noted that the Indiana Supreme Court has taken a laissez-faire approach in applying the single-subject requirement.[114]

In this case, the general assembly passed a law that restricted the collective bargaining rights of public school teachers in Indianapolis as part of the state's budget legislation after the law "failed to pass on its own merits."[115] Thus, as the court remarked, "[t]his is the very logrolling that Section 19 of our Constitution was designed to prevent."[116] The court also noted that a very weak connection existed between the budget of the state and a restriction on the rights of Indianapolis school teachers to bargain collectively.[117] Nonetheless, the court held that since the legislature linked matters of state and local administration, a

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106. *Id.* at 936 (citing IND. CODE § 20-3.1-1-1 (1993)).

107. *State Teachers Ass'n*, 679 N.E.2d at 936.

108. *Id.* at 937.

109. *Id.* at 937-38.

110. *Id.* at 938.

111. IND. CONST. art. IV, § 19.

112. "Legislators combine two unrelated bills, each without sufficient support to pass on its own, in order to accumulate the requisite number of votes to pass both." Bayh v. Indiana St. Bldg. & Const. Trades Council, 674 N.E.2d 176, 179-80 (Ind. 1996).

113. *State Teachers Ass'n*, 679 N.E.2d at 934 (quoting *Hoovler*, 668 N.E.2d at 1232).

114. *Id.* at 935.

115. *Id.*

116. *Id.*

117. *Id.*

combination previously recognized as meeting the requirement that the law contain a single subject, it did not offend article IV, section 19.[118] The court acknowledged that Justice Dickson has persuasively criticized this deferential standard[119] but it felt bound by the supreme court's broad approach to analyzing legislative acts for single-subject violations and the court's "implied invitation to the General Assembly" to enact such laws.[120]

II. FEDERAL CONSTITUTIONAL LAW

A. Procedural Due Process

In deciding whether procedural due process rights have been violated, the U.S. Supreme Court applies a two-pronged analysis, (1) requiring that a plaintiff initially identify a property or liberty interest, and, (2) assuming this burden is met, balancing the competing interests to determine whether sufficient procedural safeguards have been afforded.[121] As to the latter step, the court balances (a) the private interests affected; (b) the risk of erroneous deprivation and the value of additional procedural safeguards; and (c) the government's interests.[122] This analysis is well established and Indiana courts have consistently followed it.[123]

The most significant U.S. Supreme Court case addressing procedural due process this term was *Gilbert v. Homar*.[124] That case involved a state university policeman, Richard Homar, who was suspended without pay following his arrest by state police on drug felony charges. Although the criminal charges were dismissed about a week after the arrest, the suspension remained in effect, and Homar was not given the opportunity to tell his side of the story for almost three weeks. Relying on the Supreme Court decision in *Cleveland Board of Education v. Loudermill*,[125] Homar argued that he was entitled to at least a limited hearing prior to his suspension, to be followed by a more comprehensive post-suspension hearing. The Court, however, unanimously ruled that *Loudermill* does not apply to a suspension without pay in all circumstances, and that due process requires a flexible case-by-case balancing of the interests.[126] Applying the *Mathews* balancing test, the Court noted that Homar's interest in an uninterrupted paycheck must be judged in light of the length and finality of the temporary deprivation, and here the lost income was relatively insubstantial.[127] Second, the state had a significant interest in immediately suspending employees charged

118. *Id.* at 936.
119. *Id.* at 935 (citing Pence v. State, 652 N.E.2d 486, 489 (Ind. 1995)).
120. *Id.*
121. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
122. *Id.* at 334-35.
123. *See, e.g.*, Dible v. City of Lafayette, 678 N.E.2d 1271, 1277 (Ind. Ct. App. 1997).
124. 117 S. Ct. 1807 (1997).
125. 470 U.S. 532 (1985).
126. *Gilbert*, 117 S. Ct. at 1812.
127. *Id.* at 1813.

with felonies who occupy positions of public trust and visibility, such as police officers.[128] Most importantly, the risk of erroneous deprivation was low. The purpose of a pre-suspension hearing is to ensure reasonable grounds to support the suspension without pay, but this is already assured by the arrest and the formal filing of charges.[129] The court remanded the case, however, to determine whether defendants violated Homar's due process rights by failing to provide a sufficiently prompt post-suspension hearing.[130]

B. Substantive Due Process

The U.S. Supreme Court has recognized that the Due Process Clause also contains a substantive component that bars arbitrary, wrongful conduct. Where the government interferes with a fundamental right, the Court has demanded that government meet a strict scrutiny standard. The measure must be narrowly tailored to support a compelling government interest. Where no fundamental right is identified, however, the Court generally has been very reluctant to find a substantive due process violation, requiring that the plaintiff demonstrate that the government has acted in a truly "conscience-shocking" fashion before it will intervene.

In *Sightes v. Barker*,[131] the Indiana appellate court applied a more nuanced approach to a substantive due process claim. A grandmother, who was the mother of a child's biological father, petitioned to establish visitation under Indiana's Grandparent Visitation Act.[132] The mother and her new husband moved to dismiss the petition, alleging that the state statute unconstitutionally burdened their autonomous right as parents to raise their child. While recognizing the fundamentality of parental rights, the court noted that "family autonomy is not absolute," and that "the degree of the infringement by the state" must be examined to determine whether or not the statute is unconstitutional.[133] The court reasoned that permitting grandparent visitation over the parents' objection did not unconstitutionally impinge upon the integrity of the family since the statutory scheme did not grant visitation unless a verified petition was filed, a hearing conducted, and a decree entered with findings that this would best

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128. *Id.*

129. *Id.* at 1813-14.

130. *Id.* at 1814; *see also* Van Harken v. City of Chicago, 103 F.3d 1346, 1352-53 (7th Cir. 1997) (city's procedures for dealing with parking violations which did not require officer who wrote parking ticket to appear at hearing while allowing hearing officers to cross-examine drivers did not violate due process because benefits of requiring police officers' presence did not exceed costs); *cf.* Porter v. DiBlasio, 93 F.3d 301, 306-07 (7th Cir. 1996) (animal owner is entitled to notice and an opportunity for a hearing prior to permanent termination of interest in seized animals).

131. 684 N.E.2d 224 (Ind. Ct. App. 1997).

132. IND. CODE §§ 31-17-5-1 to -10 (Supp. 1997).

133. *Sightes*, 684 N.E.2d at 229. The court analogized to the abortion cases where the Supreme Court has reasoned that only laws that unduly burden the right trigger strict scrutiny. *Id.* at 229-30.

serve the interests of the child.[134] Citing several cases where other states' grandparent visitation statutes have been sustained, it similarly concluded that the statute was "rationally related to furthering the legitimate state interest in fostering relationships between grandparents and their grandchildren."[135] Finally, the court noted that even if strict scrutiny is applied, the state has a compelling interest in protecting the best interests of the child and in maintaining the right of association of grandparents and grandchildren.[136]

A substantive due process question of growing significance is the extent to which due process imposes a limitation on the jury's power to impose punitive damages. In *BMW of North America, Inc. v. Gore*,[137] the Supreme Court held that a $2 million punitive damages award was grossly excessive and therefore exceeded constitutional limits.[138] An Alabama jury had awarded $4 million against BMW for failing to disclose that it repainted a new $40,000 car, thereby reducing its value by $4,000.[139] The Alabama Supreme Court reduced the award to $2 million, but the U.S. Supreme Court concluded that that award, too, was excessive.[140] It outlined three criteria in reaching its conclusion: (1) the conduct was not particularly reprehensible in that it involved only economic harm and it evinced no reckless disregard for the health or safety of others; (2) punitive damages were 500 times the amount of compensatory damages; and (3) the remedy was out of proportion to civil remedies authorized or imposed in comparable cases.[141]

In *Schimizzi v. Illinois Farmers Insurance Co.*,[142] a federal district court in Indiana applied these factors in determining that a $600,000 award was excessive. Even though the defendants did not raise a substantive due process challenge, the court noted that the inquiry in *Gore* was "akin to that posed" in a case seeking to determine whether under Indiana law an award is "grossly excessive."[143] Applying the three *Gore* "guideposts," the court concluded that the award was grossly excessive since the defendant's tortious conduct consisted primarily of an insurance carrier's omissions in reckless disregard of plaintiff's rights under the policy, and no reckless disregard for health or safety.[144] The disparity between actual and punitive damages was great because the award was thirteen times actual damages, and the award was disproportionate as compared to criminal and civil penalties imposed for similar conduct—under Indiana law

134. *Id.* at 230.
135. *Id.* at 232.
136. *Id.* at 233.
137. 116 S. Ct. 1589 (1996).
138. *Id.* at 1598.
139. *Id.* at 1594.
140. *Id.* at 1598.
141. *Id.* at 1599-1603.
142. 928 F. Supp. 760 (N.D. Ind. 1996).
143. *Id.* at 785.
144. *Id.* at 785-87.

every felony is punishable by a maximum fine of $10,000.[145] The court concluded that the $600,000 award was thus "monstrously excessive and without rational connection to the evidence."[146]

Similarly in *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*[147] the court noted that the federal standards set forth in *BMW* are quite similar to those examined under Indiana law.[148] Indiana courts have identified as the critical factors the nature of the tort, the extent of actual damages sustained, and the economic wealth of the defendant.[149] In *Creative Demos*, the jury had awarded $6.5 million in punitive damages against a wholesale grocery corporation accused of violating Indiana law by fraudulently inducing the plaintiff to take action adverse to its interests. The court ruled that even if the evidence supported a punitive damages award, the amount was grossly excessive.[150] Although the grocery corporation had a large size and net worth, the harm caused by the misrepresentations was purely economic, the ratio of punitive to compensatory damages was 47,445:1, and the award was out of line with Indiana public policy.[151]

Outside the area of punitive damages, the courts have shown a great reluctance to intervene under the somewhat amorphous substantive due process provision. For example, in *Hill v. Shobe*,[152] the Seventh Circuit rejected a motorist's substantive due process claim against a police officer who drove through a red light and collided with the motorist's vehicle. The court held that for the defendant to be reckless in a constitutional sense, he must be criminally reckless: "The fact that a public official committed a common law tort with tragic results fails to rise to the level of a violation of substantive due process."[153] Rather, "motor vehicle accidents caused by public officials or employees do not rise to the threshold of a constitutional violation . . . absent a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it."[154] The court specifically found that it would be insufficient for

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145. *See* IND. CODE §§ 35-50-2-4 to -7 (1993 & Supp. 1997).

146. 928 F. Supp. at 786.

147. 955 F. Supp. 1032 (S.D. Ind. 1997).

148. *Id.* at 1042.

149. *Id.*

150. *Id.* at 1042-44.

151. *Id.*

152. 93 F.3d 418 (7th Cir. 1996).

153. *Id.* at 421.

154. *Id.* The court also ruled that the police officer's failure to provide medical care to the injured motorist did not violate due process because government has no affirmative constitutional duty to provide emergency medical services to its citizens. *Id.* at 422. *See also* Stevens v. Umsted, 131 F.3d 697, 701-06 (7th Cir. 1997) (child who was repeatedly sexually assaulted by other students at the Illinois School for the Visually Impaired even after the superintendent was put on notice of the assault, failed to state a claim under the substantive due process clause because the state neither took Stevens into custody, confining him against his will, nor did it create the danger or render him more vulnerable to an existing danger; inaction by the state in face of a known danger is not enough to trigger the obligation to protect private citizens from each other, and the

plaintiffs to prove that the officer knew that driving at high speed at night without lights could have potentially fatal consequences; instead, "plaintiffs were required to demonstrate that [the defendant] was willing to let a fatal collision occur."[155]

In *Mays v. City of East St. Louis, Illinois*,[156] the Seventh Circuit went even further, and rejected the substantive due process claim entirely. First, the court found that the police officer's high-speed pursuit of a vehicle resulting in injury did not give rise to a Fourth Amendment seizure. It then held that the

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superintendent had no constitutional duty to protect the child); Wallace v. Adkins, 115 F.3d 427, 430 (7th Cir. 1997) (prison guard failed to show that officials affirmatively placed him in position of danger by assigning him to prison unit with prisoner who had previously threatened to kill guard, despite fact that guard was ordered to stay on duty, where guard could not show that order created dangers other than those guard would have faced in absence of order to stay); Estate of Stevens v. City of Green Bay, 105 F.3d 1169, 1175-76 (7th Cir. 1997) (bar fight participant was not in police custody either in bar parking lot or when he was driven by police to nearby service station where officer told him he was free to leave; thus, no "special relationship" implicating due process duty to provide protective services existed so as to hold entity liable for ensuing death by automobile); Nabozny v. Podlesny, 92 F.3d 446, 459-60 (7th Cir. 1996) (student could not maintain claim that school officials violated due process by creating risk of harm or exacerbating existing risk of harm in connection with their alleged failure to protect student from harassment by other students based on his sexual orientation because, although student presented evidence to show officials failed to act and that their failure to act was intentional, they had no affirmative duty to act absent evidence that their failure itself placed student in danger or increased pre-existing threat of harm).

155. *Id.*; *see also* Mathis v. Fairman, 120 F.3d 88, 91-92 (7th Cir.), *cert. denied*, 118 S. Ct. 603 (1997) (for pre-trial detainee to claim substantive due process violation, prison official must have been deliberately indifferent to substantial risk of serious harm and thus official who could not have been aware of suicide risk of detainee who was evaluated by mental health specialist and found to pose no danger to himself was not deliberately indifferent and thus not subject to substantive due process claim); West v. Waymire, 114 F.3d 646, 651-52 (7th Cir.), *cert denied*, 118 S. Ct. 337 (1997) (town cannot be held liable for police officer's intimidation of teenage girl to provide sex; although the law in this circuit is unclear as to whether criminal recklessness is a sine qua non for due process liability, at minimum, defendant must make a deliberate choice and although "[s]lackness, laxness, cronyism, confusion, and dumbness there were in profusion," plaintiff could not show that there was "an obvious risk" that the officer was a child molester); Weinberger v. Wisconsin, 105 F.3d 1182, 1186-87 (7th Cir.), *cert. denied*, 118 S. Ct. 336 (1997) (since probation officer was not reckless in failing to visit home of probationer who was later discovered to be cannibalistic serial killer, officer was not liable in civil rights action brought by parents of victim; reckless conduct is that which is criminally reckless, i.e., conduct that reflects complete indifference to risk and so allows inference of actor's knowledge or intent). *But cf.* Wudtke v. Davel, 128 F.3d 1057, 1063-64 (7th Cir. 1997) (teacher's substantive due process claim against school district superintendent alleging sexual assaults and harassment stated a claim based on a liberty interest in bodily integrity; in a case of first impression, the court concluded that serious physical assaults under circumstances where the assaulter is enabled to take his actions because of his government position does rise to the level of a constitutional tort).

156. 123 F.3d 999 (7th Cir. 1997).

"reasonableness" of the pursuit was not subject to any further analysis under substantive due process because "[t]his nation's social and legal traditions do not give [automobile] passengers a legal right . . . to have police officers protect them by letting criminals escape."[157] Any "rights" beyond the Fourth Amendment must come from the political process or the common law.[158] The Supreme Court has agreed to resolve the conflict in the circuits regarding the appropriate standard that should govern substantive due process claims challenging a high-speed police chase that culminates in injury or death.[159] Perhaps it will address the more fundamental question of when tortious conduct rises to the level of a *constitutional* tort.

C. Free Speech Rights

1. The New Frontier.—Last term the Supreme Court was asked to apply First Amendment doctrine to the cable and telecommunications industries. The Court previously held that the broadcast media may be subjected to greater government regulation than the written press because of economic scarcity, public ownership of the airwaves, and the fact that broadcasting invades the privacy of the home and is uniquely accessible to children.[160] Difficult questions have been raised as to whether this same, more deferential approach should be applied to cable and the Internet. In 1994, the Supreme Court ruled in *Turner Broadcasting System, Inc. v. FCC*[161] (Turner I), that the cable industry enjoyed the same stringent First Amendment protection as the written press. It found no economic or physical scarcity argument to support greater government regulation. Following well-established Supreme Court precedent, the Court held that the "must-carry" provision of the Cable Television Consumer Protection and Competition Act,[162] which requires cable television systems to devote some of their channels to the transmission of local commercial and public broadcast stations, was a content-neutral regulation of speech subject to the intermediate level of scrutiny under the First Amendment.[163] Under this standard, the "must-carry" provisions could be upheld only if they furthered important government interests and did not burden substantially more speech than necessary to further those interests.[164] The Court remanded for a determination of whether Congress had adequate factual support for its conclusion that "must-carry" was

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157. *Id.* at 1003.

158. *Id.* at 1004-05.

159. Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2406 (1997).

160. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); FCC v. Pacifica Found., 438 U.S. 726 (1978).

161. 512 U.S. 622 (1994).

162. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 534 (1994)).

163. *Turner I*, 512 U.S. at 662.

164. *Id.*

necessary.[165]

In *Turner Broadcasting System, Inc. v. FCC*[166] (Turner II), the Court ruled 5-4 that the Cable Television Act met this intermediate scrutiny standard. Justice Kennedy found a "substantial body of evidence" before Congress during the three years of pre-enactment hearings indicating that "must-carry" serves at least two important governmental interests: preserving the benefit of free, over-the-air local broadcast television, and promoting the widespread dissemination of information from a multiplicity of sources.[167] Further, substantial evidence supported Congress' determination that a significant number of local broadcast stations would be refused carriage on cable systems absent the "must-carry" requirement, and without the congressional mandate, these local broadcast stations would be at serious financial risk and would deteriorate or fail.[168] Thus, the "must-carry" requirement served the government's important interests in a direct and effective way.

As to the second prong of intermediate scrutiny, the Court held that the provisions did not burden substantially more speech than was necessary.[169] It found that the mandate did not affect the majority of cable operators in a significant way because they had simply used previously unused channel capacity, and 94.5% had not been forced to drop any programming to comply with the mandate.[170] Acknowledging that many broadcasters would survive without cable access, the Court held that it would not invalidate this remedial scheme merely because some alternative solution was marginally less intrusive on a speaker's First Amendment interest.[171] It found that Congress took adequate steps to confine both the breadth and the burden of the regulatory scheme.[172]

Four Justices argued in dissent, as they did in *Turner I*, that the Act should not be analyzed as a content-neutral provision. Because the purpose of the Act was to increase diversity of viewpoint, it should be reviewed as a content-based restriction that must be subject to strict, not intermediate, scrutiny.[173] However, even applying intermediate scrutiny, the dissent reasoned that the Court gave too much deference to Congress' predictive judgment and its evaluation of complex economic questions: "A highly dubious economic theory has been advanced as the 'substantial interest' supporting a First Amendment burden on cable operators and cable programmers."[174] Moreover, the means were not narrowly tailored: "Congress has commandeered up to one-third of each cable system's channel capacity for the benefit of local broadcasters without any regard for

165. *Id.* at 668.
166. 117 S. Ct. 1174 (1997).
167. *Id.* at 1186-87, 1196.
168. *Id.* at 1190-97.
169. *Id.* at 1198.
170. *Id.* at 1198-99.
171. *Id.* at 1199-1200.
172. *Id.* at 1199.
173. *Id.* at 1205-06.
174. *Id.* at 1215.

whether doing so advances the statute's alleged goals."[175] The dissenting Justices believed the law was substantially broader than necessary to achieve the government's purported goals and thus should not have been upheld.[176]

In a case of first impression, the Court held that the Internet, like cable and unlike broadcast media, also enjoys the fullest degree of First Amendment protection. In *Reno v. American Civil Liberties Union*,[177] the Court held invalid provisions of the 1996 Communications Decency Act (CDA)[178] that criminalized the knowing on-line transmission of "indecent" and "patently offensive" materials to minors.[179] Further, the Act made it a crime to use an "interactive computer service" to knowingly send or display to a person under age 18 a communication "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[180] The Act contained affirmative defenses for those who in good faith took effective actions to restrict access by minors or who restricted such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number.[181] Despite these defenses, the Supreme Court held that the CDA's proscriptions abridged First Amendment rights.[182]

To justify its enactment, the government relied on two Supreme Court decisions. In *FCC v. Pacifica Foundation*,[183] the Supreme Court upheld a Federal Communications Commission ruling that the afternoon broadcast of comedian George Carlin's recorded monologue entitled "Filthy Words" could be subject to administrative sanctions.[184] Further, in *Ginsberg v. New York*,[185] the Court sustained a statute which barred sale of material to minors that was considered obscene as to them, even if not obscene as to adults.[186] Distinguishing this case precedent, the Court reasoned that the CDA did not allow for parental consent or parental participation in the communication.[187] Further, unlike the *Ginsberg* statute, the CDA was not limited to materials "utterly without redeeming social importance for minors" and it did not define the term "indecent"[188] It also did not save material that had serious literary, artistic, political, or scientific worth and it applied to all persons under 18, rather than the

175. *Id.* at 1216.
176. *Id.* at 1216-17.
177. 117 S. Ct. 2329 (1997).
178. 47 U.S.C. § 223 (1994).
179. *Reno*, 117 U.S. at 2351.
180. 47 U.S.C. § 223(a)(1)(B)(ii), (d)(1)(A)-(B).
181. *Reno*, 117 S. Ct. at 2349.
182. *Id.* at 2351.
183. 438 U.S. 726 (1978).
184. *Id.* at 750-51.
185. 390 U.S. 629 (1968).
186. *Id.* at 644.
187. *Reno*, 117 S. Ct. at 2343.
188. *Id.* at 2341.

17 year age of majority used in *Ginsberg*.[189] In addition, unlike the sanctions imposed in *Pacifica*, CDA's provisions were not limited to particular times and they imposed criminal rather than merely civil penalties.[190] Finally, the FCC order in *Pacifica* applied to radio, which has historically received the "most limited First Amendment protection."[191]

More generally, the Court held that the special factors justifying regulation of the broadcast media—the history of extensive government regulation of broadcasting, the scarcity of available frequencies at its inception, and its "invasive" nature—are not present in cyberspace and thus these cases do not provide a basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet.[192] The affirmative defenses to liability were ephemeral since the government offered no evidence of a reliable way to screen newsgroup and chat room participants for age, nor would it be possible to block children's access to indecent and patently offensive material without also blocking their access to protected material.[193] Requiring credit card verification would be costly, perhaps forcing many non-commercial Websites to shut down and would also block access by adults without credit cards. Adult passports would impose significant burdens on non-commercial sites, and it was uncertain that any of these devices would truly ensure that the user was over eighteen.[194]

Although acknowledging that the government has an important interest in protecting children from potentially harmful materials, the Court reasoned that the CDA pursued that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive.[195] The Court refused to defer to the congressional judgment that nothing short of an outright ban would effectively prevent minors from accessing indecent communications. Because of the breadth of the statute, the burden on adult speech was unacceptable if less restrictive alternatives could be used to achieve the Act's legitimate purposes.[196] Currently available "user-based" software suggests that a reasonably effective method by which parents can prevent their children from accessing material will soon be widely available,[197] In the absence of any detailed congressional findings or even hearings addressing these special problems, the Court was persuaded that the CDA simply was not narrowly tailored.[198] Although much litigation will no doubt ensue regarding regulation of both these new industries, the Supreme Court has now set the ground rules, i.e., any government regulation will purportedly be subject to the same First Amendment scrutiny that has

189. *Id.*
190. *Id.* at 2342.
191. *Id.*
192. *Id.* at 2343.
193. *Id.* at 2349.
194. *Id.* at 2349-50.
195. *Id.* at 2346.
196. *Id.* at 2348.
197. *Id.*
198. *Id.*

traditionally been applied to the written press.

2. Free Speech Rights of Government Employees.—The United States Supreme Court has held that the government cannot condition employment upon relinquishing First Amendment rights.[199] However, it has also recognized that speech rights of government employees are not the same as those of the public at large.[200] The Court has recognized the need to balance "the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs . . . ."[201] In *Connick v. Myers*,[202] the Court refined the balancing test, clarifying that a court must make an initial inquiry as to whether the government employee's speech is a matter of public concern, because "private" speech is entitled to little, if any, First Amendment protection. The Court provided little guidance as to how to make this initial determination, but it directed lower courts to examine the form, content, and context of the speech.[203] The *Connick* Court also described speech upon matters of public concern as "relating to any matter of political, social, or other concern to the community."[204]

In several cases state and federal courts took a fairly liberal approach in finding that the speech was at least partially of public concern; however, they then sustained sanctioning the speech under the *Connick/Pickering* balance. For example, in *City of Indianapolis v. Heath*,[205] the court determined that a police officer's comment in an interview with a local television station referring to Mayor Goldsmith as Mayor "Goldstein" addressed a matter of public concern. The merit board demoted the officer, alleging he had violated Indianapolis Police Department (IPD) rules and regulations by making anti-Semitic remarks about the mayor. Since the comment occurred at a public meeting in the midst of a discussion about the fiscal policies of the mayor, the court held that the speech indisputably addressed a matter of political concern to the community.[206] Nonetheless, the speech was unprotected. Although the remark did not strain the officer's working relationship with the chief, there was evidence that the words had a detrimental effect in the community, especially the Jewish community of Indianapolis. However, even if not intended as a religious slur, the comment reflected a lack of judgment on the officer's part, in particular because he was

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199. Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

200. United States v. National Treasury Employees Union, 513 U.S. 454, 465-66 (1995); *see also* Waters v. Churchill, 511 U.S. 661, 675 (1994) (the government's interest in achieving its goals is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer).

201. *National Treasury Employees Union*, 513 U.S. at 465-66 (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

202. 461 U.S. 138 (1983).

203. *Id.* at 147.

204. *Id.* at 146.

205. 686 N.E.2d 940 (Ind. Ct. App. 1997).

206. *Id.* at 943.

speaking in uniform as a representative of the IPD.[207]

Similarly, in *Khuans v. School District 110*,[208] the court found that even if some of a school psychologist's speech related to matters of public concern, i.e., that relating to a supervisor's noncompliance with the Individuals with Disability Education Act (IDEA),[209] the speech was disruptive and the government's interest in providing services efficiently outweighed it. The court conceded that "bringing to light actual or potential wrongdoing during the provision of public services obviously is in the public's interest," and that "[g]overnment employees often are in the best position to know what ails the agencies for which they work."[210] However, it also found that "this tidbit of speech on a matter of public concern was only one of a bagful of complaints" that the employee made against her supervisor. Most of the comments were solely private employment matters, not whistleblowing regarding IDEA compliance; plaintiff was really just airing her conflict with her boss.[211] The court concluded that Khuans' challenge to her supervisor in front of the principal and co-workers created a potential problem in maintaining authority and discipline within the department, and her own pleadings demonstrated the actual and potential disruption caused by her remarks.[212] Although the government must make a more substantial showing before punishing speech that discloses actual wrongdoing or breach of public trust, the court concluded that the stronger showing was demonstrated in this case: "[t]o the extent [plaintiff's] speech encompassed one item of public concern, her interest in raising that matter as she did was outweighed by the disruption—actual and potential—that she caused."[213]

Where the employee's speech as a whole more clearly goes beyond the kind of personal employee grievances that courts have found not to warrant First Amendment protection, the courts will hold the government to an even higher standard. For example, in *Hulbert v. Wilhelm*,[214] the court readily concluded that an employee who reported the Highway Department's open burning of potentially toxic materials to the Department of Natural Resources and who requested that corporation counsel investigate suspicious billing practices was engaged in speech of key public concern, even if the employee used internal

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207. *Id.* at 945-46.

208. 123 F.3d 1010 (7th Cir. 1997).

209. 20 U.S.C. § 1400 (1994).

210. *Khuans*, 123 F.3d at 1016.

211. *Id.* at 1016-17.

212. *Id.* at 1017-18.

213. *Id.* at 1018; *see also* Wales v. Board of Educ., 120 F.3d 82, 84-85 (7th Cir. 1997) (former schoolteacher who was not rehired after she advocated tougher discipline for students contrary to the learning philosophy of the education center failed to establish a viable First Amendment claim where the memorandum was closer to "private" than "public" speech addressing a subject that would have personal impact on her, and the school should have the right to insist that its staff support and carry out the educational philosophy espoused by the elected school board and principal).

214. 120 F.3d 648 (7th Cir. 1997).

memoranda and telephone calls to bring the problems to light.[215] Recognizing the significance of the speech, it rejected the county's effort to justify its action in the name of "maintaining harmonious relations between its employees."[216] Although the lower courts have frequently complained about the fuzziness of the *Pickering* balance,[217] courts will most likely find speech unprotected where an employee challenges a supervisor's management style, raising both the spectrum that the speech is more private in nature and that it will be more disruptive in the workplace. In contrast, where an employee speaks out more generally about wrongdoing or breach of public trust of a more serious nature, the speech will be found to be protected. Ironically, the more serious the charges the employee is making, the more disruptive the speech will be and, as the Seventh Circuit has noted, both the speaker and the employer may really have mixed motives for their actions, making the task "intractable."[218]

D. Freedom of Religion

1. Aid to Religious Institutions.—Although textually the Establishment Clause of the First Amendment only prohibits Congress from establishing religion, this clause has long been interpreted as a mandate that government maintain a position of neutrality vis-a-vis religion. In *Lemon v. Kurtzman*,[219] the Court held that the Establishment Clause requires that government programs have a secular purpose, that their primary effect must neither advance nor inhibit religion, and that programs not create excessive entanglement between church and state.[220] In recent years several Justices have vociferously argued that the *Lemon* test is too restrictive and that it should be replaced by a more "accommodationist" approach to church-state questions.[221] Some Justices have argued that the Establishment Clause is violated only where the government has endorsed or demonstrated approval of religion,[222] while others contend that the Establishment Clause bars only discrimination by government among religious organizations or coercive pressure by government to engage in religious activities.[223]

In *Agostini v. Felton*,[224] although the Court again refused to formally overturn

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215. *Id.* at 654.

216. *Id.*

217. *Wales*, 120 F.3d at 85 ("Open-ended balancing approaches of the sort announced in *Pickering* create unavoidable risks and costs for well-intentioned public employers . . . . As an inferior tribunal, our part is to apply the Supreme Court's approach, fuzzy though it may be.").

218. *Id.*

219. 403 U.S. 602 (1971).

220. *Id.* at 612-13.

221. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397-98 (1993) (Scalia, J., concurring).

222. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

223. *See* Lee v. Weisman, 505 U.S. 577, 638-45 (1992) (Scalia, J., dissenting).

224. 117 S. Ct. 1997 (1997).

Lemon, it reversed two earlier Supreme Court opinions that applied *Lemon*, reasoning that the older decisions could not be squared with the Court's intervening Establishment Clause jurisprudence.[225] In 1985, the Court ruled in *Aguilar v. Felton*[226] that New York City's program under Title I of the 1965 Elementary and Secondary Education Act,[227] which funds remedial instruction and counseling of disadvantaged children in public and private schools, created excessive church-state entanglement by requiring pervasive monitoring of instruction in parochial schools.[228] The parties bound by that ruling asked the Court to revisit its decision, emphasizing the significant costs of complying with *Aguilar*, and recent assertions of five Justices that the case should be reconsidered.[229] The Court agreed that later cases had undermined *Aguilar*. More specifically, it reasoned that *Aguilar* and its companion case, rested on four erroneous assumptions: (1) that a public school employee who works on religious school premises is presumed to inculcate religion in her work; (2) that the presence of public employees on private school premises creates an impermissible symbolic union between church and state; (3) that any public aid directly advancing the educational function of religious schools impermissibly finances religious doctrine; and (4) that the Title I program necessitated an excessive government entanglement with religion because public employees who teach on religious school premises must be closely monitored to ensure that they do not inculcate religion.[230]

Based on these premises, the Court in *Aguilar* had mandated that remedial services be provided only off-site, thus forcing the New York School Board to spend over $100 million to lease mobile off-site instructional units and transport parochial school students to those sites.[231] These costs significantly reduced the amount of Title I money available for remedial education and required that many programs cut back on the number of students who received the benefits. A 1987 Senate Report estimated that the 1985 decision "resulted in a decline of about 35% in the number of private school children who are served."[232]

By a 5 to 4 vote, the Court in *Agostini* held that sending taxpayer-paid teachers into religious schools to help students with such subjects as math, science, and English does not violate the constitutionally required separation between church and state.[233] Justice O'Connor reasoned that the Court's more recent cases have undermined the assumptions upon which *Aguilar* and its companion case relied. It is now accepted that placing full-time government employees on parochial school campuses does not, as a matter of law, have the

225. *Id.* at 2016.
226. 473 U.S. 402 (1985).
227. 20 U.S.C. § 2701 (1994).
228. *Aguilar*, 473 U.S. at 409.
229. *Agostini*, 117 S. Ct. at 2006.
230. *Id.* at 2010.
231. *Id.* at 2005.
232. *Id.* at 2005-06.
233. *Id.* at 2013.

impermissible effect of advancing religion.[234] In *Zobrest v. Catalina Foothills School Dist.*,[235] the Court upheld provision of a sign language translator for a deaf student attending Catholic school even though the translator would make religious statements in some translations. The Court reasoned that so long as the program has a wide scope and religious activities are only a small portion of the overall government program designed to help handicapped children, the government could not be found to have impermissibly endorsed religion.[236] The Court in *Zobrest* thus abandoned the presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence always constitutes a symbolic union between government and religion.

Furthermore, *Zobrest* demonstrated that some forms of government aid that directly assist the educational function of religious schools are valid.[237] The Court in *Agostini* emphasized that providing Title I assistance will not create a financial incentive to undertake religious education because the aid is allocated on the basis of neutral, secular criteria, that neither favor nor disfavor religion, and the aid is available to all beneficiaries on a non-discriminatory basis.[238] Thus, the aid is less likely to have the effect of advancing religion.[239] As to the Supreme Court's 1985 holding that New York City's Title I Program resulted in an excessive entanglement, this was based on the impermissible presumption that the program would require pervasive monitoring by public authorities to ensure that employees not inculcate religion: "Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required."[240]

Justice O'Connor found that New York City's Title I Program does not violate any of the criteria the Court currently uses to evaluate whether government aid has the effect of advancing religion: "[I]t does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[241] Justice O'Connor concluded that this "carefully constrained program" cannot reasonably be viewed as an endorsement of religion.[242]

In dissent, four Justices argued that the Establishment Clause prohibits the state from subsidizing religion directly or from acting in any way that would reasonably be viewed as religious endorsement.[243] The Court has followed this

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234. *Id.*
235. 509 U.S. 1 (1993).
236. *Agostini*, 117 S. Ct. at 2012.
237. *Id.* at 2013.
238. *Id.* at 2014.
239. *Id.*
240. *Id.* at 2016.
241. *Id.*
242. *Id.*
243. *Id.* at 2019 (Souter, J., dissenting).

as an "unwavering rule" in Establishment Clause cases[244] and *Zobrest* did not alter this rule since individual students were applicants for the benefits and not the school itself.[245] The fact that Title I services are available to a broad group of beneficiaries is not a sufficient condition for an aid program to satisfy constitutional scrutiny.[246]

The immediate effect of *Agostini* is to eliminate the millions of dollars spent on noneducational costs required to comply with the 1985 decisions. Although not required to do so,[247] school districts may now send public-salaried teachers into church-run schools to provide remedial educational services. It is unlikely, however, that the decision will affect other Establishment Clause rulings, such as the proscription of organized prayers in public schools. Since the 1960's, the Supreme Court has closely adhered to the principle that prayer in the public schools is prohibited by the Establishment Clause, regardless of whether students deliver the prayer, and regardless of whether the prayer ceremony is voluntary.[248] As recently as 1992, the Court held that the Establishment Clause outlaws the practice of public schools inviting clergy to deliver non-sectarian prayers at graduation ceremonies. In *Lee v. Weisman*,[249] Justice Kennedy found that graduation prayers "bore the imprint of the State and thus put school-age children who objected in an untenable position."[250] He emphasized the heightened concern with "protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[251]

In *Tanford v. Brand*,[252] the Seventh Circuit ruled that these concerns do not apply in a university setting. In *Tanford*, the court rejected claims made by an Indiana University law school professor and some of his students that the invocation and benediction delivered at Indiana University's commencement ceremonies violated the Establishment Clause. The court emphasized that "there was no coercion—real or otherwise—to participate" and that the special concerns

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244. *Id.* at 2020.

245. *Id.* at 2024.

246. *Id.* at 2025.

247. K.R. by M.R. v. Anderson Community Sch. Corp., 125 F.3d 1017, 1019 (7th Cir. 1997) (the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1491o (1994), does not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students; school board's decision to provide speech therapy, occupational therapy and physical therapy at a public school site while the plaintiff attended parochial school satisfied the statutory obligation and neither infringed on K.R.'s right to fully exercise her religious choice nor convey any message of governmental endorsement or disapproval of K.R.'s religion).

248. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (invalidating the practice of having students read passages from the Bible); Engel v. Vitale, 370 U.S. 421, 431 (1962) (striking down voluntary prayer).

249. 505 U.S. 577 (1992).

250. *Id.* at 590.

251. *Id.* at 592.

252. 104 F.3d 982 (7th Cir.), *cert. denied*, 118 S. Ct. 60 (1997).

underlying the Court's decision in *Lee* were entirely absent.[253] The court reasoned that "peer pressure is unlikely to dissuade collage graduates from protesting . . . thousands of graduates chose not to attend the stadium morning ceremony and that non-adherents could dissent without being noticed."[254] Further, the fact that the practice of invocation and benediction was 155 years old and was widespread throughout the nation suggested that this was simply an acknowledgement that such prayers solemnize public occasions, rather than an endorsement of any particular religious beliefs.[255] The benediction did not have the primary effect of endorsing or disapproving religion, nor did it cause excessive entanglement between church and state simply because the university selected the cleric and instructed the cleric that the remarks should be "unifying and uplifting."[256] Any entanglement was "*de minimis* at best."[257]

In contrast to the university setting, the special concern with religious indoctrination at the elementary and second school levels played a significant role in *Helland v. South Bend Community School Corp.*[258] The court upheld Helland's removal from a list of those eligible for substitute teaching positions in part because he interjected religious-oriented materials in the classroom—proselytizing by reading the Bible aloud, distributing biblical pamphlets, and professing his belief in the biblical version of creation.[259] Helland argued he was unlawfully dismissed because of his religious beliefs contrary to Title VII of the Civil Rights Act of 1964,[260] which bars religious discrimination in employment, and the Religious Freedom Restoration Act, discussed in the next section.[261] Applying the general principle that a school can direct a teacher to refrain from expressions of religious viewpoints in the classroom, the court held that the school corporation in fact has a compelling interest to ensure that subsidized teachers do not inculcate religion: "the Constitution requires governmental agencies to see that state-supported activity is not used for religious indoctrination. . . . [T]olerating Helland's behavior would have opened up another constitutional can of worms."[262]

Although the expression of public school teachers may be restricted, another Seventh Circuit case demonstrates that students' speech cannot be suppressed or discriminated against solely because of its religious content. In *Muller by Muller v. Jefferson Lighthouse School*,[263] the trial court issued an injunction requiring that the school allow fourth-grader Andrew Muller to hand out during school

253. *Id.* at 985.
254. *Id.*
255. *Id.*
256. *Id.* at 986.
257. *Id.*
258. 93 F.3d 327 (7th Cir. 1996).
259. *Id.* at 329.
260. 42 U.S.C. § 2000 (1994).
261. *See infra* notes 272-91 and accompanying text.
262. *Helland*, 93 F.3d at 331.
263. 98 F.3d 1530 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1335 (1997).

invitations to a religious meeting to be held at his church.[264] On appeal, the Seventh Circuit agreed with the plaintiffs that any attempt to justify the restriction on speech as necessary to prevent entanglement with religion was specious: "The Supreme Court has . . . rejected the view that, in order to avoid the perception of sponsorship, a school may suppress religious speech."[265] Although educators may restrict speech if such is contrary to the educational mission or is disruptive or injurious to the rights of other students, it may not single out students' speech solely because it is religious.[266]

Outside the school context, the Seventh Circuit addressed the somewhat unique Establishment Clause claims brought by a government employee against her boss. In *Venters v. Delphi*,[267] the plaintiff argued that the Establishment Clause is violated where a supervisor coerces an employee to submit to "religious dialogues by means of intimidation."[268] The employee, a radio dispatcher, alleged that the police chief had "virtually from his first day in office pressured her to bring her thinking and her conduct into conformity with the principles of his own religious beliefs . . . ."[269] Eight months later, the employee was dismissed for alleged performance deficiencies. The Seventh Circuit reversed a summary judgment ruling in favor of the employer, concluding that the chief's conduct would violate the Establishment Clause even if he ultimately fired the plaintiff for legitimate reasons.[270] The court also reasoned that the Free Exercise Clause shielded the employee from "being compelled to submit herself to the religious scrutiny of her superior," even if she could not show how she was injured in the exercise of her own religious beliefs.[271]

2. Free Exercise of Religion.—The most important development regarding the free exercise of religion was the Supreme Court's invalidation of the Religious Freedom Restoration Act (RFRA).[272] Congress enacted this law in 1993 in direct response to the Supreme Court's decision in *Employment Division v. Smith*,[273] which held that a state may enforce laws of general applicability even where such laws infringe upon the free exercise of religion provided such laws

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264. *Id.* at 1534.

265. *Id.* at 1543-44.

266. *Id. Cf.* Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth., 100 F.3d 1287, 1299 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1822 (1997) (county building authority's enactment of content-neutral regulation which barred all private displays in lobby of county building was reasonable in light of the purposes of the building lobby and did not violate the First Amendment rights of the Lubavitch even if such was passed in response to their request to display a five-foot high, wooden Menorah as they had been permitted to do in previous years).

267. 123 F.3d 956 (7th Cir. 1997).

268. *Id.* at 970.

269. *Id.*

270. *Id.*

271. *Id.* at 971.

272. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (1994)).

273. 494 U.S. 872 (1990).

are rational.[274] In *Smith*, the Court rejected the claim by members of the Native American Church that their free exercise right was unconstitutionally burdened by an Oregon statute that criminalized the use of the hallucinogenic drug peyote, which is ingested sacramentally.[275] Prior to *Smith*, laws which substantially burdened religious freedom were subject to a much stricter analysis: states had to show an overriding interest that would be significantly impaired by granting religious exemption.[276] To restore this analysis, RFRA prohibited government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden furthers a compelling interest and is the least restrictive means of furthering that interest.[277]

In *City of Boerne v. Flores*,[278] the Court ruled 6 to 3 that Congress cannot assert its own definition of constitutional liberties or make substantive changes in constitutional protections. The Court acknowledged both that Section 5 of the Fourteenth Amendment gives Congress the power "to enforce, by appropriate legislation, the provisions of this article," and that laws which deter or remedy constitutional violations fall within this enforcement power even if Congress prohibits conduct which is not itself unconstitutional.[279] However, the Court also admonished Congress that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[280] The Court drew a distinction between the power to enforce, which is generally described as "remedial," and the power to determine what constitutes a constitutional violation. While conceding that the line between remedying and making substantive changes is "not easy to discern," the judiciary must look to the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" in order to determine whether Congress has exceeded its power.[281]

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274. *Id.* at 879; *see also* Muller by Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1543-44 (7th Cir. 1996) (although speech cannot be suppressed or discriminated against solely because it is religious, provision of school district's code which governed distribution of non-school sponsored material by public elementary students did not implicate the Establishment Clause since the regulations applied to religious and non-religious distributions alike); Grossbaum v. Indianapolis-Marion County Bldg. Auth., 100 F.3d 1287, 1298 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1822 (1997) (county regulation that barred all private displays in lobby of county building which was non-public forum was permitted even if enacted in response to religious group's injunction against enforcement of prior regulation since motive is irrelevant for purposes of First Amendment analysis provided government enacts a content-neutral rule).

275. *Smith*, 494 U.S. at 877-78.

276. *See generally* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

277. 42 U.S.C. § 2000bb-1 (1994).

278. 117 S. Ct. 2157 (1997).

279. *Id.* at 2165.

280. *Id.* at 2164.

281. *Id.*

Applying this standard, the Court held that RFRA was not a proper exercise of Congress' remedial or preventive power. First, RFRA's legislative record did not show any recent history of laws of general application "passed because of religious bigotry."[282] Further, RFRA was so out of proportion to a supposed remedial or preventive object that it could not be understood as responsive to any unconstitutional behavior: it had no termination date; it imposed a strict compelling interest/least restrictive means test, which was a considerable congressional intrusion into the states' traditional authority to regulate for the health and safety of their citizens; and the statute's "least restrictive means" requirement was not even imposed under pre-*Smith* jurisprudence that RFRA purportedly codified.[283]

Justice O'Connor, in dissent, did not challenge the Court's exposition on congressional power. Rather, she argued that *Smith* was wrongly decided and that the parties should have been asked to brief the question of whether *Smith* should be overturned.[284] Justices Souter and Breyer joined O'Connor in suggesting that *Smith* was wrongly decided and should be re-examined.[285]

The thrust of the majority's opinion is, in essence, a reaffirmation of the Supreme Court's 1803 holding that it is "the province and duty of the judicial department to say what the law is."[286] Congress in enacting RFRA specifically stated that it did so because the Court had misconstrued the First Amendment's guarantee of the free exercise of religion. If Congress could make a substantive change in constitutional protections, the Constitution would no longer be "'superior paramount law, unchangeable by ordinary means;'" instead, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[287]

The most immediate impact of the Court's ruling is to alter the analysis in literally hundreds of cases, many of which have been brought by prison inmates raising RFRA challenges to dress and grooming requirements and demanding their religious-based right to dietary and other accommodations. For example, in *Craddick v. Duckworth*,[288] a Native American inmate challenged a state prison regulation prohibiting him from wearing a medicine bag. The court ruled that the regulation violated RFRA because the state could not demonstrate a compelling interest or that the denial was the least restrictive means of furthering its interest in enhanced prison security since there was no showing that medicine bags posed a genuine threat to prison security.[289] Although even under RFRA the majority

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282. *Id.* at 2169.

283. *Id.* at 2169-71.

284. *Id.* at 2176 (O'Connor, J., dissenting).

285. *Id.* at 2185-86 (Souter, Breyer, JJ., dissenting).

286. Marbury v. Madison, 5 U.S. 137, 177 (1803). The Court refers to *Marbury* to support its holding, 117 S. Ct. at 2172.

287. *City of Boerne*, 117 S. Ct. at 2168 (citing *Marbury*, 5 U.S. at 177).

288. 113 F.3d 83 (7th Cir. 1997).

289. *Id.* at 85; *see also* Sasnett v. Sullivan, 91 F.3d 1018, 1023 (7th Cir. 1996), *cert. granted*,

of these claims were rejected due to overriding prison security concerns,[290] now that RFRA has been invalidated, prison officials can readily meet the rational basis analysis imposed under *Smith*. Facially neutral, generally applicable dress codes and grooming requirements will likely be found to serve the legitimate government interest in prison security.[291]

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117 S. Ct. 2502 (1997) (judgment vacated and remanded for reconsideration in light of Boerne v. Flores, 117 S. Ct. 2157 (1997)) (once a prisoner has shown a substantial burden, the burden of justification is on the state; prison failed to justify flat ban on wearing jewelry as applied to religious crucifixes). *Cf.* Harless by Harless v. Darr, 937 F. Supp. 1339, 1347 (S.D. Ind. 1996) (school policy on distribution of materials did not substantially burden first grade students' free exercise of religion in violation of RFRA, and thus heightened scrutiny was not triggered).

290. O'Leary v. Mack, 80 F.3d 1175, 1180 (7th Cir. 1996), *cert. granted*, 118 S. Ct. 36 (1997) (judgment vacated in light of *Boerne*) (under RFRA prison officials do not have to do "handsprings" to accommodate religious needs of inmates, and prison officials had compelling interest in maintaining prison order that justified their denial of prisoner's request to hold banquet to celebrate birthday of their founder in view of evidence that there were approximately 300 different religious sects at the prison and that communal eating was a standard rite for many of those sects).

291. Note that even before *Smith*, the Supreme Court in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), had ruled that state prison policies need only be reasonably related to legitimate penological objectives to override free exercise claims brought by inmates. Without RFRA, *O'Lone* again becomes the standard.