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 Article examines state constitutional law cases, while the remaining materials focus on state and federal court cases that raise significant and recurring federal constitutional issues.

I. DEVELOPMENTS UNDER THE STATE CONSTITUTION

Several years ago Chief Justice Randall T. Shepard invited Indiana practitioners to re-examine the state constitution as a potential source for the protection of civil liberties.[1] On the other hand, the court has emphasized that challenged statutes will be given every reasonable presumption of constitutionality and that the challenger carries a heavy burden of proof.[2] In general, the Indiana Supreme Court has explained that it will take an historical/originalist approach in interpreting the state constitution: "Questions arising under the Indiana Constitution are to be resolved by 'examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our Constitution, and case law interpreting the specific provisions.'"[3] Thus, any analysis should begin with an

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

2. *See, e.g.*, Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994) (finding that the requirement of the Privileges and Immunities Clause, article 1, section 23 of the Indiana Constitution, are independent of those imposed by the Fourteenth Amendment to the U.S. Constitution).

3. Ratliff v. Cohn, 693 N.E.2d 530, 534 (Ind. 1998) (quoting Boehm v. Town of St. John,

examination of the text, the history from the State Constitutional Convention, as well as early decisions interpreting the state constitution.[4] As to the "purpose and structure," the court has emphasized that the drafters of the Indiana Constitution were staunch believers in Jacksonian democracy, i.e., limited government and protection of inalienable rights.[5]

In many instances this constitutional analysis may reveal that the rights protected under the state constitution are no broader than those protected under the federal constitution. For example, in *Ratliff v. Cohn*,[6] the court held that in general, article I, section 16 provides no greater protection against cruel and unusual punishment than does the Eighth Amendment, which contains the same language.[7] Similarly, in *Ajabu v. State*,[8] the Indiana Supreme Court noted that "the common interwoven history" regarding the federal and state guarantee of a privilege against self-incrimination supports the conclusion that these provisions "protect the same bundle of rights and the same constitutional values."[9] The court did caution, however, that past reliance on federal case law in construing section 14 of the state constitution "does not preclude formulation of an independent standard for analyzing state constitutional claims."[10] Based on the text, history, and case precedent the court nonetheless concluded that a murder defendant's waiver of his right against self-incrimination was knowing and voluntary even though he was unaware that an attorney retained by the defendant's father had attempted to halt police interrogation of the defendant

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675 N.E.2d 318, 321 (Ind. 1996)).

4. *See id.* at 534-35.

5. *See, e.g.*, Price v. State, 622 N.E.2d 954, 962 (Ind. 1993) (arguing that populous, anti-government Jacksonian democrats triggered the constitutional revision from which our current document emerged).

6. 693 N.E.2d 530 (Ind. 1998).

7. *Id.* at 543-44. *Ratliff*, which raised several state constitutional challenges, was discussed in last year's survey Article. *See* Rosalie Berger Levinson, *State and Federal Constitutional Law Developments*, 31 IND. L. REV. 501 (1998).

8. 693 N.E.2d 921 (Ind. 1998).

9. *Id.* at 929. *See also* Carter v. State, 692 N.E.2d 464 (Ind. Ct. App. 1998) (noting that Indiana has adopted the federal *Terry* rationale in determining the legality of an investigatory stop under section 11 of the state constitution, which similarly protects against an unreasonable search or seizure). Note, however, that the Indiana Supreme Court held in *Moran v. State*, 644 N.E.2d 536 (Ind. 1994), that section 11 requires a somewhat different analysis than that used under the Fourth Amendment. Whereas the federal constitution focuses on a victim's reasonable expectations of privacy, the *Moran* court ruled that section 11 requires the focus be solely on the reasonableness of the officer's conduct. *Id.* at 540-41. Nonetheless, the court concluded in that case that a police officer's warrantless search of curbside trash was reasonable because it did not involve a trespass and it did not create a disturbance, and thus evidence seized from the search of trash containers on the streets was admissible. *Id.* at 541. *Compare* Newby v. State, 701 N.E.2d 593, 602 (Ind. Ct. App. 1998) (holding that Indiana's statutory good faith exception to the exclusionary rule which tracks the federal rule does not violate section 11).

10. *Ajabu*, 693 N.E.2d at 929.

until he could be present.[11]

The Indiana Supreme Court has emphasized that a party wishing to rely upon the state constitution must develop a separate historical analysis. Thus, in *Valentin v. State*,[12] it reversed an appellate court decision that relied on the state double jeopardy provision because it found that the defendant's brief only invoked the federal double jeopardy clause and failed to appropriately raise and develop a separate state constitutional argument.[13] The brief did not explain why the state constitution provided protection different from that found in the federal constitution. However, the Indiana Supreme Court has been asked to grant a petition to transfer in *Richardson v. State*[14] where the defendant contended that the state double jeopardy standard is more strict than that found in the federal constitution.[15]

Further, even where the state constitution is given an independent interpretation, in many cases the end result remains the same because the state provision in reality is no more protective than the federal provision—only the analysis has changed.[16] Cases discussed in the next section illustrate this principle.

Indiana's "Equal Privileges and Immunities" Clause provides that "the 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."[17] In 1994, the Indiana Supreme Court in *Collins v. Day*,[18] held that federal equal protection analysis does not apply to article I, section 23 of the Indiana Constitution. Looking to the text of the provision, the expressed purpose and intent of the framers, and early decisions interpreting this section, the court concluded that section 23 requires: (1) that disparate treatment be reasonably related to inherent characteristics that distinguish the unequally treated classes, and (2) that the preferential treatment be uniformly applicable and equally available to all persons similarly situated.[19] The court emphasized, however, that substantial deference must be given to legislative judgment, which should be invalidated only "'where the lines drawn appear arbitrarily or manifestly unreasonable.'"[20] Applying this analysis, the court sustained an Indiana statute

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11. *Id.* at 930-31.

12. 688 N.E.2d 412 (Ind. 1997).

13. *Id.* at 413. *See also* Thorpe v. State, 695 N.E.2d 967, 968 (Ind. Ct. App. 1998) (finding that defendant failed to preserve a state constitutional double jeopardy argument where he did not argue at trial or on appeal that state constitution provided different or greater protections than that found in the federal Constitution).

14. 687 N.E.2d 241 (Ind. Ct. App. 1997), *trans. pending*. *See* Jenkins v. State, 695 N.E.2d 158, 161 (Ind. Ct. App. 1998).

15. *Id.* at 242-43.

16. Moran v. State, 644 N.E.2d 536, 541 (Ind. 1994).

17. IND. CONST. art. I, § 23.

18. 644 N.E.2d 72, 80-81 (Ind. 1994).

19. *Id*. at 80.

20. *Id.* (quoting Chaffin v. Nicosia, 310 N.E.2d 867, 869 (Ind. 1974)).

that excluded agricultural employers from worker's compensation coverage because the plaintiffs could not carry their burden "to negative every reasonable basis for the classification."[21]

Most attempts by Indiana litigants to invalidate state legislative enactments under section 23 have been unsuccessful because of the highly deferential approach set forth by the Indiana Supreme Court in *Collins*. For example, in *Indiana High School Athletic Ass'n v. Carlberg*,[22] the court sustained an Indiana High School Athletic Association ("IHSAA") Transfer Rule that gives students who change residence with their parents immediate full varsity eligibility at a new school, while denying eligibility during the first 365 days following a transfer by students who move without their parents. The court emphasized that analysis under section 23 will generally be limited to determining whether a rule has a reasonable basis.[23] It found that the distinctions were reasonably related to the goal of deterring athletically motivated transfers.[24] Although conceding that some transfers might not be impermissibly motivated, the court accepted the IHSAA position that it could not afford to investigate each transfer individually.[25] Further, the harsh effect of the rule was tempered somewhat by allowing participation at the junior varsity level.[26] Thus, when examining the deterrent value of the rule, the availability of limited eligibility, and the prohibitive cost of monitoring the motives of every transfer, the court concluded that the rule was neither arbitrary nor manifestly unreasonable and thus did not violate the Privileges and Immunities Clause.[27]

In addition, the court rejected the plaintiff's claim under article I, section 12 of the Indiana Constitution, which guarantees that a remedy "by due course of law" is available to anyone "'for injury done to him in his person, property or reputation.'"[28] The court first stated that the analysis under section 12 parallels that of the federal Due Process Clause.[29] A predicate to an analysis under either provision is a determination that a claimant has a protectible property or liberty interest. The court first noted that it was unlikely that Carlberg had any protectible interest in participating in varsity athletics.[30] Further, even if such an

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21. *Id*. at 81.

22. 694 N.E.2d 222 (Ind. 1997).

23. *Id.* at 240.

24. *Id.*

25. *Id.* at 233.

26. *See id.* at 240.

27. *Id. See also* Chamberlain v. Parks, 692 N.E.2d 1380 (Ind. Ct. App. 1998) (finding that Wrongful Death Statute that allows recovery only by those financially dependent on deceased does not violate section 23 because disparate treatment is rationally related to the state's goal of assisting those financially dependent upon the deceased, and the privilege is available to all who share the inherent characteristic of financial dependency, and suffer a pecuniary loss upon the decedent's death).

28. *Carlberg*, 694 N.E.2d at 241 (quoting IND. CONST. art. I, § 12).

29. *Id.*

30. *Id.* at 241 n.26.

interest can be implied, e.g., that athletic participation may lead to athletic scholarships, the court concluded that Carlberg was not denied the procedure that he was due because the IHSAA rules provide for an appeal and Carlberg in fact was granted a hearing before the IHSAA executive committee at which he presented witnesses and exhibits.[31]

Despite this highly deferential approach under both sections 23 and 12, two appellate courts have ruled that the statute of limitations in Indiana's Medical Malpractice Act violates these provisions. In *Martin v. Richey*,[32] the plaintiffs successfully challenged the medical malpractice statute of limitations, which provides that the statute begins to run upon the occurrence of the alleged negligence rather than at the time the negligence is discovered, contrary to the general tort statute of limitations.[33] The court reasoned that the different treatment of medical malpractice victims from other tort victims who enjoy a discovery-based statute of limitations violates section 23.[34] It admitted that the scheme is "reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs"[35] and that judges are to accord considerable deference to legislative judgments.[36] The court nonetheless concluded that injured victims who lose their claim prior to the time they even become aware of or discover the malpractice are being treated unequally: "[T]he medical malpractice statute of limitations creates an unequal burden on victims of medical negligence, thereby implicitly granting a special privilege or immunity

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31. *Id.* at 241. The court also concluded that decisions of the IHSAA constitute "state action" for purposes of federal constitutional review. *Id.* at 229. However, it determined that there is no fundamental right to participate in interscholastic sports that is entitled to heightened protection under the federal Equal Protection or Due Process Clauses. *Id.* at 242. Thus, scrutiny of IHSAA decisions under federal law will be limited to whether they have a rational basis. The court proceeded to overrule *Sturrup v. Mahan*, 305 N.E.2d 877 (Ind. 1974), which invalidated an IHSAA decision on grounds that the rule was overbroad under federal equal protection analysis. The court correctly noted that overbreadth is not part of federal equal protection analysis in the absence of a fundamental right or suspect class. *Id.* at 239. Finally, the court ruled that the IHSAA will be treated as a government agency whose decisions are subject to judicial review under the common law. *Id.* at 231. A rule or decision of the IHSAA will, however, be overruled only if it is found to be arbitrary and capricious—where it is "willful and unreasonable or without some basis which would lead a reasonable and honest person to the same conclusion." *Id.* at 233 (quoting Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000, 1007 (Ind. 1989)). Further, when member schools, rather than students, challenge a rule, the court will not interfere absent a showing of "fraud, other illegality, or abuse of civil or property rights having their origin elsewhere." *Id.* at 230 (citing Indiana High Sch. Athletic Ass'n v. Reyes, 694 N.E.2d 249, 256-57 (Ind. 1997)). As to the latter, it held that courts should not interfere in a school's dispute with a voluntary association of which it is a member unless it meets this higher standard. *Id.*

32. 674 N.E.2d 1015 (Ind. Ct. App. 1997), *trans. granted*, 698 N.E.2d 1192 (Ind. 1998).

33. *Id.* at 1018.

34. *Id.* at 1022.

35. *Id.*

36. *Id.* at 1021.

to victims of other torts."[37] Thus, the statute failed the second prong of *Collins*, which mandates that a classification be open to all persons who share the same inherent characteristics.[38]

As to the section 12 challenge, the court ruled that the purpose of this provision was to recognize the right of access to courts and the right to a complete tort remedy.[39] Further, section 12 emphasizes that "'[j]ustice shall be administered freely . . . completely, and without denial.'"[40] 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."[41] Acknowledging the long line of cases that had previously sustained Indiana's medical malpractice law against similar constitutional challenge, the court reasoned that because of the substantial scholarly analysis that had emerged in recent years, it was not bound by these earlier decisions.[42]

A second appellate court, in *Harris v. Raymond*,[43] adopted the reasoning and holding of *Martin* as to both constitutional claims. A third court, however, rejected both rulings. In *Johnson v. Gupta*,[44] Judge Staton reasoned that there is no vested property right in a remedy for a cause of action which has not accrued until after the limitations period has passed.[45] Further, the Indiana Supreme Court previously ruled that, "the legislature has the power to modify or restrict common law rights and remedies in cases involving personal injury."[46] Because the Indiana legislature made a reasoned policy decision to ensure the availability of malpractice insurance for Indiana doctors and medical services for Indiana residents, there was no reason to abandon established precedent under section 12.[47] Further, as to the section 23 equal privileges claim, the plaintiff's status as a patient-victim and "the fact that injuries arose from a breach of duty owed by a health care provider," are distinguishing characteristics which justify disparate treatment in light of the financial uncertainties in the health care industry.[48] The court held that the second prong of *Collins* is satisfied in that all persons within the class of malpractice claimants are being treated the same. All

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37. *Id*. at 1022. Article I, section 12 requires that every person who is injured "shall have remedy by due course of law." IND. CONST. art. I, § 12.

38. *See Martin*, 647 N.E.2d at 1022.

39. *Id.* at 1024.

40. *Id.* at 1025 (quoting IND. CONST. art I, § 12).

41. *Id.*

42. *Id*. at 1026.

43. 680 N.E.2d 551 (Ind. Ct. App. 1997) (finding that occurrence-based two-year statute of limitations was unconstitutional), *trans. granted*, 698 N.E.2d 1192 (Ind. 1998).

44. 682 N.E.2d 827 (Ind. Ct. App. 1997) (finding that two-year occurrence-based statute of limitations did not violate the state constitution), *trans. granted*, 698 N.E.2d 1192 (Ind. 1998).

45. *Id.* at 830.

46. *Id.* (citing State v. Rendleman, 603 N.E.2d 1333, 1336 (Ind. 1992)).

47. *See id.*

48. *Id.* at 831.

malpractice victims have the same two years from the date of occurrence to file a claim, even though some may not discover the malpractice within this two-year period.[49]

The Indiana Supreme Court has agreed to resolve this conflict among the appellate courts and its ruling will have significant impact not only on medical malpractice statutes of limitations but on other statutes as well.[50] The Indiana Supreme Court's recent analysis in *Carlberg*[51] suggests the Court will not readily invalidate legislative judgments. The court specifically ruled in *Carlberg* that the Indiana Due Course of Law Clause provides no greater protection than the Due Process Clause of the Fourteenth Amendment, which, in general, has been used to invalidate government action only if it is arbitrary, capricious, and conscience-shocking, as will be discussed in the next section.[52] As to the section 23 analysis, the court in *Carlberg* emphasized the "substantial deference due the enactment" and the plaintiff's burden to "negative every reasonable basis" for the legislative judgment.[53] In short, the plaintiffs in *Martin* face an uphill battle.

A second area where the Indiana Supreme Court has strayed from federal constitution analysis in interpreting a parallel state provision involves free speech rights under article I, section 9 of the Indiana Constitution. That provision broadly guarantees free expression, but also provides that speakers may be held accountable "for abuse of that right."[54] In 1993, the Indiana Supreme Court in *Price v. State*,[55] held that political speech is a "core value" embodied in section 9, which the government may not materially burden.[56] It ruled that punishing political speech, even in the context of resisting arrest, is proscribed by section 9 unless the speech inflicts harm upon others "analogous to that which would sustain tort liability against the speaker."[57] Four years later, a broadcast station sought to avail itself of the *Price* analysis when it resisted a criminal defendant's request to disclose unaired video footage.[58] In *In re WTHR-TV*,[59] the station argued that gathering and disseminating information about criminal proceedings is a "core constitutional value" and that compelled disclosure of unaired video footage "materially burdens" this core value.[60]

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49. *See id.*

50. *See, e.g.*, McIntosh v. Melroe Co., 682 N.E.2d 822 (Ind. Ct. App. 1997) (presenting similar constitutional challenges under sections 12 and 23 to 10-year statute of repose in Indiana Product Liability Act), *trans. granted*, 698 N.E.2d 1193 (Ind. 1998).

51. Indiana High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222 (Ind. 1997). *See supra* notes 22-31 and accompanying text.

52. *Carlberg*, 694 N.E.2d at 241.

53. *Id*. at 239-40.

54. IND CONST. art. I, § 9.

55. 622 N.E.2d 954 (Ind. 1993).

56. *Id.* at 963.

57. *Id.* at 964.

58. *In re* WTHR-TV, 693 N.E.2d 1 (Ind. 1998).

59. *Id.*

60. *Id.* at 14.

The Indiana Supreme Court assumed without deciding that a material burden on newsgathering could establish a state constitutional violation.[61] It held nonetheless that the "discovery demand does not rise to the level required to establish a Section 9 violation."[62] Disclosure of the requested tape would not directly restrain any newsgathering activities: "[I]t is not reasonably apparent that requiring the press to comply with discovery requests has produced or will produce a chilling effect on the flow of information."[63] Compliance would not "amount to anything more than a slight imposition on the media, and no impairment at all of their ability to report the news."[64] Thus, litigants seeking to invoke a *Price* analysis must demonstrate both that the government is interfering with a core value and that the government's action materially burdens that value.[65] Where a core value is not implicated, the Indiana Supreme Court has adopted a mere rational basis analysis.[66]

Finally, Indiana law has differed from federal law in the area of libel. The United States Supreme Court in *New York Times v. Sullivan*[67] 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 to recover damages.[68] The Court reasoned that the "central meaning" of the First Amendment guarantees the right of citizens to criticize their government.[69] Thus, unless the government official proves that the statement was made with knowledge that it was false, or with reckless disregard of whether it was false or not, there could be no recovery.[70] The Court expanded *Sullivan* to include defamation directed at non-elected public officials[71] and private sector public figures,[72] 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

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61. *Id*. at 15.

62. *Id.* at 16.

63. *Id.*

64. *Id.*

65. Like the First Amendment, Indiana courts have ruled that section 9 applies only to government action and not that of private citizens. *See, e.g.*, Right Reason Publications v. Silva, 691 N.E.2d 1347, 1349-50 (Ind. Ct. App. 1998).

66. *See* Whittington v. State, 669 N.E.2d 1363 (Ind. 1996). Two Justices, concurring in the *Whittington* judgment, expressed concern with the court's "all or nothing" approach to section 9 analysis, i.e., political speech is "enshrined" in article I, section 9, while other forms of speech are provided little, if any, protection under a rational basis analysis. *Id.* at 1371-72 (Sullivan, J., concurring in the result; Dickson, J., dissenting and concurring in the result). Note, too, that the majority in *Whittington* narrowly construed the concept of political speech to be limited to speech which purpose is to comment on government action. *Id.* at 1370.

67. 376 U.S. 254 (1976).

68. *Id.* at 279-80.

69. *Id.* at 274-80.

70. *Id.* at 279-80.

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

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

Rosenbloom v. Metromedia, Inc.,[73] suggested that the actual malice privilege for speech would be extended to all matters of public interest.[74]

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 were weightier, such plaintiffs should be permitted to recover upon a showing of mere negligence.[75] In *Gertz v. Robert Welch, Inc.*,[76] the Court, in a 5-4 opinion, found that private plaintiffs deserved greater protection and should not be held to the actual malice standard.[77] The Court reasoned that the private figure does not voluntarily enter the vortex of public controversy or debate, like public figures or public officials.[78] Further, the private plaintiff lacks the means of self-help access to the media available to the public victim.[79] 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.[80] Further, while compensatory damages may be available based on a finding of negligence, the actual malice standard must still be met to recover punitive damages.[81]

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.[82] Favoring the *Rosenbloom* analysis, in *Aafco Heating & Air Conditioning Co. v. Northwest Publications*, the court held that private individuals who bring a libel action involving an event of general or public interest must prove that the defamatory falsehood was published with actual malice.[83] In 1990, another Indiana appellate court panel reiterated the rule that section 9 requires that interchange of ideas on all matters of public or general interest be unimpaired.[84] In short, section 9 creates a constitutional privilege

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73. 403 U.S. 29 (1971).

74. *Id.* at 52.

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

76. *Id.*

77. *Id.* at 343-44.

78. *Id.* at 344-45.

79. *See id.* at 344.

80. *Id.* at 346-48.

81. *Id.* at 349-50.

82. *See* Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 1974).

83. *Id.* at 586.

84. *See* Near Eastside Community Org. v. Hair, 555 N.E.2d 1324 (Ind. Ct. App. 1990); *see also* Chang v. Michiana Telecasting Corp., 900 F.2d 1085, 1087 (7th Cir. 1990) ("No Indiana court has disagreed with *Aafco*, and four years ago we took *Aafco* to be the established law in Indiana."); Moore v. University of Notre Dame, 968 F. Supp. 1330 (N.D. Ind. 1997) (holding that because Indiana law provides that 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 a university was a public figure or private individual; further,

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.*,[85] 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 establishment in Indianapolis.[86] At trial, the jury had awarded significant damages ($985,000), but the appellate court determined that the record would not support a finding of actual malice.[87] 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."[88] 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.[89]

Although the evidence suggested that the newspaper fell below reasonable journalistic standards, and violated its own policy, this alone does not constitute actual malice.[90] The Indiana Supreme Court, which has never ruled on the issue, has granted transfer 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.[91]

II. FEDERAL CONSTITUTIONAL LAW

A. Federalism

One of the most significant trends in the Supreme Court is its growing sensitivity to federalism, i.e., the need to maintain a proper balance between state

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coach failed to establish actual malice on the part of the defendants as required to establish liability).

85. 672 N.E.2d 969 (Ind. Ct. App. 1996), *trans. granted*, 690 N.E.2d 1183 (Ind. 1997).

86. *Id.* at 972.

87. *Id.*

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

89. *Id.* at 973.

90. *See id.*

91. Other than Indiana, 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, 15 (D. Alaska 1979); Diversified Management v. Denver Post, 653 P.2d 1103, 1106 (Colo. 1982); Sisler v. Gannett Co., 516 A.2d 1083, 1095 (N.J. 1986), *aff'd on reh'g*, 536 A.2d 299 (N.J. Super. Ct. App. Div. 1987).

and federal power. The concern for states' rights, as embodied in the Tenth and Eleventh Amendments to the Constitution, is reflected in several recent decisions addressing Congress' power under the Commerce Clause. In *Printz v. United States*,[92] the Court held that Congress exceeded its power in passing the Brady Handgun Act, which commanded the states' chief law enforcement officers to search records to ascertain whether a person could lawfully purchase a handgun. The Court reasoned that the history and structure of the Constitution prohibit Congress from compelling state executive officers to enforce a federal regulatory program.[93]

In *United States v. Lopez*,[94] it ruled that Congress exceeded its power in passing a federal criminal statute prohibiting the possession of a firearm within 1000 feet of a school. Congress had not made clear findings demonstrating that the regulated activity substantially affected interstate commerce.[95] Additionally, the Court stressed that the criminal statute had nothing to do with commerce, nor was possession of firearms in any way connected with a commercial transaction.[96] Further, the statute lacked a jurisdictional element that would require prosecutors to demonstrate a link to commerce on a case-by-case basis,[97] and the statute governed areas historically left to states, namely criminal law enforcement and education.[98]

The concern for states' rights is also apparent in a series of decisions invoking the states' Eleventh Amendment protection from suit in federal court. In *Seminole Tribe of Florida v. Florida*,[99] the Supreme Court held that Congress lacks the power to abrogate the Eleventh Amendment when it acts under the Commerce Clause, and thus Florida could not be subjected to suit in federal court.[100] In *Idaho v. Coeur d'Alene Tribe of Idaho*,[101] the Court held that a federal court may not hear an action against state officers for injunctive and declaratory relief when such relief requires adjudication of a state's title and will deprive the state of all practical benefits of ownership of disputed waters and submerged lands.[102] This was the first time since 1908 that the Supreme Court disallowed a suit for injunctive relief as opposed to damages against a state entity in a federal court.[103]

In addition, the Supreme Court has questioned Congress' power to limit state sovereignty even when it invokes section 5 of the Fourteenth Amendment, which

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92. 117 S. Ct. 2365 (1997).
93. *Id.* at 2369-84.
94. 514 U.S. 549 (1995).
95. *See id.* at 562-63.
96. *Id.* at 561.
97. *See id.* at 562.
98. *See id.* at 564.
99. 517 U.S. 44 (1996).
100. *Id.* at 72-73.
101. 521 U.S. 261 (1997).
102. *Id.* at 287-88.
103. *Id.* at 266.

allows Congress to enact legislation to enforce the Equal Protection and Due Process Clauses.[104] Unlike the Commerce Clause, this amendment was intended to alter the balance of power and restrict state authority.[105] Nonetheless, the Supreme Court in *City of Boerne v. Flores*,[106] held that Congress had exceeded its power. In *City of Boerne* the Supreme Court struck down the Religious Freedom Restoration Act of 1993 ("RFRA"),[107] reasoning that Congress went beyond merely enforcing the substantive right to religious liberty guaranteed by the Fourteenth Amendment; rather, Congress had created new substantive rights.[108] Although in part the Court obviously was flexing its judicial muscle as the branch of government with final authority to interpret the Constitution, it also opined that Congress had violated state sovereignty by requiring states to justify by an overriding interest any law that had an adverse impact on some religious practice.[109]

The ramifications of these decisions is clearly being felt in the lower courts. In *Mueller v. Thompson*,[110] the Seventh Circuit joined the First, Fourth, Sixth, Eighth, and Tenth Circuits in holding that the Eleventh Amendment bars suits against a state employer in federal court under the Fair Labor Standards Act ("FLSA"), which was enacted under Congress' power to regulate interstate commerce.[111] The court in *Mueller* further ruled that the State of Wisconsin did not waive this immunity by enacting legislation authorizing suits against state employers under state statutes addressing overtime pay.[112] The court noted that after *Seminole Tribe* "states will have to decide whether they want to allow

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104. Section 5 of the Fourteenth Amendment provides that Congress shall have the power to enforce the guarantees of the Fourteenth Amendment "by appropriate legislation." U.S. CONST. amend. XIV, § 5.

105. The Supreme Court ruled in the 1960s that section 5 is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). Chief Justice Rehnquist wrote in a 1976 decision that the principle of state sovereignty is

> necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment . . . . When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Justice Rehnquist cited the Fourteenth Amendment and observed that it "quite clearly contemplates limitations on [state] authority" and represents a "shift in the federal-state balance." *Id.* at 453-55.

106. 117 S. Ct. 2157 (1997).

107. 42 U.S.C. §§ 2000bb1-2000bb4 (1994).

108. For a discussion of RFRA, see *infra* notes 366-85 and accompanying text.

109. *City of Boerne*, 117 S. Ct. at 2169-71.

110. 133 F.3d 1063 (7th Cir. 1998).

111. *Id.* at 1064-66. *See* 29 U.S.C. §§ 201-19 (1994 & Supp. II 1996).

112. *Mueller*, 133 F.3d at 1064-65.

FLSA suits to be brought in federal as well as state court against them."[113] However, any waiver must be clear.

Thus far the state courts have also split on whether they must make their own courts available to hear these claims. The Maine Supreme Court has held that Congress cannot force state courts to entertain FLSA claims, thus in essence nullifying FLSA as to state employers.[114] However, the Arkansas Supreme Court has ruled that Congress exercising its Commerce Clause power may subject an unconsenting state to suit for monetary relief in its own state courts even when it cannot validly subject the state to such suit in a federal forum.[115] The Supreme Court will review this question during the 1998-99 Term.[116]

In *Velasquez v. Frapwell*,[117] the Seventh Circuit held that Indiana University, a state employer, could not be sued in federal court under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"),[118] which prohibits discrimination in employment against members of the armed forces and authorizes private suits for damages and injunctive relief against the employer—including a state employer. The court initially found that Congress was exercising its war powers under Article I when it enacted this provision.[119] Relying on *Seminole Tribe*, the court reasoned that when Congress exercises power under any provision of Article I, it may not abrogate the states' Eleventh Amendment immunity.[120]

In addition, the court concluded that Congress could not be deemed to have enacted USERRA under section 5 of the Fourteenth Amendment and that, even if Congress had explicitly relied on section 5, its attempt to do so would be barred by the Supreme Court's decision in *City of Boerne*.[121] The authorization in this federal statute for private lawsuits in federal court against state employers could not be sustained as an exercise of congressional power under the Fourteenth Amendment, which must be adapted to remedying wrongs targeted by that Amendment. The statute's main purpose was to encourage people to join the armed forces reserves, not to combat any invidious discrimination against members of the armed services.[122] This was "at most a distinctly secondary purpose of [USERRA]," too remote from the policies and objectives of the Equal Protection Clause to invoke section 5.[123] Thus, this lawsuit could not be maintained in federal court against Indiana University, an instrumentality of the

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113. *Id.* at 1066.
114. Alden v. Maine, 715 A.2d 172 (Me.), *cert. granted* 119 S. Ct. 443 (1998).
115. Arkansas Dep't of Educ. v. Jacoby, 962 S.W.2d 773 (Ark. 1998), *request for cert. pend'g*.
116. Alden v. Maine, 715 A.2d 172 (Me.), *cert. granted*, 119 S. Ct. 443 (1998).
117. 160 F.3d 389 (7th Cir. 1998), *vacated in part*, 165 F.3d 593 (7th Cir. 1999).
118. 38 U.S.C. §§ 4301-33 (1994 & Supp. II 1995).
119. *Velasquez*, 160 F.3d at 392.
120. *Id.* at 393.
121. *Id.* at 391.
122. *See id*. at 392.
123. *Id.*

state, because of the Eleventh Amendment barrier.[124] The court later learned that on the day before it rendered its opinion, Congress amended USERRA to confer jurisdiction only on state courts over suits against a state employer.[125] As a result, the court vacated its opinion and reaffirmed dismissal on grounds that it lacked jurisdiction over the USERRA claim.[126]

The state sovereignty defense did not fare as well in other cases. For example, the Seventh Circuit in *United States v. Black*,[127] ruled that the Child Support Recovery Act ("CSRA"),[128] which regulates non-payment of interstate child support obligations, was a valid exercise of Congress' power under the Commerce Clause. Distinguishing *Lopez*, the court reasoned that the CSRA addresses only non-payment of interstate child support obligations and thus it regulates something in interstate commerce: "[A] parent's intentional failure to pay child support constitutes a conscious impediment to interstate commerce that Congress can criminalize."[129] Further, the legislative history addressed the problem of interstate enforcement of child support and the bill was designed solely to target interstate cases: "Congress made express findings that collecting child support from out-of-state parents has grown beyond the States' enforcement capabilities."[130] Because this was a valid exercise of Congress' power, the court also rejected the purported Tenth Amendment claim that the CSRA violated the states' traditional authority over matters concerning domestic relations and enforcement of criminal laws.[131]

Similarly, in *Travis v. Reno*,[132] the Seventh Circuit sustained the federal Driver's Privacy Protection Act (the "Act"), which restricts the disclosure of personal information that states maintain in drivers' records.[133] The district court had ruled that the Act violated the Tenth Amendment because it required the states to administer and enforce a detailed federal program.[134] Although conceding that the Act would force states to alter the way they handled requests for information, the appellate court reasoned that the Act affected states only as owners of data, not as sovereigns. Recognizing that numerous federal statutes impose record-keeping requirements on state government, the court explained that "the anti-commandeering rule comes into play only when the federal government calls on the states to use their sovereign powers as regulators of their citizens."[135] It rejected the Fourth Circuit's broader interpretation of *Printz* that

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124. *See id.*
125. 165 F.3d 593 (7th Cir. 1999).
126. *See id.* at 594.
127. 125 F.3d 454 (7th Cir. 1997).
128. 18 U.S.C. § 228 (1994 & Supp. III 1997).
129. *Black*, 125 F.3d at 460.
130. *Id.* at 462.
131. *Id.* at 462-63.
132. 163 F.3d 1000 (7th Cir. 1998).
133. *See* 18 U.S.C. §§ 2721-25 (1994 & Supp. III 1997).
134. 12 F. Supp. 2d 921 (W.D. Wis. 1998).
135. *Travis*, 163 F.3d at 1004-05.

would restrict Congress to regulating states only through laws of general applicability.[136]

Similarly, in *Gillispie v. City of Indianapolis*,[137] the district court rejected state sovereignty claims and sustained the Lautenberg Amendment to the Gun Control Act of 1968,[138] which prohibits a person who has been convicted in any court of a misdemeanor claim of domestic violence from owning a firearm. The Lautenberg Amendment applies to law enforcement officers and it was invoked by the Indianapolis Police Department to terminate a police officer who pled guilty to a misdemeanor battery offense involving his ex-wife. The court ruled that this section does not invade state sovereignty in violation of the Tenth Amendment.[139] It has only an ancillary effect on the employment of state and local law enforcement officers and it does not force states to administer and enforce a federal regulatory program, as was the case in *Printz*.[140] Further, the amendment was held to be a proper exercise of Congress' power under the Commerce Clause because, unlike the statute in *Printz*, the law contained an express requirement that the prosecution prove the firearm in question was shipped or transported in interstate commerce.[141] This "jurisdictional nexus" defeats the Commerce Clause challenge.[142]

The Seventh Circuit also overrode Eleventh Amendment state sovereignty defenses by invoking the congressional abrogation doctrine. In *Goshtasby v. Board of Trustees*,[143] the court held that Congress validly exercised its power under section 5 of the Fourteenth Amendment in applying the Age Discrimination in Employment Act ("ADEA")[144] to state employers. The court reasoned that the 1974 amendment to the ADEA's definition of employer to include state and local government was a clear expression of Congress' intent to override state sovereignty.[145] Further, although Congress did not state explicitly that it was acting under section 5 when it amended the ADEA, the court ruled that the legislature need not recite the constitutional basis for its enactment in order to effect a valid exercise of power.[146] Distinguishing *City of Boerne*, the court reasoned that RFRA was a statute "'so out of proportion to the problems

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136. *Id.* at 1006. In *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), the Fourth Circuit held this Act exceeded Congress' authority under the Commerce Clause.

137. 13 F. Supp. 2d 811 (S.D. Ind. 1998).

138. 18 U.S.C. § 922(g)(9) (1994).

139. *Gillispie*, 13 F. Supp. 2d at 819-21.

140. *Id.* at 820.

141. *Id.* at 822.

142. *See id. Compare* Fraternal Order of Police v. United States, 152 F.3d 998 (D.C. Cir.), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998) (holding that this statute violates the Equal Protection Clause because it imposes a federal firearms disability on persons convicted of domestic misdemeanors, but not domestic violence felonies—a distinction without any rational justification).

143. 141 F.3d 761 (7th Cir. 1998).

144. 29 U.S.C. §§ 621-34 (1994 & Supp. III 1997).

145. *Goshtasby*, 141 F.3d at 766.

146. *Id.* at 768.

which it identified that the Act could not be viewed as enforcing the provisions of the Fourteenth Amendment.'"[147] In contrast, the ADEA is not out of proportion to the problem that it addresses—the act is supported by legislative findings of intentional discrimination against workers because of their age. The court explained that "[t]he critical question remains whether the act remedies constitutional violations or whether it imposes new substantive constitutional rights through legislation."[148] The ADEA falls within the former category. Finally, the fact that age is not a "suspect classification" does not foreclose Congress from enforcing the Equal Protection Clause through a statute that protects against arbitrary and invidious age discrimination.[149] On the other hand, the Eighth and Eleventh Circuits have ruled that because Congress did not clearly express its intent to abrogate immunity in enacting the ADEA, state employers may not be sued in federal court.[150] The Supreme Court will resolve the circuit dispute during the 1998-99 Term.[151]

The Seventh Circuit followed the *Goshtasby* analysis in *Varner v. Illinois State University*,[152] holding that "magic words" are unnecessary where the intent to abrogate is clear.[153] Thus, the 1974 amendments to the Fair Labor Standards Act, which authorized employees to sue public agencies in federal court for Equal Pay Act ("EPA") violations, sufficiently demonstrates intent to abrogate state immunity.[154] The court rejected the state university's argument that the legislative history demonstrated Congress' reliance on the Commerce Clause, rather than section 5 of the Fourteenth Amendment; instead it found the legislative history to be "murky."[155] As to the *City of Boerne* question, the court ruled that the purpose of the EPA was to prohibit arbitrary, discriminatory government conduct, and thus it is a valid exercise of congressional power to enforce the equal protection guarantee of the Fourteenth Amendment.[156] In the

147. *Id.* at 769 (quoting City of Boerne v. Flores, 117 S. Ct. 2157, 2170 (1997)).

148. *Id.*

149. *See id.* at 770. *Accord* Keeton v. University of Nev. Sys., 150 F.3d 1055, 1057 (9th Cir. 1998) (citing cases from several circuits reaching this same conclusion).

150. Kimel v. State of Fla. Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998) (finding that because there is no unequivocal expression of an intent to abrogate immunity in the ADEA, nor is there a plain statement that state employers may be sued in federal court under this provision, states may not be sued by private citizens in federal court for age discrimination), *cert. granted*, 119 S. Ct. 901 (1999)); Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822 (8th Cir. 1998) (holding that ADEA amendments did not clearly indicate Congress' intent to abrogate and they were not enacted pursuant to the Fourteenth Amendment).

151. *See Kimel*, 119 S. Ct. at 901 (granting cert.).

152. 150 F.3d 706 (7th Cir. 1998).

153. *Id.* at 712-13.

154. *Id.* at 710.

155. *Id.* at 714.

156. *Id.* at 714-17. Although the EPA reaches gender-based wage disparity even where such is unintentional, whereas the Equal Protection Clause has been interpreted to require proof of discriminatory intent, this does not indicate that the EPA is substantive legislation beyond the scope

same vein, the Seventh Circuit has determined that the Americans with Disabilities Act ("ADA")[157] was lawfully enacted under section 5 of the Fourteenth Amendment and, therefore, abrogates any Eleventh Amendment defense to suit in federal court.[158]

B. Procedural and Substantive Due Process

As in past years, several litigants claimed their procedural due process rights were violated. The Supreme Court applies a two-prong analysis, requiring that a plaintiff initially identify a property or liberty interest. Assuming this burden is met, the Court then balances the competing interests to determine whether sufficient procedural safeguards have been afforded. As to the latter step, the Court balances (a) the private interest affected; (b) the risk of erroneous deprivation and the value of additional procedural safeguards; and (c) the government's interests.[159]

In *Family & Social Services Administration v. Jones*,[160] the court ruled that a licensed childcare provider had a property interest in a childcare license because the statutory qualifications were objective, leaving little discretion to the issuing agency. The holder had a legitimate claim of entitlement and, therefore, a property interest in the license.[161] Further, the court ruled that the administrative hearing held in connection with the proceeding to suspend the license, during which the provider was not given the opportunity to challenge the underlying allegations of abuse, did not comport with due process.[162] The court reasoned that the administrative law judge essentially ignored any evidence which tended to show that the allegations of abuse had not occurred.[163]

Similarly in *Alston v. King*[164] the Seventh Circuit upheld the district court's

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of section 5 enforcement powers. *City of Boerne* itself recognized that section 5 remedial legislation may prohibit conduct that is not itself unconstitutional if there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne v. Flores, 117 S. Ct. 2157, 2159 (1997). In *Varner*, significant congressional findings demonstrated that pervasive wage discrimination existed between men and women, and the EPA was reasonably tailored to remedy that problem. *Varner*, 150 F.3d at 716. *Accord* Ussery v. Louisiana, 150 F.3d 431, 435 (5th Cir. 1998) (citing cases from several circuits finding that Congress clearly stated in the EPA its intent to abrogate the states' Eleventh Amendment immunity), *cert. denied*, 119 S. Ct. 1161 (1999).

157. 42 U.S.C. §§ 225, 12101-213 (1994 & Supp. II 1996).

158. Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997). *Accord* Autio v. AFSCME, Local 3139, 157 F.3d 1141 (8th Cir. 1998); Clark v. California, 123 F.3d 1267 (9th Cir. 1997).

159. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

160. 691 N.E.2d 1354 (Ind. Ct. App. 1998).

161. *Id.* at 1356.

162. *Id.* at 1357.

163. *Id.*

164. 157 F.3d 1113 (7th Cir. 1998).

ruling that termination of a city employee without a meaningful pretermination hearing violates due process.[165] Although the City argued that the employee's threats to shut off the water supply to City Hall justified immediate action, the district court properly determined that "the City's asserted interest could have been accomplished through suspension rather than termination."[166] A suspension, rather than the ultimate sanction of termination, was constitutionally required until the employee was afforded a hearing.[167]

Most Indiana litigants, however, did not fare as well in bringing their procedural due process cases. Some failed to meet the threshold question of establishing a property interest. In *Moulton v. Vigo County*,[168] Moulton claimed he had a protected property interest in his job at the county area plan department. The court examined Indiana Code section 36-7-4-312(5) and concluded that it "did not specify a term of employment for employees of the Plan department, nor [did] it establish that employees could be removed only for cause."[169] The county's policy of giving plan commission members a pre-termination hearing did not establish that the plaintiff had a property right in his job, and there was no evidence in the record demonstrating that the commission promulgated any county termination policies.[170]

In other cases, a protected property interest was found, but the court determined that the procedural safeguards were adequate. For example, in *Tweedal v. Fritz*,[171] the court rejected procedural due process claims brought by a teacher suspended from school and allegedly constructively discharged for making inappropriate sexual comments to a student. The teacher was initially suspended with pay until a hearing could be held, where he was given an opportunity to respond to his accusers.[172] Although conceding that the teacher's interest in protecting his reputation was substantial, the court noted that "the government's interest in protecting children from a teacher's sexual misconduct is urgent and extreme."[173] Further, the suspension with pay was based on

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165. *Id.* at 1117.

166. *Id.* ("in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay") (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 544-45 (1985)). *See also* Staples v. City of Milwaukee, 142 F.3d 383, 386 (7th Cir. 1998) (holding that contemporaneous rather than advance notice given during a hearing convened for an entirely different purpose fails to satisfy *Loudermill*).

167. *See Alston*, 157 F.3d at 1117. On the other hand, the court ruled that the jury was improperly instructed that it could award damages for the termination rather than for the consequences of being denied a hearing before termination, and thus the award of damages was reversed. *Id.* at 1118.

168. 150 F.3d 801 (7th Cir. 1998).

169. *Id.* at 805.

170. *Id.*

171. 987 F. Supp. 1126 (S.D. Ind. 1997).

172. *Id.* at 1128.

173. *Id.* at 1133.

credible accusations and carried with it a low risk of erroneous deprivation.[174] In addition, post-deprivation remedies, which fully comported with due process standards, were available within a week after the suspension.[175]

In *Gagne v. Trustees of Indiana*,[176] a former law student sought judicial review of an administrative determination expelling him from the state university's law school. The court held that the procedure used to determine appropriate discipline for the student did not violate his due process rights. The student, who was accused of violating the Code of Ethics, received all the process that he was due—notice, a hearing, and an opportunity to respond, explain, and defend.[177] Although the court noted that due process requires that the university base an expulsion on substantial evidence, the court also found that the university was not required to follow the same legal formalities as state-wide administrative bodies in taking evidence.[178] The court ruled that for school expulsion, due process requires only an informal give-and-take between the student and the disciplinarian, where the student is given an opportunity to explain his version of the facts.[179] Gagne was given that opportunity and in fact, his attorney made opening and closing statements and presented witnesses on Gagne's behalf, and Gagne also spoke at length explaining his reasons for enclosing false statements on his application for admission and resume for employment.[180]

The U.S. Supreme Court has recognized that the Due Process Clause[181] also contains a substantive component that bars arbitrary, wrongful conduct. Where the government interferes with a fundamental right, the Court has demanded that the conduct meet a strict scrutiny standard. The government action must be narrowly tailored to support a compelling interest. Where no fundamental right is identified, however, the Court generally has been very reluctant to find a substantive due process violation, requiring the plaintiff to demonstrate that the government has acted in a truly "conscience-shocking" fashion before it will intervene.

This all-or-nothing approach to substantive due process was questioned in

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174. *Id.* at 1132. The court relied on the Supreme Court's decision in *Gilbert v. Homar*, 117 S. Ct. 1807 (1997), sustaining immediate suspension of a university police officer following his arrest on drug-related charges, despite early precedent suggesting that some minimal pre-deprivation process, i.e., notice and an opportunity to respond, is normally required in the employment context. *Tweedal*, 987 F.Supp. at 1133-34.

175. *Id.* at 1133.

176. 692 N.E.2d 489 (Ind. Ct. App. 1998).

177. *See id.* at 493.

178. *Id.* at 493-94.

179. *Id.* at 493.

180. *Id.* at 493-94. *See also* Zimmerman v. Tippecanoe Sheriff's Dep't, 25 F. Supp. 2d 915 (N.D. Ind. 1998) (finding that inmate who claimed defendant removed material from his incoming mail could not pursue procedural due process claim because Indiana law provides an adequate remedy for deprivation of property by municipal officials).

181. U.S. CONST. amend. XIV.

Sightes v. Barker.[182] A grandmother, who was the mother of a child's biological father, petitioned to establish visitation under Indiana's Grandparent Visitation Act.[183] The mother and her new husband moved to dismiss the petition, alleging 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 alleged infringement must be examined to determine the constitutionality of the statute.[184] The court reasoned that allowing grandparent visitation over parents' objection did not unconstitutionally impinge upon the integrity of the adoptive family because visitation could only be granted following the filing of a verified petition, a hearing, and an entry of a decree supported by findings that this would best serve the interests of the child.[185] Further, the court noted that even if strict scrutiny was applied, the state had a compelling interest in protecting the best interests of the child and in maintaining the right of association of grandparents and their grandchildren.[186]

Associational rights have also been raised by defendants challenging Illinois' loitering ordinance. The Supreme Court has agreed to review the constitutionality of a Chicago ordinance that authorizes the arrest of persons who have disobeyed a police order to move on, when the officer has reasonable cause to believe that the group of loiterers includes a member of a criminal street gang. In *City of Chicago v. Morales*,[187] the Illinois Supreme Court found that the ordinance unreasonably infringed upon the personal liberty of being able to freely walk streets and associate with others and, therefore, violated substantive due process.[188]

In general, the United States Supreme Court has shown a great reluctance to intervene under the somewhat amorphous substantive due process provision, or to find that the conduct of government officials meets the stringent conscience-shocking standard. The Court has frequently voiced concern for constitutionalizing everyday torts, which should be left to state law.[189] Indeed the only area where the conscience of the Justices appears to have been "shocked" is in the area of excessive punitive damage awards. In *BMW of North America,*

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182. 684 N.E.2d 224 (Ind. Ct. App. 1997).

183. IND. CODE §§ 31-17-5-1 to -10 (1998).

184. *Sightes*, 684 N.E.2d at 229.

185. *Id.* at 230-31.

186. *Id.* at 233.

187. 687 N.E.2d 53 (Ill.), *cert. granted*, 118 S. Ct. 1510 (1998).

188. *Id.* at 65. *Compare* Klein v. State, 698 N.E.2d 296 (Ind. 1998) (upholding Indiana's Criminal Gang Activity statute, which defines a criminal gang as a group that promotes, sponsors, assists in, or participates in a felony. The law was not unconstitutionally vague or overbroad, even as amended to exclude a previous requirement that the gang mandate commission of a felony as a condition of membership. The statute did not criminalize mere status of gang membership, but applied only to criminal associations that are not protected by the First Amendment.).

189. *See* Paul v. Davis, 424 U.S. 693, 699 (1976).

Inc. v. Gore,[190] the Supreme Court held that a $2 million punitive damages award was grossly excessive and exceeded constitutional limits.[191] The Court outlined three criteria that should be examined in determining whether punitive damage awards should be deemed excessive: (1) the reprehensibility of the conduct, in particular whether only economic harm is involved; (2) the relation between compensatory and punitive damages; and (3) the relation of the damages to other civil remedies authorized or imposed in comparable cases.[192] Both federal and state courts in Indiana appear to be applying the *BMW* factors in assessing constitutional challenges to punitive damage awards.[193]

Outside the area of punitive damages, litigants face an uphill battle in establishing a substantive due process violation. In *County of Sacramento v. Lewis*,[194] the Supreme Court reviewed the conduct of a deputy sheriff who conducted a high-speed chase of two boys on a motorcycle when they failed to obey another officer's command to stop. In violation of departmental policy, the deputy continued the pursuit at speeds of up to 100 miles-per-hour in a residential area. The chase ended seventy-five seconds after it began when the motorcycle overturned and the deputy's vehicle skidded into the boy who was riding on the back of the motorcycle, killing him.[195]

Addressing the substantive due process standard, the Supreme Court noted that "the cognizable level of abuse of executive power [is] that which shocks the conscience."[196] The Ninth Circuit held that the deputy had acted with deliberate indifference to the boys' safety and thus his conduct met the "shocks the conscience" standard.[197] Reversing the appellate court, the Supreme Court reasoned that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another . . . ."[198] Thus, while the Court in *Revere*

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190. 517 U.S. 559 (1996).

191. *Id.* at 585.

192. *Id.* at 574-75.

193. *See* Michigan Mut. Ins. Co. v. Sports, Inc., 698 N.E.2d 834 (Ind. Ct. App. 1998) (finding that punitive damages award of $1 million against a property insurer for bad faith denial of coverage for a fire loss was not so excessive as to violate due process; although award was nearly fourteen times greater than compensatory damages award, insurer acted intentionally and left purchaser financially vulnerable to both economic and non-economic harm and the award was only five times greater than the statutory civil fine that might have been imposed). *Compare* Schimizzi v. Illinois Farmers Ins. Co., 928 F. Supp. 760 (N.D. Ind. 1996) (finding that $600,000 award was excessive because the defendant's tortious conduct did not consist of reckless disregard for health and safety; further, disparity between actual and punitive damages was great—thirteen times actual damages, and award was disproportionate as compared to criminal and civil penalties imposed under Indiana law).

194. 118 S. Ct. 1708 (1998).

195. *See id.* at 1712.

196. *Id.* at 1717.

197. *See id.* at 1712-13.

198. *Id.* at 1718.

Massachusetts v. Massachusetts General Hospital[199] used a deliberate indifference standard in determining the constitutional adequacy of medical care provided to pre-trial detainees, in *Whitley v. Albers*,[200] it held that in the context of correction officers' actions during a prison riot a standard of *purposeful harm* is necessary.[201] The *Lewis* Court explained that since deliberate indifference implies the opportunity for actual deliberation, it should not be applied to prison guards or police officers who face a situation calling for fast action where competing factors must be weighed in haste and under pressure.[202] Thus, the Court determined that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment . . . ."[203] Because the plaintiff in *Lewis* did not allege that the deputy acted with "intent to harm," the lawsuit failed to meet the shocks the conscience test and thus had to be dismissed.[204]

Lewis establishes that a "shocks the conscience" standard must be met to make out a substantive due process case alleging abuse of executive power.[205] More specifically, it clarifies that a police officer does not violate substantive due process by causing death through deliberate or reckless indifference to life in a high-speed auto chase aimed at apprehending a suspected offender because under such circumstances actual deliberation is impossible and thus "a purpose to cause harm" must be proven.[206] On the other hand, where there is time for deliberation a deliberate indifference standard may be appropriate. Applying the lessons of *Lewis*, the Seventh Circuit in *Armstrong v. Squadrito*[207] ruled that a sheriff's conduct in holding a detainee for 57 days pursuant to a civil body attachment warrant, without an appearance before a magistrate, shocks the judicial conscience and is, therefore, actionable under the substantive due process clause.[208] The court explained that in the prison context forethought about an inmate's welfare is feasible and in fact is constitutionally required, and thus deliberate indifference is the appropriate standard.[209] The court first determined

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199. 463 U.S. 239 (1983).

200. 475 U.S. 312 (1986).

201. *Id.* at 320-21.

202. *Lewis*, 118 S. Ct. at 1719-20.

203. *Id.* at 1720.

204. *See id.* at 1721. In *Mays v. City of East St. Louis*, 123 F.3d 999 (7th Cir. 1997), the court flatly rejected *any* substantive due process challenge to a police officer's high-speed pursuit of a vehicle resulting in injury: "This nation's social and legal traditions do not give [automobile] passengers a legal right . . . to have police officers protect them by letting criminals escape." *Id.* at 1003. This same approach is reflected in the concurring opinion of Justices Scalia and Thomas in *Lewis*. They argued that the plaintiff's claim lacked any historical or textual support as a constitutional cause of action. *Lewis*, 118 S. Ct. at 1724 (Scalia, J., concurring in judgment only).

205. *Lewis*, 118 S. Ct. at 1716.

206. *Id.* at 1720.

207. 152 F.3d 564 (7th Cir. 1998).

208. *Id.* at 582.

209. *Id.* at 576-77.

that prolonged detention, even pursuant to a valid arrest, implicates a protected interest under substantive due process.[210] Although Indiana's body attachment statute does not itself create a substantive due process right, the procedures set forth in the law are relevant in assessing whether lack of prompt appearance offends federal due process.[211] Because under Indiana law a sheriff has exceedingly limited authority pursuant to a writ of attachment and is required to bring an arrestee immediately before the Circuit Court, the prolonged detention "represents an affront to substantive due process."[212] The court determined that Allen County's failure to ensure that arrestees be promptly brought before a magistrate demonstrated deliberate indifference to the rights of those arrested with a civil warrant.[213] At minimum, the plaintiff presented facts establishing that the jail had a policy or custom of refusing to accept complaint forms from detainees requesting information on their status.[214] In short, the court concluded that what happened to Walter Armstrong "shocks the conscience."[215]

Other questions remain unanswered regarding when tortious conduct rises to the level of a *constitutional tort*.[216] Of particular difficulty are cases involving misconduct by private parties where the injured plaintiff accuses the government of failing to act to prevent harm. For example, in *Stevens v. Umsted*,[217] the court rejected claims brought by a child who was repeatedly sexually assaulted by another student at the Illinois School for the Visually Impaired, even after the superintendent was put on notice of the assault. The court reasoned that the state did not take the child into custody, did not confine him against his will, and did not create the danger or render him more vulnerable to an existing danger.[218] Following Supreme Court precedent, the Seventh Circuit ruled that "'[i]naction

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210. *Id.* at 573.

211. *See id.* at 575.

212. *Id.* at 576.

213. *Id.* at 579.

214. *Id. Compare* Tesch v. County of Green Lake, 157 F.3d 465, 475-76 (7th Cir. 1998) (finding that although deliberate indifference is the appropriate standard for substantive due process claims alleging failure to attend to handicapped pre-trial detainee's physical and medical needs, district court properly granted summary judgment under the facts of the case; the plaintiff presented no evidence suggesting that jail officials knew placing him in a cell that provided limited access to toilet and sink and no access to a shower for a 44-hour period would cause him any harm).

215. *Armstrong*, 152 F.3d at 582.

216. One question that has been fairly well resolved in this circuit is that deprivations of property, rather than liberty, ordinarily will not be actionable at all on a substantive due process theory, at least where state remedies are available. Thus, in *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699, 704 (7th Cir. 1998), the court rejected plaintiff's claim that the government acted in an arbitrary and capricious fashion in denying him a building permit. Because federal courts should not be viewed as "zoning boards of appeal," a plaintiff must allege that some other substantive constitutional right has been violated or that state remedies are inadequate to survive dismissal for failure to state a claim. *See id.*

217. 131 F.3d 697, 701-06 (7th Cir. 1997).

218. *Id.* at 704-06.

by the state in the face of a known danger is not enough to trigger the obligation [to protect private citizens from each other].'"[219] The superintendent simply had no constitutional duty to protect the child. In contrast, the Supreme Court has ruled that where the state actually takes someone into custody, e.g., placing persons in its prisons or its mental institutions, there is a constitutional duty to guarantee conditions of reasonable care and safety.[220] Relying on this case precedent, the Indiana Supreme Court in *Ratliff v. Cohn*,[221] rejected the state's motion to dismiss a fourteen-year-old inmate's substantive due process claim that she had been subjected to hostility and threats by adult inmates and that she feared for her safety.[222]

C. Equal Protection

The Supreme Court in *Miller v. Albright*,[223] upheld the constitutionality of a federal statute that grants foreign-born children automatic citizenship status where the mother is a U.S. citizen, but that mandates proof of paternity by age eighteen where the father is a U.S. citizen. Miller was born out of wedlock in the Philippines to a Filipino national and an American citizen who was serving in the U.S. military at the time the child was conceived. The father never married the petitioner's mother and never returned to visit the child.[224] Although the father did later secure a paternity decree, he failed to do so before the child reached age eighteen as required by the federal statute. The father and petitioner then challenged the statute's different treatment of citizen fathers. After dismissing the father for lack of standing, both lower courts held against the petitioner.[225]

Six Justices rejected the equal protection challenge to the statute, but there was no majority opinion. Although this was the first gender-based statute to withstand constitutional challenge since the 1980s, only two Justices held that the law survived the fairly stringent standard mandating that government prove its classification scheme bears a fair and substantial relation to an important government interest.[226] Justice Stevens and Chief Justice Rehnquist reasoned that "biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born out of wedlock in foreign lands."[227] They contended that the statute was not a tainted product of "overbroad stereotypes."[228] Further, the

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219. *Id.* at 705 (quoting Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993) (alteration in original)).

220. Youngberg v. Romeo, 457 U.S. 307, 324 (1982).

221. 693 N.E.2d 530 (Ind. 1998).

222. *Id.* at 547.

223. 118 S. Ct. 1428 (1998).

224. *See id.* at 1433.

225. *See id.* at 1433-34.

226. *Id.* at 1440.

227. *Id.* at 1442.

228. *Id.* at 1437.

different treatment met the intermediate scrutiny applied in gender-bias suits because the government had an important interest in ensuring reliable proof of a biological relationship between a potential citizen and the citizen-parent.[229] Congress also had an important interest in encouraging the development of a healthy relationship between the two while the child is a minor.[230]

Justices Scalia and Thomas concurred for a wholly unrelated reason. They reasoned that the remedy sought, namely conferral of citizenship on a basis other than that proscribed by Congress, went beyond the powers of federal courts.[231] Taking yet another approach, Justices O'Connor and Kennedy concurred on grounds that the petitioner did not have standing to raise her father's gender discrimination claim and her own claims were subject only to rational basis analysis.[232] While rejecting Justice Stevens' conclusion that the provision withstands heightened scrutiny, Justice O'Connor concluded that the gender discrimination claim was not properly before the Court.[233]

Three Justices in dissent argued that this disparate treatment of fathers and mothers reinforced stereotypical, historic patterns and could not survive heightened scrutiny. Justice Ginsburg cited well established case precedent that a gender-neutral classification should be used where it can accomplish the government's goal.[234] Here the government can ensure that only children who have established at least minimal contact with the citizen-parent during their early and formative years will qualify for citizenship, without using a gender-based classification.[235] Justice Breyer opined that the statutory distinctions were based on a generalization that "mothers are significantly more likely than fathers to care for their children, or to develop caring relationships with their children."[236] Any concerns about false paternity claims were easily resolved by mandating inexpensive DNA testing that could prove paternity with certainty.[237]

Although the decision seems to fly in the face of recent Supreme Court cases mandating "an exceedingly persuasive" justification for gender-based distinctions,[238] it is uncertain how the Court would have ruled had the father remained a party to the action. Arguably, Justices O'Connor and Kennedy may have joined the three dissenters to reach the opposite conclusion. Indeed it is important to note that only two Justices justified the disparity based on the biological differences between the sexes. In fact, both Justices Breyer and Ginsburg cite to Justice O'Connor's concurring view that gender classifications based on stereotypes cannot survive heightened scrutiny. They conclude that a

229. *See id.* at 1438.
230. *See id.* at 1439.
231. *Id.* at 1446-48 (Scalia, J., concurring).
232. *Id.* at 1442-46 (O'Connor, J., concurring).
233. *Id.* at 1445.
234. *Id.* at 1454 (Ginsburg, J., dissenting).
235. *See id.*
236. *Id.* at 1461 (Breyer, J., dissenting).
237. *See id.* at 1462.
238. *See* United States v. Virginia, 518 U.S. 515, 531 (1996).

majority of the Court really does not share Justice Stevens' assessment of the law on the merits.[239]

D. Free Speech and Association Rights

1. Commercial Speech.—Since 1976, the Supreme Court has recognized that commercial speech falls within the umbrella of the First Amendment although it has never afforded commercial speech the full protection of non-commercial speech. Because commercial speech is protected only to the extent it conveys truthful information to consumers, the state may ban such speech if it is false, deceptive, or misleading, or if it concerns unlawful activity. Further, in *Central Hudson Gas & Electric v. Public Service Commission*,[240] the Court held that even truthful, non-misleading commercial speech may be subject to state regulation, provided the law directly and materially advances a substantial governmental interest in a manner no more extensive than necessary to serve that interest.[241]

In *Wallace v. Brown County Area Plan Commission*,[242] the court applied this four-prong analysis to sustain a town ordinance banning neon signs. The Wallaces, who installed a neon "OPEN" sign in the front of their restaurant, conceded that the ordinance sought to implement a substantial government interest, namely the interest of the town in aesthetics and safety.[243] As in most commercial speech cases, the dispute arose over "whether the ordinance directly advance[d] the interests of safety and aesthetics, and whether the ordinance reach[ed] further than necessary to accomplish those objectives."[244] The Wallaces complained "that the [t]own submitted no evidence to show that the neon sign create[d] a distraction to pedestrians and motorists or that the [t]own's aesthetic image [was] harmed by their sign."[245] At minimum, they contended a genuine issue of material fact existed on these points and thus the trial court erred in granting summary judgment in the town's favor.[246]

Rejecting these arguments, the court pointed to the law's preamble in which the plan commission asserted its concerns regarding public safety and welfare.[247] The sign ordinance had been enforced for over twenty-five years and during that time the town board had "consistently cited the unique scenic and architectural characteristics of the town and concerns for public safety as the reason for enacting the ordinance."[248] Finally, the court concluded that the law was not

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239. *Miller*, 118 S. Ct. at 1457-58 (Breyer, J., dissenting); *id.* at 1450 (Ginsburg, J., dissenting).

240. 447 U.S. 557 (1980).

241. *Id.* at 566.

242. 689 N.E.2d 491 (Ind. Ct. App. 1998).

243. *See id.* at 493.

244. *Id.*

245. *Id.*

246. *See id.*

247. *Id.* at 494.

248. *Id.*

more extensive than necessary, citing Supreme Court precedent that the "fit" between the restriction and the government interest need only be reasonable.[249] The town contended that because Nashville covers a geographically small area, it could not limit neon signs to any particular area. Further, no certain type of neon sign would be less distracting, whereas alternatives were open to the Wallaces, such as ground-lighted signs that would not adversely affect the aesthetic concerns of the community.[250]

A somewhat more complicated commercial speech issue was addressed in *Ad Craft, Inc. v. Board of Zoning Appeals*.[251] The Area Plan Commission of Evansville and Vanderburgh County (the "APC") had a sign ordinance, which required that a permit be obtained before a sign could be "erected" or "placed."[252] The plaintiffs in this case were simply altering the sign of their customer, a realty company, which, having merged with another company, directed Ad Craft to change the sign to reflect the new entity.[253] The court first rejected Ad Craft's argument that the sign ordinance did not even apply to alteration of an existing sign. Adopting the position of the Board of Zoning Appeals ("BZA"), the court held that the statute applied because when an existing sign is "altered" a different sign is "placed" or "erected" in its stead and thus a permit must first be secured.[254]

Addressing the constitutional issue, the court applied the *Central Hudson*[255] test and concluded that the permit application requirement directly advanced the governmental interests in aesthetics and traffic safety by "providing notice to the APC of sign changes that its investigators may otherwise miss."[256] The court further concluded that the ordinance reached no further than necessary to accomplish that interest. As to the latter, Ad Craft argued that the BZA was attempting to regulate the content of its speech, which, even as to less protected commercial speech, is generally impermissible.[257] The Supreme Court in *Central Hudson* cautioned that a government entity can regulate only certain non-communicative aspects of commercial expression for purposes such as aesthetics and traffic safety.[258] Further, in *44 Liquormart v. Rhode Island*,[259] the Court held that where government seeks to suppress truthful, non-misleading information for paternalistic reasons, e.g., it wants to stop the public from purchasing the item, the *Central Hudson* test must be applied with "special care."[260] In that case, the

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249. *Id*. (citing Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)).
250. *See id.*
251. 693 N.E.2d 110 (Ind. Ct. App. 1998).
252. *Id.* at 114.
253. *See id.* at 112.
254. *Id.* at 115.
255. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).
256. *Ad Craft*, 693 N.E.2d at 117.
257. *See id.* at 116-17.
258. *Central Hudson*, 447 U.S. at 563 n.5.
259. 517 U.S. 484 (1996).
260. *Id.* at 485-86, 504.

Supreme Court invalidated a statute that banned advertisement of retail liquor prices except at the place of sale.[261] In *Ad Craft*, the court found the BZA was not attempting to regulate the content of Ad Craft's speech. Even though it was a change in the message that triggered the ordinance, it was not the content of the message that concerned the APC. The APC wanted to ensure that the alteration of the sign did not affect the physical characteristics of the sign that had been allowed under a previously-obtained permit.[262] Because the purpose of the permit requirement was unrelated to content and was administered without reference to content, the court viewed this as a valid regulation of commercial speech.[263]

2. Free Speech and Association Rights of Government Employees.—The United States Supreme Court has held that the government cannot condition employment upon relinquishing First Amendment rights.[264] However, it has also recognized that speech rights of government employees are not the same as those of the public at large. Rather, courts must balance "the interests 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 . . . ."[265] In *Connick v. Myers*,[266] the Court refined the balancing test, clarifying that judges 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 directed judges to examine the form, content, and context of the speech, describing speech upon matters of public concern as "relating to any matter of political, social, or other concern to the community."[267] As to the balancing test, the Supreme Court explained in *Waters v. Churchill*,[268] that "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."[269]

In several cases, state and federal courts took a fairly liberal approach in finding that the speech in question was at least partially of public concern; however, they upheld imposing sanctions for the speech under the *Connick* balance. For example, in *Messman v. Helmke*,[270] the court held that a collective bargaining provision prohibiting city firefighters from participating in non-city firefighting organizations addressed a matter of public concern. The court

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261. *Id.* at 499-500.

262. *Ad Craft*, 693 N.E.2d at 117.

263. *Id.*

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

265. United States v. National Treasury Employees Union, 513 U.S. 454, 465-66 (1995) (citing Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

266. 461 U.S. 138 (1983).

267. *Id.* at 146.

268. 511 U.S. 661 (1994).

269. *Id.* at 675.

270. 133 F.3d 1042 (7th Cir. 1998).

acknowledged that associating with firefighting organizations in Ft. Wayne's surrounding communities had taken on "a political sheen," because associating with the volunteer fire departments supported the political goal of opposing annexation by Ft. Wayne of the surrounding communities.[271] Applying the *Connick* balance, however, the court determined that the firefighters' interest in participating in non-city firefighting organizations was outweighed by the city's interests in reducing off-duty injuries, avoiding conflicts in firefighters' duties, and minimizing liability for paid sick leave.[272] The court determined that interference with work, personnel relationships, or job performance detracts from the public employer's function and that avoiding such interference can be a strong state interest.[273] Relying on *United States v. National Treasury Employees Union*,[274] the firefighters argued that the interests propounded by the city were unsupported by any evidence and that the prohibition impermissibly singled out their off-duty firefighting activities when the same harm to the city's interests could result from many other off-duty occupations that were not prohibited.[275]

The court distinguished *National Treasury*, which involved a flat ban on 1.7 million federal employees from accepting honoraria from anyone for speaking on any topic regardless of how remote from their jobs. In that case, the Supreme Court concluded that the nexus between the government interest and the speech at issue was simply too tenuous to support the all-out ban on speech.[276] In contrast, the ban on off-duty firefighting was closely related to the harms Ft. Wayne wished to avoid. Further, this was not a blanket restriction on speech and the firefighters were still free to voice their support for the unannexed communities.[277] In short, the court concluded that the city's interest in efficiency and fiscal responsibility outweighed the firefighters' associational rights.

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271. *Id.* at 1045.

272. *Id.* at 1045-47. The court applied the balancing test, though noting that a question has been raised as to whether *Connick* is useful in cases involving freedom of association rather than free speech. *Id.* at 1046 n.3. On the same day this case was decided, the court ruled in *Balton v. City of Milwaukee*, 133 F.3d 1036, 1039-40 (7th Cir. 1998), that despite the split in the circuits, it will apply the *Connick* balancing test to a freedom of association claim. The *Balton* court concluded that retaliatory action taken against employees for failing to pay dues to an officers' association did not violate First Amendment rights where their disillusionment with the Chiefs Association had nothing to do with its political, social, or religious goals, but was based purely on issues of individual economic importance. *Id.* at 1040.

273. *Messman*, 133 F.3d at 1047.

274. 513 U.S. 454 (1995).

275. *See Messman*, 133 F.3d at 1047.

276. *See id.* (citing United States v. National Treasury Employees Union, 513 U.S. 454 (1995)).

277. *See id.* at 1047-48. The union's constitution prohibited advocacy, or membership in, other firefighting organizations, but the court concluded that the conduct of the union was not state action and there was no evidence supporting any type of joint action between Ft. Wayne's contract with its firefighters and the union's adoption of its constitution, which was enacted at least four years before the collective bargaining agreement provision came into being. *Id.* at 1044-45.

Similarly, in *Davidson v. City of Elkhart*,[278] the court ruled that even though a police officer's statements to the press regarding the department's ongoing investigation of a controversial shooting was of public concern, his termination for releasing the information without authorization did not violate the First Amendment.[279] The court determined, as a matter of law, that the disruptiveness of the officer's conduct, which "threatened to undermine the authority and credibility of both the Elkhart Police Department and the County Prosecutor's Office," by making it appear that the outcome of the investigation was predetermined, outweighed any value his speech might have had.[280]

Where political affiliation alone, unaccompanied by other forms of expression, is the basis for the adverse employment action, the Supreme Court has applied a different analysis. In *Elrod v. Burns*[281] and *Branti v. Finkel*,[282] the Court held that government officials may not discharge public employees for refusing to support a political party or its candidates unless political affiliation is a reasonably appropriate requirement for the job in question.[283] Once an employer has established that protected association was a motivating factor in the government's decision, the burden shifts to the government to prove that political affiliation is "an appropriate requirement for the effective performance" of the job in question.[284]

In *Nelms v. Modisett*,[285] a field investigator in the Consumer Protection Division ("CPD") of the office of the Indiana Attorney General claimed he was terminated because of his political affiliation some six months after a Democrat was elected Attorney General. The court held that Nelms did not even establish a *prima facie* case of politically-motivated discharge.[286] Nelms' superiors argued that they were reorganizing the CPD and found it necessary to reduce the role of field investigators, and the individual who was retained had more seniority and more exemplary work habits than Nelms.[287] Although Nelms cited a comment by one of his superiors that "you understand political realities," the court deemed this insufficient and generally stated that an employee cannot rely on speculation or opinions of non-decision-makers as proof that a firing was impermissibly

278. 696 N.E.2d 58 (Ind. Ct. App. 1998).

279. *Id.* at 62.

280. *Id. Compare* Lickiss v. Drexler, 141 F.3d 1220, 1222-23 (7th Cir. 1998) (finding that deputy sheriff who raised questions about the defendants' official investigation of the activity of another officer was addressing a matter of public concern; *Connick* balance weighed in favor of the employee, especially where plaintiff was not a confidential employee or policy-maker and had a duty to report the information to his superiors).

281. 427 U.S. 347 (1976).

282. 445 U.S. 507 (1980).

283. *Branti*, 445 U.S. at 518; *Elrod*, 427 U.S. at 349.

284. *Branti*, 445 U.S. at 518.

285. 153 F.3d 815 (7th Cir. 1998).

286. *Id.* at 819.

287. *See id.*

motivated by political affiliation.[288] In short, the defendants proffered a legitimate, nonpolitical reason for the termination, and the plaintiff did not present evidence casting doubt on that reason.

In a second case, *Kline v. Hughes*,[289] the court rejected the political patronage claim brought by a former deputy auditor. Looking to Indiana law, the court determined that the deputy county auditor performs all the official duties of the county auditor and thus plays a vital role in the implementation of the county auditor's policies.[290] Although Kline argued that she should be protected because the duties she actually performed as deputy auditor did not involve any policy-making discretion, Seventh Circuit case precedent makes it clear that the powers inherent in the office, rather than the duties performed by a particular officeholder, are controlling.[291] Thus, as a matter of law, her position was not protected by the First Amendment.

3. Free Speech Rights of the Media.—The U.S. Supreme Court, as well as lower federal and state courts, addressed questions related to freedom of the press. Although the First Amendment to the U.S. Constitution specifically guarantees freedom of the press, the Supreme Court has been reluctant to recognize any type of press privilege. Thus, in *Branzburg v. Hayes*,[292] the Court held that reporters called to testify before a grand jury do not enjoy a First Amendment privilege to refuse disclosure of confidential sources or information gathered in the course of reporting.[293] The Court reasoned that subjecting reporters, like private citizens, to subpoenas did not intrude upon speech, did not restrict what the press may publish, and did not mandate the press to publish anything that it preferred to withhold.[294] Despite the Supreme Court's pronouncement, several lower federal and state court decisions have recognized a "qualified" reporter's privilege based on Justice Powell's concurring opinion, which provided the crucial fifth vote rejecting the privilege.[295] Justice Powell urged a "proper balance" be struck between the interests of the press and the duty of all citizens to give evidence in criminal proceedings.[296] Some courts have interpreted this dictum to mandate some extraordinary showing of relevance and necessity before disclosure is compelled.[297]

In a case of first impression, the Indiana Supreme Court in *In re WTHR-TV*

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288. *Id.*

289. 131 F.3d 708 (7th Cir. 1997).

290. *Id.* at 710.

291. *See id.*

292. 408 U.S. 665 (1972).

293. *Id.* at 697.

294. *Id.* at 700-01.

295. *Id.* at 709 (Powell, J., concurring).

296. *Id*. at 709-10 (Powell, J., concurring).

297. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 13.03[30] n.34 (1994) (listing cases accepting a reporter's privilege). *See also In re* WTHR-TV, 693 N.E.2d 1, 12 n.11 (Ind. 1998) (citing cases accepting a reporter's privilege).

v. Cline,[298] rejected this line of cases, opining that those decisions construing *Branzburg* to recognize a qualified reporter's privilege misread the Supreme Court decision. In *Branzburg*, Justice Powell cautioned lower courts not to read *Branzburg* as eviscerating all First Amendment protection for newsgathering, yet he specifically rejected the qualified press privilege urged by four dissenting Justices.[299] The Indiana Supreme Court reasoned that nothing in Supreme Court precedent, nor any policy arguments, justified granting such a privilege.[300] It therefore rejected the station's claim that it could not be forced to disclose unaired video footage, which recorded an interview with a juvenile charged with murder. Relying upon the test adopted by those courts that had granted a qualified privilege, the station argued that the plaintiff should have to show the information was "clearly material and relevant" to her defense, that it was "critical to the fair determination" of her case, and that she had "exhausted all other sources for the same information."[301] Because this was precisely the protective standard rejected by the majority in *Branzburg*, the Indiana Supreme Court denied the station's position.[302]

More broadly, the court reasoned that First Amendment values do not compel recognition of a privilege. Since *Branzburg*, the press does not appear to have been chilled, notwithstanding the obligation of reporters to give evidence in criminal proceedings.[303] The court also rejected the notion that compelled disclosure of unaired footage might encourage prompt destruction of that data or that it would distract reporters and editors from doing their jobs. Although the court conceded that it might be possible to envision a situation in which compliance might be so time-consuming so as to undermine the ability to report the news, here the plaintiff sought only a copy of the full interview conducted with her while she was in police custody, and there was no reason to suppose that compliance would impose any significant burden.[304] In addition, because claims of abuse of the discovery process can be made on a case-by-case basis, the mere possibility of abuse does not justify blanket immunity from discovery: "Unless and until this horrible shows up at a real parade, we are unwilling to assume it as a basis for decision."[305] Thus, when information regarding a criminal case is demanded from a reporter, the First Amendment simply does not require in every case that a special showing of need and relevance be made beyond that imposed under normal discovery rules.

Alleged interference with the press' ability to gather the news was likewise

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298. 693 N.E.2d 1 (Ind. 1998). *See also supra* notes 58-65 (rejecting the state constitutional basis for the discovery request).

299. *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring).

300. *In re WTHR-TV*, 693 N.E.2d at 12.

301. *Id.* at 10.

302. *Id.*

303. *See id.* at 13.

304. *Id.* at 13-14.

305. *Id.* at 14.

rejected in *South Bend Tribune v. Elkhart Circuit Court*.[306] In another matter of first impression, the Indiana Court of Appeals held that a gag order placed on participants in a local murder trial did not constitute an impermissible restraint on the media's ability to gather the news.[307] Although the United States Supreme Court has held that a gag order on the press is barred by the First Amendment absent a showing of a clear and present danger of prejudicial impact,[308] in *South Bend Tribune* the gag order was placed solely upon trial participants, and thus the defendant judge did not have to meet the stringent standard.[309] Further, the appellate court maintained that the order was justified because pre-trial publicity likely threatened the defendant's Sixth Amendment right to a fair trial.[310]

The press fared much better in a case brought before the United States Supreme Court, but the issues were significantly different because the broadcaster was a publicly owned television station. Despite allegations of government censorship of speech,[311] the Court in *Arkansas Education Television Commission v. Forbes*, held that the public television station had discretion to exclude from a televised congressional election debate a candidate who generated insufficient public interest.[312]

Because the station was publicly owned, the Supreme Court first addressed the question of "forum."[313] Regulation of speech on government owned property, such as streets and parks, is subjected to a strict test, which requires that the regulation be content-neutral and narrowly tailored to achieve a significant public interest while leaving open ample alternative means for the message to be communicated.[314] For example, in *Ayres v. City of Chicago*,[315] the court affirmed a preliminary injunction against enforcement of a peddler's ordinance, which prevented an organization from selling t-shirts at a city-sponsored park festival. The court ruled that even if the regulation served important government interests in controlling congestion, as well as aesthetics, the no peddling zone was much too broad and the government's interests could have been served by simply fixing certain locations near the park or limiting the size of the plaintiff's peddling operation.[316]

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306. 691 N.E.2d 200 (Ind. Ct. App. 1998).

307. *Id.* at 201.

308. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

309. *See South Bend Tribune*, 691 N.E.2d at 201-02. The defendant relied on *Application of Dow Jones & Co. v. Simon*, 842 F.2d 603 (2nd Cir.), *cert. denied*, 488 U.S. 946 (1988), for its determination that its gag order did not constitute a prior restraint. The Second Circuit drew the same distinction between gag orders imposed on the press and gag orders imposed on trial participants. *Id.* at 609.

310. *South Bend Tribune*, 691 N.E.2d at 203.

311. Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998).

312. *Id.* at 1640.

313. *Id.* at 1640-41.

314. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

315. 125 F.3d 1010 (7th Cir. 1997).

316. *Id.* at 1016.

On the other hand, in *Potts v. City of Lafayette, Indiana*,[317] the court sustained an order imposing a "weapons" ban on attendees of a Ku Klux Klan ("KKK") rally that included tape recorders carried by attendees without a media pass and any other objects that might be thrown.[318] The court first ruled that the regulation was not aimed at the content of the views aired at the rally.[319] In addition, the goal of preventing violence and injury would have been achieved less effectively absent regulation, although other items such as belt buckles and shoelaces were permitted.[320] Further, the order left open ample alternative channels of communication.[321] The court emphasized that KKK rallies by their very nature breed violence and in fact, such violence had erupted at earlier KKK demonstrations.[322] The court emphasized that significant discretion must be given police officers who have to make "instantaneous judgment calls" in order to protect the public.[323]

In *Arkansas Education Television Commission v. Forbes*,[324] the Supreme Court decided that even though the station was government owned, and even though candidate debates are "of exceptional significance in the electoral process," the station was not regulating speech in a traditionally public forum like a park or street.[325] Further, since the station never generally "opened" the debate, it could not be considered a "designated" public forum.[326] The Court therefore concluded that this was a non-public forum, which is held to a less restrictive First Amendment analysis.[327] The government can exclude speakers from non-public forums provided its reasons are viewpoint-neutral and the regulation is reasonable in light of the property's purpose.[328] Here the Court found ample evidence to support the jury's finding that Mr. Forbes was not excluded because of his political views, but because he lacked a campaign organization and popular support.[329] Further, the station's regulation was reasonable in that limiting debate to major party candidates and other candidates with strong popular support ensures that the views of serious contenders will be

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317. 121 F.3d 1106 (7th Cir. 1997).

318. *Id.* at 1114.

319. *Id.* at 1111.

320. *See id.* at 1111-12.

321. *See id.* at 1112. The court relied on the special information-gathering function of the press to sustain this form of discrimination; the attendees were not permitted to bring in tape recorders, pens, etc., whereas the press was so permitted, to reasonably accommodate the First Amendment rights of the press. *See id.*

322. *Id.*

323. *Id.*

324. 118 St. Ct. 1633 (1998).

325. *Id.* at 1640-41.

326. *See id.* at 1642.

327. *Id*. at 1641-42.

328. *See id.* at 1643.

329. *Id.* at 1643-44.

heard.[330] The Court noted that if all speakers are allowed access, stations might choose not to air them at all in order to avoid a choice between "cacophony, on the one hand, and First Amendment liability, on the other."[331] In short, the decision to exclude Forbes, an independent candidate with little popular support, was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment.[332]

4. Government Funding of Speech.—The Supreme Court has held that the government has more leeway under the First Amendment in choosing to fund certain speech than it does in directly regulating or penalizing speech. On the other hand, the government may not attempt to suppress particular viewpoints in making funding decisions, and it cannot justify viewpoint discrimination among private speakers based on economic scarcity. Thus, in *Rosenberger v. Rector & Visitors of University of Virginia*,[333] the Court held that a state university violated the First Amendment in denying student activity funds to a religious journal where the subsidy was widely available to all student organizations that met the objective criterion that the activity be related to the university's educational purpose.[334]

In *National Endowment for the Arts v. Finley*,[335] the Supreme Court distinguished *Rosenberger* and sustained selective funding of the arts. In the wake of public outrage at the National Endowment for the Arts' (the "NEA") award of grants, which funded homoerotic photographs by Robert Mapplethorpe and a photograph of a crucifix immersed in artist's Adres Serrano's urine, the federal law was amended in 1990 to add a clause admonishing the NEA to take "decency and respect" into consideration in determining whether the grant statute's criteria of "artistic excellence" and "artistic merit" are met.[336] Citing to the legislative history, the Supreme Court noted that this statutory amendment was actually a "bipartisan proposal introduced as a counterweight to amendments aimed at eliminating the NEA's funding or substantially constraining its grant-making authority."[337] Viewed in this light, the Court determined in an 8-1 decision that the amendments were constitutional.[338]

The Court contrasted *Rosenberger*, where funds were widely available to all student organizations, with the NEA funding, which is a highly competitive

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330. *See id.* at 1644.

331. *Id.* at 1643.

332. The Court noted that most public broadcasting should not be subjected to any scrutiny under the First Amendment because this would be antithetical to editorial discretion that broadcasters must exercise. Because, however, candidate debates are by design a forum for political speech, and they are of exceptional significance in the electoral process, the Court proceeded to apply First Amendment forum analysis. *Id.* at 1640.

333. 515 U.S. 819 (1995).

334. *Id.* at 845-46.

335. 118 S. Ct. 2168 (1998).

336. *See id.* at 2172-73.

337. *Id.* at 2176.

338. *Id.* at 2180.

process whereby the NEA must make aesthetic judgments as well as the inherently content-based "excellence" threshold to support any grant.[339] Although conceding that the terms of the statute are "undeniably opaque," the Court found the law unlikely to compel speakers "to steer too far clear of any 'forbidden area' in the context of grants of this nature."[340] Further, it emphasized that even some chilling effect on speech is less objectionable where the government acts as patron rather than sovereign.[341] Although the majority took pains to conclude that the "decency and respect" criteria did not prohibit any particular viewpoint, Justices Scalia and Thomas in a concurring judgment contended that the law clearly discriminated on the basis of content and viewpoint but that it was nonetheless "perfectly constitutional" because taxpayers should not be forced to subsidize art that conveys an offensive message.[342]

E. Freedom of Religion

The First Amendment guarantees both that Congress makes no law respecting an establishment of religion and that it not interfere with the free exercise of religion.[343] Together the clauses have been interpreted as mandating that government maintain a position of neutrality vis-a-vis religion. Defining what constitutes "a neutral position" has proved troublesome. As to the Establishment Clause, the Supreme Court in the early 1970's, in *Lemon v. Kurtzman*,[344] held that government programs must have a secular purpose, their primary effect may neither advance nor inhibit religion, and any government program may not create excessive entanglement between church and state.[345] 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.[346] Justice O'Connor has argued that the Establishment Clause is violated only where the government has endorsed or demonstrated approval of religion,[347] while Justice Scalia would find a violation only when government discriminates among religious organizations or imposes coercive pressure to engage in religious activities.[348]

In *Agostini v. Felton*,[349] the Supreme Court, while not formally overturning *Lemon*, rejected earlier Supreme Court opinions that applied *Lemon*, announcing

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339. *Id.* at 2178.

340. *Id.* at 2179.

341. *Id.*

342. *Id.* at 2180-85 (Scalia, J., concurring in judgment).

343. U.S. CONST. amend. I.

344. 403 U.S. 602 (1971).

345. *Id.* at 612-13.

346. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399-400 (1993) (Scalia, J., concurring).

347. Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring).

348. Lee v. Weisman, 505 U.S. 577, 637-44 (1992) (Scalia, J., dissenting).

349. 117 S. Ct. 1997 (1997).

that the older decisions could not be squared with the Court's intervening Establishment Clause jurisprudence.[350] The Supreme Court held that the federal government, pursuant to Title I of the 1965 Elementary and Secondary Education Act,[351] could fund remedial instruction and counseling for disadvantaged students in parochial schools without violating the Establishment Clause.[352] By a 5-4 vote, it held that sending publicly-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.[353]

Similarly, in *Zobrest v. Catalina Foothills School District*,[354] the Court upheld providing a sign language translator for a deaf student attending Catholic school, even though the translator would make religious statements in some translations.[355] In both cases, the Court abandoned the presumption that public employees on parochial school grounds will inevitably inculcate religion or that their presence always constitutes a symbolic union between government and religion.

The Court in *Agostini* emphasized that providing Title I assistance would not create a financial incentive to undertake religious education. The aid was allocated on the basis of neutral, secular criteria, that neither favor nor disfavor religion, and the aid was available to all beneficiaries on a non-discriminatory basis.[356] The Court explained that aid to parochial schools will not be deemed to impermissibly advance religion if "it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[357]

The immediate effect of *Agostini* was to allow public school districts to send public-salaried teachers into church-run schools to provide remedial educational services. Indiana litigants learned this year, however, that federal law does not *mandate* public schools to do so. In *K.R. by M.R. v. Anderson Community School Corp.*,[358] plaintiffs argued that the school district violated federal statutory law, namely the Individuals with Disabilities Education Act ("IDEA"),[359] as well as federal constitutional law, in refusing to provide disabled students attending private schools the same services it made available to those attending public schools.[360] Although the school board provided speech therapy, occupational

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350. *Id.* at 2016-17.

351. 20 U.S.C. §§ 6301-8962 (1994 & Supp. III 1997).

352. *Agostini*, 117 S. Ct. at 2018-19.

353. *Id.* at 2013.

354. 509 U.S. 1 (1993).

355. *Id.* at 13-14.

356. *Agostini*, 117 S. Ct. at 2014.

357. *Id.* at 2016.

358. 125 F.3d 1017 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1360 (1998).

359. 20 U.S.C. §§ 1400-91o (1994 & Supp. III 1997).

360. The IDEA states only that services "may be provided . . . on the premises of private . . . schools." *Id.* § 1412 (1994). Thus, the court ruled that school districts have discretion in the matter. *K.R. by M.R.*, 125 F.3d at 1018. *Accord* Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998);

therapy, and physical therapy at the public school site, which plaintiffs were permitted to attend, it did not offer services at the parochial school site. The court determined that this decision did not convey any message of government disapproval of religion nor did it infringe on K.R.'s right to fully exercise her religious choice.[361]

Agostini has also fueled the debate as to the constitutionality of school voucher programs whereby voucher checks are issued to students who can then select the elementary or secondary school of their choice, whether public or parochial. The Wisconsin Supreme Court in *Jackson v. Benson*,[362] upheld a state statute authorizing financial aid vouchers on the basis of religion-neutral eligibility criteria for low-income students in the Milwaukee area. Applying the *Lemon* analysis, the court determined the program had the secular effect of providing low-income children with the opportunity for a better education.[363] It survived the primary-effect prong based on the *Agostini* rationale that no impermissible effect should be found, provided the government has instituted a broad, neutral program that neither favors nor disfavors religion, and the aid occurs primarily as a result of private choices of parents and provides no financial incentive to choose a religious school.[364] Finally, the court determined that minimal oversight standards would not result in excessive church-state entanglement.[365]

A final development worth noting concerns the Religious Freedom Restoration Act ("RFRA").[366] Congress enacted this law in 1993 in direct response to the Supreme Court's decision in *Employment Division v. Smith*,[367] 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 are rational.[368] Prior to *Smith*, laws that 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. RFRA sought to restore this analysis by clarifying that government could not substantially burden a person's exercise of religion unless it demonstrates that the burden furthers a compelling interest and is the least restrictive means of furthering that interest.[369]

In *City of Boerne v. Flores*,[370] the Supreme Court struck down RFRA, ruling that Congress could not impose its own definition of constitutional liberties or

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Russman v. Board of Educ. of Watervliet, 150 F.3d 219 (2nd Cir. 1998).

361. *K.R. by M.R.*, 125 F.3d at 1019.

362. 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998).

363. *Id.* at 612.

364. *See id.* at 616-17.

365. *Id.* at 619.

366. 42 U.S.C. §§ 2000bb1-bb4 (1994).

367. 494 U.S. 872 (1990).

368. *Id.* at 879.

369. 42 U.S.C. § 2000bb(a).

370. 117 S. Ct. 2157 (1997).

make substantive changes in constitutional protections. Although Congress has the power under section 5 of the Fourteenth Amendment to pass laws that deter or remedy constitutional violations, the Court drew a distinction between the power to enforce, which is "remedial," and the power to determine what constitutes a constitutional violation.[371] The Court held that RFRA was so out of proportion to a supposed remedial or preventive objective that it could not be understood as responsive to any unconstitutional behavior.[372] Because it saddled states with a strict compelling interest/least restrictive means test, RFRA was a considerable congressional intrusion into the states' traditional authority to regulate for the health and safety of their citizens.[373]

Perhaps the most immediate impact of the Court's ruling was to alter the analysis in literally hundreds of cases, many of which were brought by prison inmates raising RFRA challenges to dress and grooming requirements and demanding accommodation of their religious-based dietary laws, among other things.[374] More recently several courts have questioned whether the Supreme Court invalidated RFRA only as applied to state government. In *Young v. Crystal Evangelical Free Church*,[375] the Eighth Circuit ruled that RFRA could constitutionally be applied to federal laws, including the law of bankruptcy.[376] Indeed, the court held that RFRA effectively amends section 548(a)(2)(A) of the Bankruptcy Code to bar a bankruptcy trustee from voiding debtors' tithes to their church as fraudulent transfers.[377] In accordance with their religious beliefs, the debtors had given a tenth of their income, or $13,450, to their church in the year before they filed a Chapter 7 bankruptcy petition. Although finding that such a transfer would be deemed a fraudulent transfer within the meaning of bankruptcy law, the court ruled that recovery of these contributions substantially burdened the debtors' free exercise of religion and, because it did not further a compelling government interest, it violated RFRA.[378] The court reasoned that *City of Boerne* did not affect its ruling, because there the Supreme Court addressed only the question of whether Congress exceeded its power under section 5 of the Fourteenth Amendment, but did not address whether Congress could, pursuant to its Article I authority, constitutionally impose RFRA on federal laws.[379]

After finding that the "portion of RFRA applicable to the federal government

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371. *Id.* at 2164.

372. *Id.* at 2170.

373. *Id.* at 2169-71.

374. *See, e.g.*, Sasnett v. Sullivan, 91 F.3d 1018, 1023 (7th Cir. 1996) (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), *cert. granted*, 117 S. Ct. 2502 (1997), *vacated and remanded in light of* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

375. 141 F.3d 854 (8th Cir.), *cert. denied*, 119 S. Ct. 43 (1998).

376. *Id.* at 861.

377. *Id.*

378. *Id.* at 863.

379. *Id.* at 858.

is fully severable from the portion applicable to the states,"[380] the court ruled that RFRA was an appropriate means by Congress to modify the federal bankruptcy law.[381] The court also held that, as so construed, RFRA did not violate the Establishment Clause.[382] RFRA has the secular purpose of preserving everyone's free exercise rights, rather than benefitting a particular religious sect, accommodating religious practice does not impermissibly advance religion, and no excessive entanglement between church and state will result.[383]

The opinion seems misguided in light of *City of Boerne*'s apparent holding that Congress, in enacting RFRA, violated not only federalism but also separation of powers by intruding on the judicial function. Thus, the entire statute is invalid, not merely its application to the states. Indeed, the Seventh, Ninth and Tenth Circuits have reached this conclusion.[384] The Supreme Court nonetheless denied certiorari in *Young*, an Eighth Circuit case.[385] The outcome of this battle will obviously have far-reaching effects because it raises a core question regarding who is the final arbiter of the meaning of the Constitution and what is the scope of congressional power to expand on constitutional values.

380. *Id.* at 859.

381. *Id.* at 861.

382. *Id.* at 863.

383. *See id.* at 861-62.

384. *See* Edward J.W. Blatnik, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410, 1412-13 (1998) (listing cases diverging on whether RFRA is invalid only in its application to state law).

385. *See supra* note 375.