# STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

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## INTRODUCTION

This Article explores key state and federal constitutional law developments over the past year. Part I 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

For several years, Chief Justice Randall T. Shepard has urged Indiana practitioners to re-examine the Indiana Constitution as a potential source for the protection of civil liberties.[1] On the other hand, the Indiana Supreme Court is clearly not anxious to usurp the general assembly's legislative role, and it has repeatedly cautioned that state statutes will be presumed constitutional and that the challenger carries a heavy burden of proof.[2] In *Martin v. Richey*,[3] the court, in a 3-2 decision, struck the balance between these competing concerns by leaving intact on its face Indiana's two-year occurrence-based medical malpractice statute of limitations.[4] The court held, however, that the statute is

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1. *See* 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).

3. 711 N.E.2d 1273 (Ind. 1999).

4. *See id.* at 1284.

unconstitutional as applied to a plaintiff who suffered from a medical condition with a long latency period that prevented her from discovering the alleged malpractice within the two-year period.[5]

Martin claimed that Dr. Richey committed malpractice when he told her that a suspicious lump in her breast was benign based on a needle aspiration he performed. He also allegedly failed to tell her that she needed to follow up with an excisional biopsy and, in fact, had her cancel an appointment she had made for this procedure.[6] Three years later, when she discovered that she had breast cancer and that it had spread to her lymph nodes, she sued Dr. Richey. The trial court held that her claim was time barred because the two-year statute of limitations for malpractice ran from the date of "occurrence," not discovery.[7] The court of appeals reversed, finding that the different treatment of medical malpractice victims from other tort victims who enjoy a discovery-based statute of limitations violates article I, section 23 of the state constitution,[8] which provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."[9] In addition, the appellate court held that the statute violated article I, section 12 of the state constitution,[10] 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."[11] The Indiana Supreme Court agreed that application of the statute of limitations violates both of these constitutional provisions, although it rejected the appellate court's decision to strike the statute as unconstitutional on its face.[12] The decision nonetheless has potentially broad implications because it is the first case in recent years in which either of these constitutional provisions has been successfully invoked. More specifically, all earlier challenges to Indiana's Medical Malpractice statute under the state constitution were soundly rejected.[13] Thus, Justice Selby faced the difficult task of reconciling her decision with past case precedent.

Addressing the article I, section 23 claim, Justice Selby turned to *Collins v. Day*,[14] in which the Indiana Supreme Court rejected federal equal protection analysis in favor of an interpretation more faithful to the text and the express purpose and intent of the framers of this state provision.[15] To pass muster under section 23, the disparate treatment must be (1) reasonably related to inherent characteristics that distinguish the unequally treated classes and (2) the

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5. *See id.*
6. *See id.* at 1275.
7. *Id.* at 1278 (construing IND. CODE § 34-18-7-1(b) (1998)).
8. *See id.* at 1277.
9. IND. CONST. art I, § 23.
10. *See Martin*, 711 N.E.2d at 1277.
11. IND. CONST. art I, § 12.
12. *See Martin*, 711 N.E.2d at 1281.
13. *See id.* at 1283.
14. 644 N.E.2d 72 (Ind. 1994).
15. *See id.* at 75.

preferential treatment must be uniformly applicable and equally available to all persons similarly situated.[16] The Indiana Supreme Court in *Collins* emphasized that substantial deference must be given to the legislative judgment, which should be invalidated only "where the lines drawn appear arbitrary or manifestly unreasonable."[17] Until *Martin*, all attempts to invalidate state legislative enactments under article I, section 23 had been unsuccessful because of this highly deferential approach.[18]

In *Martin*, the plaintiff argued that victims of medical malpractice are treated differently than other tort victims where the statute of limitations runs from the date that the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of tortious conduct.[19] As to the first prong of *Collins*, the Indiana Supreme Court ruled that the disparate treatment was "reasonably related to characteristics" that distinguished the two groups.[20] The Indiana Supreme Court reached this same conclusion and upheld the statute in 1980, finding that the limitations period was rationally related to the legitimate legislative goal of maintaining sufficient medical treatment and controlling medical malpractice insurance costs by encouraging the prompt presentation of claims and shielding providers from having to defend against stale claims.[21] Although these rulings preceded *Collins*, the highly deferential approach applied post-*Collins* suggested that no more than a rational basis was needed to sustain the law.

Thus, the Indiana Supreme Court in *Martin* concluded, as it did in 1980, that the classification scheme is reasonably related to legitimate state goals.[22] Although a classification may later cease to satisfy the requirement of section 23 because of intervening changes, nothing in the record warranted re-examination of the legitimacy of the legislative goal underlying the Medical Malpractice Act or its statute of limitations.[23]

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16. *See id.* at 78-79.

17. *Id.* at 80.

18. *See* Rondon v. State, 711 N.E.2d 506, 513 (Ind. 1999) (refusal to retroactively apply statutory exemption from death penalty for mentally retarded individuals does not violate Equal Privileges and Immunities Clause with regard to defendant convicted of felony murder and sentenced to death before statute's effective date); *see also* Indiana High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222, 240 (Ind. 1997) (IHSAA Transfer Rule that gives students who change residence with their parents immediate full varsity eligibility at new school while denying such to students who move without their parents is rationally related to the goal of deterring athletically motivated transfers and the prohibitive cost of monitoring the motives of every transfer).

19. *See Martin*, 711 N.E.2d at 1277.

20. *Id.* at 1281-82.

21. *See* Rohrabaugh v. Wagoner, 413 N.E.2d 891, 894-95 (Ind. 1980); Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980), *abrogated by* Collins v. Day, 644 N.E.2d 72 (Ind. 1994).

22. The court initially acknowledged that section 23 applies regardless of whether a statute grants unequal privileges or imposes unequal burdens. *See Martin*, 711 N.E.2d at 1280.

23. *See id.* at 1281.

As to the second prong of *Collins*, the Indiana Supreme Court agreed with the lower court's observation that victims of medical negligence who are unable to discover their injury/malpractice before the expiration date of the two-year statute of limitations are treated differently than those able to do so, but it disagreed that this provided grounds to invalidate the statute on its face.[24] Rather than compare victims of medical malpractice with victims of other tortious conduct, Justice Selby focused on a subclass of medical malpractice victims who cannot discover their injury during the statutory limitation period.[25] She notes that on its face, the statutory provisions do not expressly create "the assertedly unfair or disadvantaged subclassification of medical malpractice plaintiffs."[26] It is only *as applied* to this sub-class who are unable to file any claim at all that the statute fails the "uniformly applicable" standard of *Collins*.[27] Further, it is only with regard to this subclassification that the statutory goal of lowering medical costs by encouraging the prompt filing of claims becomes irrational.[28] The supreme court thus limited its holding as follows:

> [P]laintiff cannot be foreclosed from bringing her malpractice suit when, unlike many other medical malpractice plaintiffs, she could not reasonably be expected to discover the asserted malpractice and resulting injury within the two-year period given the nature of the asserted malpractice and of her medical condition.[29]

Although this passage appears to reach only an "unconstitutional as applied" determination, Chief Justice Shepard, in dissent, opines that he cannot envision any cases where the statute could be constitutional.[30] He explains that the very purpose of the statute is "to adopt an event-based limit rather than a discovery-based limit."[31] If the majority finds that the law is unconstitutional as to those who cannot promptly discover their injury, in essence it has invalidated the occurrence-based limit and the law cannot stand. This would be clearly contrary to a long line of cases rejecting this same constitutional challenge. Although the majority purports to limit its decision to the malpractice victim who suffers from a "medical condition with a long latency period" that prevents early discovery, the crux of the holding is the impermissibility of applying the statute to any malpractice victim who could not with due diligence discover the tort at an earlier point in time.[32] On the other hand, by taking an "as applied" approach, Justice Selby leaves intact the 1980 decisions upholding the limitations period, while preventing the arbitrary result of denying Martin the right to pursue her

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24. *See id.*
25. *See id.*
26. *Id.*
27. *Id.*
28. *See id.*
29. *Id.* at 1282.
30. *See id.* at 1286 (Shepard, C.J, dissenting).
31. *Id.*
32. *Id.* at 1277.

claim.

As to the article I, section 12 claim, the appellate court ruled that the occurrence-based medical malpractice statute of limitations was an "unconstitutional abrogation of the right to a complete tort remedy" guaranteed by this provision.[33] The Indiana Supreme Court rejected this rationale, again refusing to invalidate the statute on its face and declining "to formulate a rule of constitutional law broader than is required by the precise facts at issue."[34] Justice Selby acknowledged a long line of cases allowing the legislature to modify or abrogate common law rights, including cases specifically sustaining the medical malpractice statute of limitations against a facial challenge under section 12.[35] As in the case of its article I, section 23 analysis, the supreme court instead ruled that the statute was unconstitutional *as applied* to a plaintiff who has "no meaningful opportunity to file an otherwise valid tort claim within the specified statutory time period."[36] The court reasoned that to deny a cause of action under circumstances where the "plaintiff did not know or, in the exercise of reasonable diligence, could not have discovered that she had sustained an injury as a result of malpractice . . . would impose an impossible condition on plaintiff's access to courts and ability to pursue an otherwise valid tort claim."[37] Under the circumstances of this case where plaintiff was unaware she had a malignancy and Dr. Richey assured her that the mass was just indicative of non-life threatening fibrocystic breast disease, application of the statute of limitations would, in essence, require plaintiff "to file a claim before such claim existed."[38]

Although the supreme court cautioned that Indiana citizens do not have a "fundamental right"[39] of access to the courts, nor a fundamental right to a complete tort remedy, the decision is significant in that it represents the first case in twenty-two years in which a plaintiff has successfully invoked this provision. In 1977, in *City of Fort Wayne v. Cameron*,[40] the Indiana Supreme Court ruled that an occurrence-based notice provision, requiring the city to be placed on notice within sixty days of alleged tortious conduct, was unconstitutional as applied to a plaintiff who was mentally and physically incapacitated during the statutory notice period. Application of the law under such circumstances would deprive a litigant of his constitutional right to a remedy by due course of law.[41] However, case law since *Cameron*, including some six decisions cited by Justice Sullivan in a concurring opinion in *Martin*, specifically rejected the claim that the Medical Malpractice Act's statute of limitations violates article I, section

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33. *Id.* at 1282 (quoting Martin v. Richey, 674 N.E.2d 1015, 1026 (Ind. Ct. App. 1997)).
34. *Id.*
35. *See id.* at 1283.
36. *Id.* at 1284.
37. *Id.*
38. *Id.* at 1285.
39. *Id.* at 1283.
40. 370 N.E.2d 338 (Ind. 1977).
41. *See id.* at 341.

12.[42] In fact, three years after *Cameron*, the Indiana Supreme Court in *Rohrabaugh v. Wagoner*[43] rejected a similar state constitutional challenge under sections 12 and 23, to the limitations period regarding minors. Justice DeBruler acknowledged the potential arbitrariness of the statute, but nonetheless emphasized that statutes are presumed constitutional.[44] It sufficed that the classification scheme was generally accurate: "There can be no doubt that this measure is a stern one and will have harsh application in individual cases. However, a court has no authority to annul a statute because of that fact."[45] The same words could have been written to describe the plight of Melody Martin.

Thus, despite the majority's reluctance to use sections 12 and 23 to invalidate the statute on its face, its decision breathes new life into these provisions, inviting practitioners to invoke the state constitution in cases where a statute creates irrational distinctions or "imposes an impossible condition" that operates to arbitrarily deny a remedy for the violation of common law rights. On the other hand, it should be noted that only two Justices, Dickson and Boehm, joined in Justice Selby's opinion in *Martin*. Justice Sullivan concurred in *Martin* based solely on the existence of fact questions regarding plaintiff's claim that the statute of limitations should be tolled based on the doctrine of active fraudulent concealment.[46] He specifically rejected the state constitutional arguments and contended, together with Chief Justice Shepard, that case precedent dictates that the statute is valid.[47] Since Justice Selby has stepped down from the court, the future of state constitutional arguments brought under section 12 or section 23 remains in doubt.[48]

The Indiana Supreme Court further explicated its *Martin* decision in a companion case, *Van Dusen v. Stotts*.[49] In that case, the plaintiff, William Stotts, was told by a physician that, based on a needle biopsy, his tumor was benign. Two and one-half years later, Stotts learned that he had incurable prostate cancer. The doctor told Stotts that the initial biopsy may have been improperly read.[50] Like the plaintiff in *Martin*, he was unable to discover the malpractice and the resulting injury within the two-year statutory period.[51] The supreme court explained that plaintiffs in such circumstances may file their claims within two years of the date when they discover the malpractice and the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of

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42. *See Martin*, 711 N.E.2d at 1285 (Sullivan, J., concurring).

43. 413 N.E.2d 891, 894-95 (Ind. 1980).

44. *See id.* at 895.

45. *Id.*

46. *See Martin*, 711 N.E.2d at 1285 (Sullivan, J., concurring).

47. *See id.* at 1285-86.

48. Newly appointed Justice Robert Rucker, while sitting on the court of appeals, did not participate in any lower court opinions addressing these constitutional provisions.

49. 712 N.E.2d 491 (Ind. 1999).

50. *See id.* at 494.

51. *See id.*

the malpractice and the resulting injury.[52] The supreme court acknowledged that its analysis may raise difficult factual questions as to when a plaintiff should have discovered the injury.[53] It noted that "[although] a plaintiff's lay suspicion that there may have been malpractice is not sufficient to trigger the two-year period[,] . . . a plaintiff need not know with certainty that malpractice caused his injury."[54] Further, "when it is undisputed that plaintiff's doctor has expressly informed a plaintiff that he has a specific injury and that there is a reasonable possibility . . . that . . . [it] was caused by a specific act at a specific time," the plaintiff will be "deemed to have sufficient facts to require him to seek promptly any additional medical or legal advice needed to resolve any remaining uncertainty . . . regarding the cause of his injury."[55] In this case, once the doctor informed the plaintiff that he had prostate cancer and that it was possible that the biopsy of the tumor was misread, the two-year period was triggered.[56] Plaintiff's complaint was filed within two years and was therefore timely. In short, *Martin* and *Van Dusen* read together mean that as to those who reasonably fail to discover the malpractice within two years, the limitations period will be tolled until discovery, from which point plaintiff is entitled to two years in which to bring a lawsuit. Because "discovery" arguably may not occur until several years after the occurrence of medical malpractice, the Act's stated goal of creating some certainty regarding the duration of liability of doctors and health care providers has been thwarted. On the other hand, several malpractice victims have already benefitted from these rulings.[57]

Although *Martin* found the statute of limitations to be unconstitutional only as applied to a sub-class of individuals who could not, with due diligence, have discovered the malpractice until after the two years had run, an appellate court has extended this analysis to save a claim brought by a victim who learned of the malpractice within the two-year period but who did not file a complaint until after the limitations period lapsed. In *R.C. Boggs v. Tri-State Radiology*,[58] the plaintiff went in for a mammogram in July 1991, and was told there was no abnormality. When she returned for her annual mammogram in July 1992 she

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52. *See id.* at 495.

53. *See id.* at 499.

54. *Id.*

55. *Id.*

56. *See id.*

57. *See* Harris v. Raymond, 715 N.E.2d 388 (Ind. 1999) (holding that plaintiff who did not discover that her dental implant was defective until years later because her physician failed to inform her that the FDA had issued a safety alert regarding this product, could not, like Martin, have discovered the problem during the limitations period and thus application of the statute of limitations would deprive her of a claim before she had any reason to know it existed); *see also* Weinberg v. Bess, 717 N.E.2d 584 (Ind. 1999) (holding that because plaintiff had no reason to suspect that her doctor gave her silicone rather than the saline breast implants she requested, her filing of a complaint two months after she discovered the truth in her medical records fell within the statutory period); Halbe v. Weinberg, 717 N.E.2d 876 (Ind. 1999) (same fact pattern as *Bess*).

58. 716 N.E.2d 45 (Ind. Ct. App. 1999), *aff'd*, 730 N.E.2d 692 (Ind. 2000).

learned she had Stage IV breast cancer and, in fact, she died one year later at the age of fifty-two.[59] Her estate filed a claim in July 1994, within two years of having discovered the malpractice, but three years after the occurrence. The court conceded that applying the limitations period to this claim would not violate section 12.[60] Unlike Martin, R.C. was not denied a meaningful opportunity to bring a claim since she had eleven months from the time the malpractice was discovered in which to file her lawsuit.[61] However, the court proceeded to find that application of the statute under these circumstances would still violate section 23.[62] Although application of the two-year rule to individuals like R.C. does not harm members of a subgroup who could not discover the malpractice within the statutory period, it nonetheless creates two subclasses who are treated differently without any rational justification.[63] A strict reading of *Martin* means that only those who cannot discover the malpractice within the statutory period enjoy two years from the actual date of discovery to file a lawsuit. Others, like R.C., who discover the malpractice within the two years, even if it is one day or one hour before the end of the two-year period, may lose their claim if they fail to act immediately. By focusing attention on victims who discover the malpractice one day before versus one day after the two-year limitations period, the irrationality of denying R.C. relief becomes apparent.[64]

The general reluctance of the Indiana Supreme Court to explore state constitutional arguments is reflected in its decision in a recent defamation case. In *Journal-Gazette Co. v. Bandido's, Inc.*,[65] the supreme court was asked to re-examine Indiana libel law, which mandates that all victims of libelous material which is "newsworthy" must meet an "actual malice" standard, that is, they must prove at minimum that the false material was published with reckless disregard for its truth in order to recover. In 1974, an appellate court in *AAFCO Heating & Air Conditioning Co. v. Northwest Publications Inc.*,[66] rejected the notion that private victims of libel, as opposed to public officials or public figures, should be able to maintain suits based merely on a negligence theory.[67] Six months earlier the U.S. Supreme Court in *Gertz v. Robert Welch, Inc.*,[68] had held that private victims of libel deserved greater protection and should not be held to the actual malice test.[69] The U.S. Supreme Court reasoned that private individuals do not ordinarily voluntarily relinquish their right to be free from defamatory

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59. *See id.* at 46.
60. *See id.* at 48.
61. *See id.* at 47.
62. *See id.* at 49.
63. *See id.*
64. *See id.* at 50.
65. 712 N.E.2d 446 (Ind. 1999), *cert. denied*, 120 S. Ct. 499 (1999).
66. 321 N.E.2d 580 (Ind. Ct. App. 1974).
67. *See id.* at 586.
68. 418 U.S. 323 (1974).
69. *See id.* at 343-44.

material, like public figures or public officials.[70] Thus, although states cannot impose strict liability, they may allow private citizens to recover in a libel suit by merely proving negligence.[71] Although individual states retained the option of imposing a stricter standard more protective of the press, all but four states adopted the negligence standard for private victims of libel.[72] In Indiana, *AAFCO* remained the law.

Since 1974, *AAFCO*'s actual malice rule has been justified by invoking article I, section 9 of the state constitution that broadly guarantees free expression "on any subject whatever," but which also admonishes that speakers may be held accountable "for abuse of that right."[73] In urging the Indiana Supreme Court to reverse *AAFCO*, plaintiffs relied on the "abuse" clause as well as article I, section 12 of the state constitution, which specifically guarantees a remedy by due course of law for injury to reputation.[74] The majority in *Bandido's* refused to enter the quagmire of interpreting these two competing constitutional provisions. Instead, the court in *Bandido's*, without invoking section 9, simply acknowledged *AAFCO* as the well-established defamation law of Indiana.[75] Justice Dickson, dissenting in *Bandido's*, addressed the constitutional issues. He argued that tortious defamation is an abuse of the right to free expression and thus is not protected by section 9 of article I of the Indiana Constitution.[76] Further, he relied on article I, section 12 to support his view that private victims of libel should be able to recover on a negligence, rather than an actual malice, standard.[77]

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70. *See id.* at 344-45.

71. *See id.* at 346-48.

72. 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, Inc. v. Denver Post, Inc., 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).

73. Near East Side Community Org. v. Hair, 555 N.E.2d 1324 (Ind. Ct. App. 1990).

74. Article I, section 12 of the Indiana Constitution guarantees a remedy "[for] every person, for injury done to [an individual's] . . . person, property or reputation . . . by due course of law." IND. CONST. art. I, § 12.

75. *See* Journal-Gazette Co. v. Bandido's Inc., 712 N.E.2d 446, 469 (Ind. 1999), *cert. denied*, 120 S. Ct. 499 (1999). Justice Sullivan reasoned that stare decisis was his major concern and *AAFCO* had been the law in Indiana for some twenty-five years.

76. *See id.* at 489 (Dickson, J., dissenting).

77. *See id.* Chief Justice Shepard concurred in Justice Dickson's decision that Indiana should join the majority of states that allow private victims of libel to recover on a negligence theory. He also wrote a separate dissent in which he did not, however, address the constitutional issues. Justice Boehm concurred and summarily concluded that adopting an actual malice standard gives appropriate recognition to the balance necessary between the conflicting values found in sections 9 and 12. *See id.* at 469 (Boehm, J., concurring).

## II. FEDERAL CONSTITUTIONAL LAW

### *A. Federalism*

The most significant constitutional decisions of the Rehnquist Court this Term further expanded the doctrine of state sovereignty. In recent years, the U.S. Supreme Court has invoked the Tenth and Eleventh Amendments to greatly limit Congress' power both to enact laws aimed at states and to subject states to suit for violating federal laws. As to the Tenth Amendment, which reserves power not delegated to the federal government to the states, the Court two years ago in *Printz v. United States*,[78] invalidated the Brady Handgun Act because it impermissibly commanded the states' chief law enforcement officers to search records to ascertain whether a person could lawfully purchase a handgun.[79] The Court reasoned that the history and structure of the Constitution prohibit Congress from utilizing the Commerce Clause to compel state executive officers to enforce a federal regulatory program.[80] In a second significant ruling, *United States v. Lopez*,[81] the Court ruled that Congress exceeded its power in passing a federal criminal statute prohibiting the possession of a firearm within 1000 feet of a school. The Court stated that Congress failed to make clear findings demonstrating that the regulated activity substantially affected interstate commerce, and Congress sought to regulate criminal activity that had nothing to do with commerce.[82] In addition, the statute was not limited to firearms that had traveled in interstate commerce and it governed areas historically left to states, namely criminal law enforcement and education.[83]

This Term federalism is revisited regarding three significant federal statutes. The Fourth Circuit in *Condon v. Reno*,[84] addressed the validity of the Driver's Privacy Protection Act (DPPA),[85] which regulates the dissemination and use of information contained in state motor vehicle records and prohibits state departments from disclosing personal information. The Fourth Circuit ruled that this was an unconstitutional exercise of commerce power that violated the Tenth Amendment because, as in *Printz*, it forced state employees to administer a federal regulatory program.[86] Chief Justice Rehnquist delivered the unanimous opinion of the Court reversing this holding. The Court ruled that the DPPA does not violate Tenth Amendment federalism principles because it does not "require

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78. 521 U.S. 898 (1997).

79. *See id.* at 926.

80. *See id.* at 903-34.

81. 514 U.S. 549 (1995).

82. *See id.* at 561-63.

83. *See id.* at 562-64.

84. 155 F.3d 453 (4th Cir. 1998), *rev'd*, 120 S. Ct. 666 (2000).

85. 18 U.S.C. §§ 2721-2725 (1994 & Supp. III).

86. Note that the Seventh Circuit reached a contrary result, upholding the Act in *Wisconsin Department of Transportation v. Reno*, 163 F.3d 1000 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 931 (2000).

the states in their sovereign capacity to regulate their own citizens [but rather] regulates the states as the owners of databases."[87] The Court distinguished[88] *Printz* and *New York v. United States*[89] as follows:

> [T]he DPPA does not require the states in their sovereign capacity to regulate their own citizens . . . . It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.[90]

Finding no Tenth Amendment violation, the Court also held that the Act has a valid exercise of congressional power under the Commerce Clause.[91] The information that the DPPA regulates is a "'thing in interstate commerce,' and . . . the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation."[92]

The Court this Term will also determine whether Congress exceeded its power in enacting the 1994 Violence Against Women Act that creates a right "to be free from crimes of violence motivated by gender."[93] In *Brzonkala v. Virginia Polytechnic Institute*,[94] the Fourth Circuit, relying on *Lopez*, ruled that this statute,[95] which creates a private cause of action against anyone who commits gender-motivated crimes, was an unconstitutional exercise of power despite congressional findings that gender motivated violence adversely affects interstate commerce.[96] Finally, in *United States v. Jones*[97] it will decide whether the federal arson statute[98] should be interpreted to apply to a private residence and, if so, whether this application is constitutional. The statute purportedly reaches

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87. *Condon*, 120 S. Ct. at 672.

88. It likened the regulatory requirements of the DPPA to those upheld in *South Carolina v. Baker*, 485 U.S. 505 (1998) (statute that prohibited states from issuing unregistered bonds was constitutional because it regulated state activities and did not seek to control or influence the manner in which states regulate private parties).

89. 505 U.S. 144 (1992).

90. *Condon*, 120 S. Ct. at 672.

91. U.S. CONST. art. I, § 8, cl. 3.

92. *Condon*, 120 S. Ct. at 671 (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995)).

93. 42 U.S.C. § 13981 (1994).

94. 169 F.3d 820 (4th Cir.), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999). The Court's decision in *Morrison* will be discussed in next year's Survey Issue.

95. § 13981 (1994).

96. *See Brzonkala*, 169 F.3d at 845-59. Further, the Act could not be sustained as a constitutionally legitimate exercise of power under the Fourteenth Amendment because this Amendment does not permit Congress to make such a "sweeping intrusion" into areas of behavior traditionally regulated by the states. *Id.* at 867-89.

97. 178 F.3d 479 (7th Cir.), *cert. granted*, 120 S. Ct. 494 (1999), *and rev'd by* 120 S. Ct. 1904 (2000). The Court's reversal will be discussed in next year's Survey Issue.

98. 18 U.S.C. § 844(i).

only arson of property "used in interstate or foreign commerce or in any activity affecting" such commerce.[99] The Seventh Circuit sustained a broad reading of the law, reasoning that the collective effect of arsons on buildings or even residences establishes the requisite substantial effect on commerce.[100] Despite the unanimity of the decision in *Condon*, it is likely the Court, which has often split down the middle in the volatile federalism battle, will not reach common ground in these two cases because they address laws reaching non-commercial activity.

The Court let stand a Seventh Circuit decision upholding the constitutionality of an amendment to the Gun Control Act of 1968 against a Tenth Amendment challenge.[101] An Indianapolis police officer sought to rely on the Tenth Amendment to invalidate a 1996 amendment to the Gun Control Act of 1968, which prohibits a person who has been convicted in any court of a misdemeanor claim of domestic violence from owning a firearm.[102] The so-called 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. In *Gillespie*, the Seventh Circuit ruled that this provision does not invade state sovereignty in violation of the Tenth Amendment.[103] The court held that the amendment was a proper exercise of Congress' power under the Commerce Clause because, unlike the statute in *Lopez*, the law contained an express requirement that the prosecution prove the firearm in question was shipped or transported in interstate commerce.[104] This "jurisdictional nexus" requirement distinguished the case from *Lopez*.[105] Further, the court ruled that it was not constitutionally significant that the firearms ban happened to include individuals employed in state and local law enforcement.[106] The law had only an ancillary effect on the employment of such officers and, unlike the law in *Printz*, it did not force states to administer and enforce a federal regulatory program.[107]

The Supreme Court closed its 1998-99 Term with three major decisions interpreting the Eleventh Amendment that bars suit against states in federal court. These holdings dramatically curtail the power of Congress to provide a judicial forum for redress of state infringement of federal rights. One case, *Alden v. Maine*,[108] involved a suit brought by probation officers who claimed that the State of Maine violated the Fair Labor Standards Act (FLSA) by failing to observe

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99. *Id.*

100. *See Jones*, 178 F.3d at 480-81.

101. *See* Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 934 (2000).

102. *See* 18 U.S.C. §§ 922(d)(9), 925(a)(1) (Supp. IV 1998).

103. *See Gillespie*, 185 F.3d at 697.

104. *See id.* at 706.

105. *Id.* at 698.

106. *See id.* at 707.

107. *See id.* at 708.

108. 119 S. Ct. 2240 (1999).

overtime provisions.[109] The employees first brought suit in federal district court, seeking compensation and liquidated damages. Because the Supreme Court in *Seminole Tribe of Florida v. Florida*,[110] held that Congress does not have the power under Article I to abrogate the states' Eleventh Amendment immunity from damage suits in federal court, the case was dismissed. Because, however, the amendment only bars suit in federal court, the employees re-filed their action in state court.[111] The U.S. Supreme Court ruled that Congress lacks the power under Article I to subject non-consenting states to private suits in their own courts as well.[112] A five-Justice majority reasoned that state sovereign immunity is neither derived from nor limited by the terms of the Eleventh Amendment: "[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."[113]

The Court justified its landmark decision by relying on the original intent of the framers of the Constitution as well as the common understanding of those who framed and ratified the document.[114] Justice Kennedy in *Alden* admitted that the "historical record gives no instruction as to the founding generation's intent to preserve the States' immunity from suit in their own courts," but he interpreted congressional silence to mean that the framers never envisioned that Article I would strip states of their then-existing immunity from suit.[115] The Court did not invalidate the Fair Labor Standards Act as applied to state employers, nor did it overturn its 1985 holding in *Garcia v. San Antonio Metropolitan Transit Authority*,[116] which specifically rejected the state sovereignty argument. What the *Alden* Court did, however, was to deny a judicial forum in which private citizens can enforce their federal rights. The Court's decision in essence approved complete jurisdictional preclusion—a state employee who feels he is owed back wages or overtime under the FLSA has no forum in which to seek a remedy.

The Supreme Court tried to mitigate the apparent harshness of its holding by itemizing several arguments to support its contention that protecting sovereign immunity will not give states carte blanche power to disregard the Constitution or valid federal laws.[117] First, the Department of Labor may still pursue FLSA claims on behalf of employees against a non-complying state in either state or federal court (provided it decides to invest resources to do this).[118] Neither the Eleventh Amendment nor the broader state immunity doctrine, which it

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109. *See id.* at 2246-47.
110. 517 U.S. 44 (1996).
111. *See Alden*, 119 S. Ct. at 2246.
112. *See id.*
113. *Id.* at 2246-47.
114. *See id.* at 2260.
115. *Id.*
116. 469 U.S. 528 (1985).
117. *See Alden*, 119 S. Ct. at 2269.
118. *See id.*

purportedly embodies, bars suits against states brought by the United States or federal agencies.[119] Paradoxically, the Court's approach would mandate creation of a broad federal bureaucracy, contrary to concerns of federalism.

Second, the Court noted that sovereign immunity does not bar actions against state officers for injunctive or declaratory relief—the sovereign immunity concern focuses only on damages.[120] Third, the Court explained that states are free to enact, and some have indeed enacted statutes consenting to a wide variety of suits.[121] Throughout the decision, the Court expressed its trust in state officials, proclaiming that a judicial forum is not necessary because we can trust that states will voluntarily comply with federal law. Obviously this comforting remark rings hollow in *Alden* where the state has in fact denied its employees a forum in which to vindicate violation of their federal right to overtime pay.

Fourth, the Court emphasized that its decision is based on the fact that Congress was exercising Article I powers, leaving intact the notion that when Congress acts under Section 5 of the Fourteenth Amendment, states may be forced to surrender a portion of their sovereignty preserved to them by the original Constitution.[122] In *Fitzpatrick v. Bitzer*,[123] Justice Rehnquist, one of the most staunch advocates of the states' rights movement, confirmed that Congress may authorize private suits against non-consenting states in federal court pursuant to its Section 5 enforcement power since the Fourteenth Amendment itself fundamentally altered the balance of state-federal power.[124]

Despite its recognition of Congress' broader power to restrict states' rights when it enacts legislation under Section 5 of the Fourteenth Amendment, the Court, in its two other federalism decisions last term, rejected congressional attempts to justify legislation under this provision. In the process, the Court further refined the limits of Congress' power under Section 5, first pronounced in *City of Boerne v. Flores*.[125] In that case, the Court struck the federal Religious Freedom Restoration Act (RFRA),[126] which subjected state laws to strict scrutiny whenever they interfere with religious liberty. The U.S. Supreme Court had interpreted the Free Exercise Clause to trigger only a rational basis analysis with regard to facially neutral, generally applicable statutes.[127] The Court reasoned

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119. *See id.*

120. *See id.* at 2264.

121. *See id.* at 2267.

122. *See id.*

123. 427 U.S. 445, 456 (1976).

124. *See id.* at 446. The Court in *Alden* also acknowledged that Congress can employ the power of the purse, conditioning funding of state programs on the states' relinquishing their immunity. *Alden*, 119 S. Ct. at 2265. In addition, the Court noted that sovereign immunity bars suit against states but not lesser entities such as municipalities, counties, or other "non-arms" of the state. *Id.* at 2267.

125. 521 U.S. 507 (1997).

126. 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994).

127. *See* Employment Div. v. Smith, 494 U.S. 872 (1990). RFRA was in direct response to this holding, which was viewed as significantly restricting protection for religious liberty.

that lawmakers exceeded their power by redefining, rather than merely providing, a remedy for the Fourteenth Amendment religious freedom guarantees.[128] In *City of Boerne*, the Court explained that to pass muster, a Section 5 measure must be remedial and there must be proportionality between the injury to be prevented or remedied and the means adopted to reach that end.[129]

Last summer, the Court addressed the question of whether Congress, acting under Section 5 of the Fourteenth Amendment, could subject states to suit for violation of the Patent Act and the Lanham Act. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[130] College Savings Bank sued the state agency claiming it had pirated a plan for pre-paying college tuition that it had patented. The Court ruled that the lack of evidence of any widespread pattern of patent infringement by states precluded Congress from invoking its Fourteenth Amendment power to abrogate state immunity from patent infringement suits.[131] In a 5-4 decision, Chief Justice Rehnquist reasoned that even though suits against states are expressly authorized by the Patent Remedy Act, Congress had no authority to enact the law.[132] While acknowledging that patents qualify as "property" protected by the Fourteenth Amendment Due Process Clause, there was "scant support" for a finding that states have violated patent owners' constitutional rights by depriving them of their property without due process.[133] Further, with regard to RFRA, the remedy was "out of proportion to a supposed remedial or preventive object[ive]."[134] It made all states "immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration."[135]

In a second case involving the same parties, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[136] the Court similarly rejected the Bank's right to proceed against the state under the Lanham Act. It held that Congress inappropriately sought to abrogate state immunity when it amended the Act to expressly allow suit against states for claims of false advertising.[137] The Court reasoned that because the protection against false advertising secured by the Act does not even implicate property rights protected by the Due Process Clause, Congress could not rely on its remedial power under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity.[138] In this case, the Court also held that states do not "constructively waive" their immunity by

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128. *See id.* at 890.
129. *See City of Boerne*, 521 U.S. at 530.
130. 119 S. Ct. 2199 (1999).
131. *See id.* at 2207-08.
132. *See id.* at 2211.
133. *Id.* at 2210-11.
134. *Id.* at 2210 (quoting *City of Boerne*, 521 U.S. at 530).
135. *Id.*
136. 119 S. Ct. 2219 (1999).
137. *See id.* at 2223.
138. *See id.* at 2225.

voluntarily engaging in federally regulated conduct.[139] Thus, College Savings Bank had no remedy against the Florida state agency that allegedly copied the plaintiff's system for prepaying college tuition and also made misstatements in its brochures and annual reports touting its tuition prepayment plan, in violation of the Lanham Act as well as the Patent Act.[140]

Four Justices in dissent in the first case recognized the potentially broader ramifications of these decisions: "The Court's opinion today threatens to read Congress' power to pass prophylactic legislation out of § 5 altogether."[141] According to the dissent, the Constitution gave Congress plenary authority over patents and copyrights, and since Congress long ago preempted state jurisdiction over patent infringement, it was reasonable for Congress to assume that state remedies did not exist and that a federal forum was necessary.[142] Unlike the broad statute challenged in *City of Boerne*, which subjected state conduct to strict scrutiny for any alleged interference with religious freedom, these laws narrowed in on a specific problem and "merely effectuated settled federal policy to confine patent infringement litigation to federal judges."[143] The Court's rulings suggest that in the future Congress cannot exercise its Section 5 power absent a well established record demonstrating a significant pattern of constitutional violations. More immediately, the cases mean that state officials and state entities, such as state universities, are absolutely immune from patent rights violations brought by private citizens seeking damages. Again, as in *Alden*, this would not preclude suits to enjoin a continuing violation of patent rights, i.e., prospective relief, nor suits brought by the U.S. government itself on behalf of private citizens who claim patent violations. Nonetheless, the decisions impose substantial obstacles to litigants who seek damages for violation of federal rights.

The extent to which the Court will closely scrutinize congressional legislation, even when such is enacted to protect Fourteenth Amendment rights, was reviewed this Term in *Kimel v. Florida Board of Regents*.[144] Professor Kimel brought suit under the Age Discrimination in Employment Act (ADEA) alleging that the state university discriminated against him and thirty-one other professors by adopting a salary structure that was biased against the aged in violation of federal law. The University contended that the ADEA was not a valid exercise of congressional power under Section 5 of the Fourteenth Amendment, and the Supreme Court agreed. In a 5 to 4 ruling, the Court determined that the substantive requirements that the Act imposed on state and local government were "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[145] The Supreme Court has ruled in

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139. *Id.* at 2229.

140. *See id.* at 2203 & n.1.

141. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 119 S. Ct. 2199, 2217 (1999) (Stevens, J., dissenting).

142. *See College Savings Bank*, 119 S. Ct. at 2235 (Breyer, J., dissenting).

143. *Id.* at 2240.

144. 120 S. Ct. 631 (2000).

145. *Id.* at 645. The Act permits employers to rely on age only when it is a "bona fide

three decisions that states may discriminate on the basis of age provided the classification is rationally related to a legitimate interest.[146] Because the ADEA imposes a more stringent standard on state government, it could not be understood as merely responsive to or designed to prevent unconstitutional behavior.[147] Further, "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of a constitutional violation."[148] This lack of evidence of discrimination, coupled with "the indiscriminate scope of the Act's provisions," led the Court to rule that the abrogation of the States' sovereign immunity was invalid.[149]

The Court's analysis of the ADEA in *Kimel* promises to be critical because it calls into question the validity of other Acts of Congress that allow suit against state entities, including the Equal Pay Act[150] and the Americans with Disabilities Act.[151] The Supreme Court has agreed to hear two cases this Term addressing the

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occupational qualification reasonably necessary to the normal operation of the business." *Id.* at 647.

146. *See id.*

147. *See id.* at 647-48.

148. *Id.* at 649.

149. *Id.* at 650.

150. *See* Varner v. Illinois State Univ., 150 F.3d 706 (7th Cir. 1998), *vacated*, Illinois State Univ. v. Varner, 120 S. Ct. 928 (2000) (remanded for consideration in light of Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000)). The Seventh Circuit held that Congress expressed clear intent to abrogate state immunity when it enacted the Equal Pay Act and this was a valid exercise of Congressional power under Section 5 of the Fourteenth Amendment, even if the legislative history did not clarify whether the Commerce Clause or Section 5 provided the constitutional basis for the law. *See Varner*, 150 F.3d at 712. The court reached the same conclusion with regard to the ADEA, reasoning that the legislature need not recite the constitutional basis for its enactment in order to effect a valid exercise of power. *See* Goshtasby v. Board of Trustees, 141 F.3d 761 (7th Cir. 1998); *accord* Wichmann v. Board of Trustees of S. Ill. Univ., 180 F.3d 791 (7th Cir. 1999), *vacated*, Board of Trustees of S. Ill. Univ. v. Wichmann, 120 S. Ct. 929 (2000) (same remand as above).

151. In *Crawford v. Indiana Department of Corrections*, 115 F.3d 481 (7th Cir. 1997), the court held that the ADA was lawfully enacted under Section 5 and therefore abrogated any Eleventh Amendment defense to suit in a federal court. The Second Circuit reached a similar conclusion in *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999). The Seventh Circuit, however, has re-evaluated its decision in *Crawford* in light of the intervening *Kimel* decision. In *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*, 207 F.3d 945 (7th Cir. 2000), the court reasoned that in prohibiting disparate impact discrimination against the disabled and requiring accommodation of their disabilities, the ADA imposes remedies not required by the Fourteenth Amendment's equal protection clause which bars only intentional, irrational discrimination against the handicapped. Thus, the ADA exceeds Congress' enforcement power under Section 5 of the Fourteenth Amendment.

The court reasoned that Title 1 of the ADA actually goes further than the ADEA because it specifically requires state employers to consider and to accommodate disabilities unless doing so

constitutionality of the Americans with Disabilities Act, but both were dismissed when the parties settled.[152] Subsequently, however, the Court granted certiorari in the case of *University of Alabama at Birmingham Board of Trustees v. Garrett*,[153] which will be decided during the 2000-01 term. The Eleventh Circuit ruled, contrary to the Seventh and Eighth Circuits, that states are not immune from suits brought be states employees under either the Americans with Disabilities Act or section 504 of the 1973 Rehabilitation Act.

### *B. Procedural and Substantive Due Process*

As in past years, significant litigation involved the procedural Due Process Clause. 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 value of additional procedural safeguards; and (c) the government interest.[154]

In *American Manufacturers Mutual Insurance Co. v. Sullivan*,[155] the U.S. Supreme Court held that disabled employees receiving workers' compensation benefits do not have a property interest protected by the Due Process Clause in payment of benefits for treatment that has not yet been found to be "reasonable and necessary."[156] Plaintiffs challenged a Pennsylvania statute that gave employers and insurers the right to withhold payment of medical bills during an impartial review of treatment options by an independent panel. The Court initially found that the Due Process Clause does not apply at all to the conduct of private insurers—the state's heavy regulation of insurance companies did not convert private conduct into state action.[157] Although this alone would have justified rejection of plaintiffs' case, the Court went on to hold that no property

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would impose an undue hardship. The court emphasized, however, that "all our holding means is that private litigation to enforce the ADA may not proceed in federal court." *Id.* at 952. Because Illinois has not adopted a "blanket rule of sovereign immunity," but actually has authorized suits against itself under state disability discrimination law, it would not be immune from suit in its own state courts. *Id.* By attaching this significant caveat to its holding, the court leaves open ADA suits against state employers in Illinois, provided such suits are pursued in Illinois state court.

152. *See* Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999), *cert. granted*, Alsbrook v. Arkansas, 120 St. Ct. 1003, *and cert. dismissed*, 120 S. Ct. 1265 (2000); Florida Dep't of Corrections v. Dickson, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 525 U.S. 1121 (1999), *and cert. dismissed*, 120 S. Ct. 1236 (2000).

153. 193 F.3d 1214 (11th Cir.), *cert. granted*, 120 S. Ct. 1669 (2000).

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

155. 119 S. Ct. 977 (1999).

156. *Id.* at 990.

157. *See id.* at 980-81.

right was implicated.[158] This is because under Pennsylvania law, payment of a medical bill to a workers' compensation recipient was not owed unless medical treatments were deemed "reasonable and necessary."[159] Until that determination is made, injured workers simply had no property interest in having their providers pay for treatment.[160]

In *Crenshaw v. Baynerd*,[161] the court rejected claims brought by an attorney against members of the Indiana Civil Rights Commission for failing to investigate a charge she brought against a judge who had sanctioned her for filing frivolous claims. She alleged that the defendants violated her right to due process because they dismissed her complaint without complying with what she perceived to be an Indiana statutory mandate to investigate all charges filed with the Commission.[162] The court ruled that the plaintiff failed to identify a property interest or a state-created liberty interest sufficient to raise any procedural due process claim.[163] On the other hand, in *St. John v. Town of Ellettsville*,[164] a district court held that a personnel policy adopted by a town council as an ordinance may create a federally protected property interest in a job even if, under Indiana law, it would not be deemed a contract altering at-will employment status.[165] The court reasoned that if an ordinance evidenced a mutually explicit understanding of continued employment, it may establish a federally protected property interest.[166] Thus, the defendants were not entitled to summary judgment on the procedural due process issue.[167]

Even if a property or liberty interest is identified, the balance of factors may dictate that the procedural safeguards were adequate. For example, in *City of West Covina v. Perkins*,[168] the U.S. Supreme Court unanimously held that when police officers seize property pursuant to a warrant for a criminal investigation, procedural due process does not require them to give the owner of the property notice of state statutory remedies available for recovering the property.[169]

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158. *See id.* at 990.

159. *Id.*

160. *See id.*

161. 180 F.3d 866 (7th Cir.), *cert denied*, 120 S. Ct. 374 (1999).

162. *See id.* at 867.

163. *See id.* at 869; *see also* Reed v. Schultz, 715 N.E.2d 896, 901-02 (Ind. Ct. App. 1999) (finding that an educator's interest in remaining on a list of available special education hearing officers for a two-year period, even if based on an implied contract protected under state law, does not rise to the level of a constitutionally protected property interest; mere placement on the list does not trigger compensation nor guarantee educator will be assigned any hearings since such is left strictly to the discretion of the Superintendent, and thus is "too attenuated from receipt of the actual benefit, case assignment, to constitute a protected property interest").

164. 46 F. Supp.2d 834 (S.D. Ind. 1999).

165. *See id.* at 844.

166. *See id.*

167. *See id.* at 847-48.

168. 119 S. Ct. 678 (1999).

169. *See id.* at 681.

Although due process requires police to notify the owner that the property has been taken, it does not require the police to provide individualized notice of state-law remedies because the owner can readily turn to "public sources" to learn about such remedies.[170] The Court distinguished its earlier ruling in *Memphis Light, Gas & Water Division v. Craft*,[171] holding that notice of available remedies to contest termination of utility service was mandated by the Due Process Clause. That case was distinguishable because the available administrative remedy was not described in any publicly available document.[172]

The U.S. Supreme Court has recognized that the Due Process Clause also contains a substantive component that bars arbitrary, wrongful conduct. Where the government interferes with a fundamental right, the Court has demanded that the conduct meet a strict scrutiny standard. The U.S. Supreme Court has ruled, for example, that parents have a fundamental right to guide the upbringing of their children.[173] This term, in *Troxel v. Granville*,[174] the Court will determine whether this right trumps the interests of grandparents who seek visitation. Several states, including Indiana, in recent years have enacted Grandparent Visitation Statutes. The Washington Supreme Court ruled that its statute, which permits any person to petition for child visitation rights whenever this serves the best interests of the child, interferes with the parents' fundamental liberty interest in the care and companionship of their children.[175]

Where no fundamental right is identified, the U.S. Supreme Court generally has been very reluctant to find a substantive due process violation, and it has required the plaintiff to demonstrate that the government acted in a truly "conscience-shocking" fashion before it will intervene. In *Conn v. Gabbert*,[176] the Court conceded that individuals enjoy a general substantive due process right (though not a fundamental right) to practice a trade or profession.[177] However, it rejected an attorney's claim that a prosecutor's execution of a search warrant against him while his client, a grand jury witness, was testifying violated this right. The Court reasoned that earlier cases involved "a complete prohibition of the right to engage in a calling, and not the sort of brief interruption which

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170. *See id.* at 682.

171. 436 U.S. 1 (1978).

172. *See West Covina*, 119 S. Ct. at 682.

173. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

174. 120 S. Ct. 11 (1999) (decision below was *In re* Custody of Smith, 969 P.2d 21 (Wash. 1998)). The Court's finding that Washington's statute was unconstitutional will be analyzed in next year's Survey Issue.

175. *See In re Custody of Smith*, 969 P.2d at 24. *Compare* Sightes v. Barker, 684 N.E.2d 224 (Ind. Ct. App. 1997) (Indiana's Grandparent Visitation Act does not unconstitutionally burden parent's right to raise their children; even under strict scrutiny, state has a compelling interest in protecting the welfare of a child, and because visitation would be granted only if the court determined this was in the child's best interest, the Act was no more intrusive than necessary).

176. 119 S. Ct. 1292 (1999).

177. *See id.* at 1294.

occurred here."[178] In short, "the Fourteenth Amendment right to practice one's calling is not violated by the execution of a search warrant, whether calculated to annoy or even to prevent consultation with a grand jury witness."[179] The Court also ruled that the attorney did not have standing to raise a claimed violation of his client's right to advice concerning exercise of the privilege against self-incrimination.[180]

Another U.S. Supreme Court case brought under the Due Process Clause, *City of Chicago v. Morales*,[181] addressed the question of whether Chicago's loitering ordinance was unconstitutionally vague. The ordinance defined loitering as remaining "in any one place with no apparent purpose,"[182] and it authorized police to issue dispersal orders to a group of two or more persons seen loitering in a public place if the officer reasonably believed one of them was a criminal street gang member.[183] The ordinance made it a criminal offense to disobey such an order, and the Illinois Supreme Court construed its law to give "absolute discretion to police officers to determine what activities constitute loitering."[184] This interpretation proved fatal to the ordinance's constitutionality. The Court reasoned that the ordinance lacked sufficient guidelines to prevent arbitrary or discriminatory enforcement and provided too much discretion to local police.[185] Further, the "no apparent purpose" language was inherently subjective because it depended on whether some purpose was apparent to the officer on the scene.[186] The Court did suggest that a loitering ordinance limited to those acting with an apparently harmful purpose or aimed only at suspected gang members might pass constitutional muster, but here the ordinance covered even "harmless loitering" and allowed for the arrest of non-gang members.[187]

The Court's refusal to tolerate vague anti-loitering laws was not surprising in light of *Papachristou v. City of Jacksonville*,[188] where the Court twenty-seven years ago unanimously ruled a similar ordinance unconstitutional. This time the U.S. Supreme Court was much more divided on the issue, perhaps because the findings accompanying the ordinance pointed to rising street gang activity in Chicago and increased rates of murder and other serious crimes. The City Council contended that gangs used loitering to establish control over turf, and that such loitering induced fear among persons. During the three years the statute was in place, it generated 42,000 arrests and the city's homicide rate dropped

178. *Id.* at 1296.
179. *Id.*
180. *See id.*
181. 119 S. Ct. 1849 (1999).
182. *Id.* at 1851.
183. *See id.*
184. *Id.* at 1861.
185. *See id.*
186. *Id.* at 1862.
187. *Id.*
188. 405 U.S. 156 (1972).

some twenty-five percent.[189]

The dissenting Justices in *Morales* chided their colleagues for creating a "fundamental right to loiter" and for failing to recognize the seriousness of the problem faced by the city.[190] Justice Scalia stated in his dissent that:

> The citizens of Chicago have decided that depriving themselves of the freedom to 'hang out' with a gang member is necessary to eliminate pervasive gang crime and intimidation—and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.[191]

Justice Thomas similarly stressed the harm caused by gangs and complained that the majority ignored the plight of those who have seen their neighborhoods "literally destroyed by gangs and violence and drugs."[192]

Although the six Justices in the majority recognized these concerns, they relied on *Papachristou* as well as a 1965 case, *Shuttlesworth v. City of Birmingham*,[193] in which the Court overturned a city's anti-loitering law which was used primarily against black picketers. In this case, Luis Gutierrez similarly claimed that he was targeted partly because of his Hispanic appearance. The complaint alleged that black and Hispanic young men were being given criminal records unfairly because of this ordinance.[194] Although a majority voted to invalidate the law, Justices both in the majority and in concurring opinions stressed that with some modification, gang loitering statutes in fact could be sustained.[195]

### *C. Free Speech and Association Rights*

*1. Commercial Speech.*—Since 1976, the U.S. 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, misleading, or if it concerns unlawful activity. Further, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[196] the Court held that even truthful, non-misleading commercial

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189. *See Morales*, 119 S. Ct. at 1855 n.7; *see also* David G. Savage, *Civil Liberties Back on the Street: Anti-Gang Efforts Struck Down; Ruling Criticized as Creating a "Right to Loiter,"* 85 A.B.A. J. 50 (1999).

190. *Morales*, 119 S. Ct. at 1878-83 (Thomas, J., dissenting).

191. *Id.* at 1879 (Scalia, J., dissenting).

192. *Id.* at 1887 (Thomas, J., dissenting).

193. 382 U.S. 87 (1965).

194. *See* Savage, *supra* note 189, at 50.

195. *See Morales*, 119 S. Ct. at 1860, 1864.

196. 447 U.S. 557 (1980).

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.[197]

Applying the factors in *Central Hudson,* the Court in *Greater New Orleans Broadcasting Ass'n v. United States*,[198] unanimously struck down part of a federal statute[199] and FCC regulations prohibiting radio and television broadcasters from carrying advertising about privately operated commercial casino gambling. A few years ago in *United States v. Edge Broadcasting Co.*,[200] the Court upheld the constitutionality of a portion of this statute that prohibits broadcast of lottery advertisements from stations licensed in non-lottery states. Congress could proscribe the advertisement of Virginia's lottery by a broadcaster in North Carolina where the lottery was restricted because the ban advanced the government's policy of assisting states that ban or limit gambling within their borders.[201] The *Greater New Orleans Broadcasting Ass'n* case was different in that New Orleans broadcasters wanted to run advertisements for commercial casinos that are lawful in Louisiana and Mississippi.[202] In a sense, this was an easy case because the federal government presented little, if any, justification for its statute. Although the government asserted that its law was aimed at preventing the social costs of gambling, it was riddled with exceptions that favored state lotteries as well as casinos operated by Native American Indians and not-for-profit organizations.[203] When the ban was added to the Federal Communications Act of 1934, gambling was illegal nationwide and commercial speech was afforded no protection under the First Amendment. Today, lotteries are sponsored by thirty-seven states and Native American Indians operate casinos in about half the states.[204] The fact that Congress has done little to directly and effectively halt this expansion or to otherwise address "the social costs" of gambling undermined its asserted interest.[205]

Thus, the Court ruled that the law violated the *Central Hudson* test. It did not directly advance the asserted government interests, and it was more extensive than necessary. The regulatory scheme was "so pierced by exemptions and inconsistencies" that it could not be said to advance the state's interest in alleviating casino gambling's social costs.[206] Further, even if it directly advanced the federal government's interest in assisting states that disfavored private casinos, the law "sacrifices an intolerable amount of truthful speech about lawful

197. *See id.* at 566.
198. 119 S. Ct. 1923 (1999).
199. 18 U.S.C. § 1304 (1994).
200. 509 U.S. 418 (1993).
201. *See id.* at 428.
202. *See Greater New Orleans*, 119 S. Ct. at 1928.
203. *See id.* at 1925.
204. *See id.* at 1931 n.5.
205. *Id.* at 1926.
206. *Id*. at 1933.

conduct."[207] The Court left intact the decision in *Edge Broadcasting* that the federal government may proscribe the broadcast of lottery advertisements from stations licensed in non-lottery states. The problem in this case was that the government imposed speech restrictions selectively "among speakers conveying virtually identical messages."[208] Justice Thomas concurred separately to reiterate his view that *Central Hudson* should not be applied at all when the Government's interest is simply to keep legal users of a product ignorant in order to manipulate choices in the market place.[209] The majority found "no need to break new ground" in this case, although it recognized the Court's growing disillusionment with *Central Hudson*.[210]

*2. Anonymity.*—It has long been recognized that anonymity is an important part of First Amendment doctrine. Recognizing that the Federalist Papers themselves were written anonymously, the U.S. Supreme Court has been wary of measures that mandate disclosure, in particular by those who engage in controversial speech. This term, the Court invoked this principle to invalidate a California statute mandating that those who gather signatures to qualify ballot initiative measures cannot be forced to wear identification badges. In *Buckley v. American Constitutional Law Foundation, Inc.*,[211] three ballot-initiative proponents testified that the badge law kept potential workers from circulating petitions. Recognizing that petition circulation is "core political speech" for which First Amendment protection is "at its zenith," the Court applied "exacting scrutiny" in weighing the injury to speech against the State's proffered interest of "enabl[ing] the public to identify, and the State to apprehend, petition circulators who engage in misconduct."[212] The Court concluded that the badge requirement "discourage[d] participation in the petition circulation process by forcing name identification without sufficient cause."[213]

The same principle of anonymity was invoked by the Ku Klux Klan in Indiana to challenge a Goshen ordinance forbidding Klan members from wearing masks in public. In *American Knights of the Ku Klux Klan v. City of Goshen*,[214] the district court held that the Constitution protects a speaker's right to anonymity when past harassment makes it likely that disclosure will impact a "group's ability to pursue its collective efforts at advocacy."[215] The statute made it unlawful for a person to wear a mask or other device in a public place for the purpose of disguising or concealing his or her identity, and subjected those who violated the ordinance to a fine of up to $2500.[216] The Mayor of Goshen asserted

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207. *Id.* at 1935.
208. *Id.*
209. *See id.* at 1936 (Thomas, J., concurring).
210. *Id.* at 1930.
211. 119 S. Ct. 636 (1999).
212. *Id.* at 645-46.
213. *Id.* at 646.
214. 50 F. Supp.2d 835 (N.D. Ind. 1999).
215. *Id.* at 836.
216. *See id.*

that the law was passed based on citizens' complaints that the Klan's appearance in the city had caused intimidation and fear because citizens did not know the masked people's identity.[217]

The court rejected these arguments. It relied on *Buckley*, as well as the U.S. Supreme Court's earlier decision in *McIntyre v. Ohio Elections Commission*,[218] which struck down an ordinance prohibiting the anonymous distribution of political leaflets.[219] Because the Klan presented cogent evidence that its members were retaliated against as a result of disclosure of their identity, strict scrutiny had to be applied, and the City could not prove that its anti-mask ordinance was narrowly tailored to serve an overriding or compelling state interest.[220] While conceding that the prevention of violence and the identification and apprehension of criminals are compelling government interests, the record did not support a connection between the ordinance and Goshen's asserted interest.[221] City officials could not show how the ban on masks would help to prevent violence, nor was there any evidence that Klan members engaged in criminal activity while masked.[222]

*3. Free Speech and Association Rights of Government Employees.*—The U.S. Supreme Court has held that the government cannot condition employment upon relinquishing First Amendment rights.[223] However, the Court 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 interest of the State, as an employer, in promoting the efficiency of the public services it performs . . . ."[224] As the U.S. Supreme Court explained in *Waters v. Churchill*,[225] when an employee "begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."[226] In *Klunk v. County of St. Joseph*,[227] the Seventh Circuit applied this analysis to reject free speech claims brought by the Director of Intake at the County Juvenile Probation Department. Klunk was terminated after he announced his intention to run for the school board.[228] Applying the *Pickering* balancing test, the circuit court determined that the Juvenile Probation Department's interest in having confidential employees and providing efficient services without the appearance of political considerations outweighed Klunk's

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217. *See id.* at 837.
218. 514 U.S. 334 (1995).
219. *See id.* at 357.
220. *See American Knights of the Klu Klux Klan*, 50 F. Supp.2d at 842.
221. *See id.*
222. *See id.* at 843.
223. *See* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).
224. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).
225. 511 U.S. 661, 675 (1994).
226. *Id.* at 675.
227. 170 F.3d 772 (7th Cir. 1999).
228. *See id.* at 774.

interest in serving on the school board or in being a candidate for that body.[229] The Seventh Circuit has set forth several factors to consider when performing the *Pickering* balancing test, including:

> (1) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his daily responsibilities; (4) the time, place, and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public.[230]

Applying these factors, the court concluded that probation officers hold a position of loyalty and confidence, and Klunk's political role might affect his exercise of discretion or at least create the impression in the public eye that it could do so.[231]

The Seventh Circuit similarly struck the *Pickering* balance in favor of defendants in the case of *Weicherding v. Riegel*.[232] In this case, the Illinois Department of Corrections suspended a guard, who held an intermediate management position at the prison, after he spoke to the television media in order to promote a Ku Klux Klan rally. The court reasoned that if the inmate population and staff perceived that prison administrators tolerated a Klan supporter, this would exacerbate racial tensions within the prison and increase danger to the staff as well as inmates.[233] The Seventh Circuit determined that the State's interest in maintaining safety and avoiding racial violence at the prison clearly outweighed the employee's interest in associating with and promoting the Klan.[234] Although there were no racially motivated violent attacks or disruptions in the few days between the time the local broadcasts were aired and the employee's suspension, the court cited U.S. Supreme Court precedent clarifying that government need not wait for actual disruption to occur in the workplace before sanctioning speech.[235] Instead, courts have "given substantial weight to government employers' reasonable predictions of disruption . . . ."[236]

Despite this deferential approach, the *Pickering* balance was struck in favor

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229. *See id.* at 776.

230. *Id.*

231. *See id.* at 778. Klunk also claimed the defendants violated his rights under the Indiana Constitution, article I, section 9. The court ruled that the analysis under section 9 was the same as that under the First Amendment. *See id.*

232. 160 F.3d 1139 (7th Cir. 1998).

233. *See id.* at 1143.

234. *See id.*

235. *See id.* at 1143-44.

236. *Id.* (citing Waters v. Churchill, 511 U.S. 661, 673 (1994)).

of the employee in another Seventh Circuit case, *Coady v. Steil*.[237] The plaintiff was a firefighter who was struck in the face numerous times by his superior for displaying a sign on his car roof in support of the democratic candidate for mayor.[238] Demonstrating the confusion in this area, the court first announced that the *Connick-Pickering* analysis requires the plaintiff to show that his interest in exercising his rights outweighs the government's interest "in promoting the efficiency of its public services."[239] Later, the court more accurately stated that the "burden of showing that the government's interests outweighed the plaintiff's falls on the defendant."[240] Setting forth the seven factors cited *supra*, the court emphasized that the plaintiff was not on duty at the time he exercised his First Amendment rights and that the defendant offered no evidence that the plaintiff's conduct "in any way poisoned the atmosphere" of the fire department.[241] In addition, none of the other firefighters suggested that the political sign "threatened to undermine the sense of harmony at the Firehouse."[242] The court concluded by stating that:

> [T]he defendant has failed to carry his burden of showing that the plaintiff's right to exercise his First Amendment rights by affixing a placard atop his car in support of a candidate for mayor while he was off-duty was outweighed by the government's interest in the effective and efficient delivery of firefighting services.[243]

As this statement suggests, the burden of proof ultimately is on the government to justify the retaliatory action once the plaintiff proves his speech is a matter of public concern.

In *Warner v. City of Terre Haute*,[244] the district court used a different rationale to reject First Amendment claims brought by an employee alleging she was retaliated against because she had supported the mayor's opponent in the primary. Although the court acknowledged that the right to associate with others for the advancement of common political beliefs and ideas is protected by the U.S. Constitution, it concluded that none of the alleged retaliatory acts rose to the level of a constitutional rights violation.[245] Warner claimed that as a result of her support for the mayor's opponent she was subjected to numerous acts of harassment. She was reassigned from the information desk to the records room to perform mundane clerical tasks.[246] She was transferred from a daytime to night shift, and she was not allowed to leave the building for a dinner break

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237. 187 F.3d 727 (7th Cir. 1999).
238. *See id.* at 729.
239. *Id*. at 731.
240. *Id.* at 732.
241. *Id.*
242. *Id.*
243. *Id.* at 733.
244. 30 F. Supp.2d 1107 (S.D. Ind. 1998).
245. *See id.* at 1124.
246. *See id.* at 1113.

during the night shift. When she returned to the information desk, she was subjected to close surveillance by a supervisor,[247] her lunch break was reduced from one hour to forty minutes, and she was required to ask a male supervisor for permission to go to the bathroom.[248] Finally, her request to transfer her PERF pension to the police pension fund was delayed.[249] Nonetheless, the court rejected plaintiff's claim because she was not disciplined, threatened with discipline, reprimanded, or demoted, nor did she lose any pay.[250] Despite the litany of harassment, the court concluded that none of this would deter the ordinary person from holding political beliefs.[251] The court's crabbed reading of the First Amendment ignores the chilling effect retaliatory action has on government employees. It also sends a misconceived message to employers that they may harass with impunity provided the retaliatory action does not deny economically tangible job benefits. Although retaliatory conduct must be significant enough such that it would deter a person from exercising her First Amendment rights, cases in the Seventh Circuit suggest that low performance evaluations and job transfers that dramatically alter tasks, even though not accompanied by salary reduction, may trigger First Amendment protection.[252]

### *D. Freedom of Religion*

*1. Aid to Parochial Education.*—One of the most controversial and recurring constitutional issues facing the U.S. Supreme Court is whether parochial education may be funded by government vouchers issued to parents to pay tuition at the school of their choice. The Court in 1998 denied certiorari in the case of *Jackson v. Benson*,[253] leaving intact the Wisconsin Supreme Court ruling that such voucher systems are constitutional, at least where eligibility criteria are religion neutral. On the other hand, courts in Vermont, Maine, Ohio, and Puerto Rico have invalidated voucher programs.[254]

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247. *See id.* at 1114.

248. *See id.*

249. *See id.* at 1126.

250. *See id.* at 1121.

251. *See id.* at 1128.

252. *See* Hulbert v. Wilhelm, 120 F.3d 648, 654-55 (7th Cir. 1997) (lower performance evaluation and lower cost of living salary increase constitute adverse job actions); *see also* Dahm v. Flynn, 60 F.3d 253, 256-57 (7th Cir. 1994) (dramatic downward shift in skill level required to perform job duties can constitute adverse employment action and thus precludes summary judgment); Glass v. Dachel, 2 F.3d 733, 742 (7th Cir. 1993) (letter of reprimand may be viewed as retaliatory action).

253. 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998). *See also* Kotterman v. Killian, 972 P.2d 606, 626 (Ariz.) (upholding the use of tax credit to support private and sectarian schools), *cert. denied*, 120 S. Ct. 283, *cert. denied*, 120 S. Ct. 42 (1999).

254. *See* Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me.), *cert. denied*, 120 S. Ct. 364 (1999); Chittenden Town Sch. Dist. v. Department of Educ., 738 A.2d 539 (Vt.), *cert. denied*, 120 S. Ct. 626 (1999); Assoc. de Maestros de Puerto Rico v. Torres, 1994 WL 780744 (P.R. Nov. 30,

The increase in voucher statutes has been fueled in part by the U.S. Supreme Court's 1997 decision in *Agostini v. Felton*,[255] which overturned earlier restrictive decisions and held that it was permissible for the federal government to fund remedial instruction and counseling for disadvantaged students in parochial schools.[256] In a narrow 5-4 ruling, the majority reasoned 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.[257] The Court emphasized that providing remedial education pursuant to Title I of the 1965 Elementary and Secondary Education Act[258] would not supplant the cost of regular education nor would it create a financial incentive to undertake religious education, thus perhaps distinguishing the voucher situation.[259] In addition, no actual dollars flowed into the coffers of the religious schools, whereas voucher checks are signed over to parochial schools by parents without any restrictions as to how the funds will be expended.[260] The mere size of the financial aid could swing one vote to invalidate such programs, at least if offered on a large scale. On the other hand, the Court in *Agostini* more broadly asserted that aid to parochial schools would 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."[261]

Although the U.S. Supreme Court has thus far denied certiorari in the voucher and tax credit cases, it may very likely clarify its position on "paroch-aid" this term. It has agreed to review the constitutionality of Title I (the same statute at issue in *Agostini)* as applied to the loan of state-owned instructional equipment, including computers and software, to religious schools. In *Helms v. Picard*,[262] the Fifth Circuit ruled that the assistance violated the Establishment Clause because the equipment could readily be used to advance the sectarian

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1994) (unreported). In an Ohio case the U.S. Supreme Court has granted an application to stay a federal district court order, which preliminarily enjoined implementation of a state's tuition voucher program, whereby scholarship payments could be made by the state to private schools providing education to certain students from kindergarten through eighth grade. The district court ruled that because the overwhelming number of private schools participating in the program were sectarian, financial assistance would not satisfy the Establishment Clause requirement that government action cannot advance religion. *See* Simmons-Harris v. Zelman, 54 F. Supp.2d 725 (N.D. Ohio), *stay granted*, 120 S. Ct. 443 (1999) (Justices Stevens, Souter, Ginsburg and Breyer would deny the application for stay).

255. 521 U.S. 203 (1997).

256. *See id.* at 240.

257. *See id.* at 226-28.

258. 20 U.S.C. §§ 6301-8962 (1994 & Supp. III 1997).

259. *See Agostini*, 521 U.S. at 229.

260. *See id.* at 2013.

261. *Id.* at 234.

262. 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom.*, Mitchell v. Helms, 119 S. Ct. 2336 (1999).

mission of the schools. In recent years, several Justices have vociferously argued that the current test for ascertaining whether the wall between church and state has been breached is too restrictive and should be replaced by a more "accommodationist" approach.[263] The current standard mandates that any government program have a secular purpose and its primary effect cannot advance religion. In addition, the program cannot create excessive entanglement between church and state.[264] Using this "test," the U.S. Supreme Court in the 1970s invalidated most forms of direct assistance to parochial schools, other than textbooks.[265] Although never formally overturned, the Court's recent decisions appear to ignore this analysis. Justice O'Connor has tried to persuade her colleagues that the Establishment Clause is violated only where the government has endorsed or demonstrated approval of religion.[266] Justices Rehnquist, Scalia and Thomas contend that a violation occurs only when government discriminates among religious organizations or imposes coercive pressure to engage in religious activities.[267] Justices Ginsburg, Breyer, Souter and Stevens would apparently maintain the stricter separationist approach.[268] Thus far, no majority position has emerged.

*Mitchell v. Helms*[269] provides the Court an opportunity to further explicate its Establishment Clause jurisprudence, and this ruling could be critical to the voucher debate. If a majority adopts an endorsement test, it can be argued that facially neutral voucher programs do not send a message that government is endorsing religion. Rather, such programs simply promote parental choice regarding the education of their children. If a majority adopts a coercion approach, it is highly likely that no coercion will be found, although some have argued that because of the small number of private non-sectarian schools, parents living in drug and gang infested public school districts may feel coerced into "choosing" a parochial education for their children. In any event, the Court appears ready to drop its earlier analysis and its choice of a new "test" will be extremely important to the broader parochial aid debate.

*2. Official Acknowledgment of Religion.*—The Supreme Court let stand two circuit decisions holding as constitutional a state's designation of Good Friday as a paid legal holiday. The key Seventh Circuit decision this past year

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

264. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

265. *See* Meek v. Pittenger, 421 U.S. 349 (1975).

266. *See* Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring); *see also* Books v. City of Elkhart, 79 F. Supp. 979 (N.D. Ind. 1999) (the Lemon Test is not helpful in cases involving government display of religious symbols unless applied in the form of the endorsement test, and under that analysis a city may acknowledge the importance of the Ten Commandments in the moral and legal development of the nation by displaying it on a monument outside the City Municipal Building).

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

268. *See* Agostini v. Felton, 521 U.S. 203, 240-60 (1997).

269. 119 S. Ct. 2336 (1999).

addressing the Establishment Clause was *Bridenbaugh v. O'Bannon*,[270] wherein plaintiff challenged the constitutionality of a statute that has made Good Friday a paid legal holiday in Indiana since 1941.[271] The Seventh Circuit initially acknowledged that *Agostini* did not alter the Supreme Court's traditional three-part establishment clause analysis, which, as discussed, focuses on whether the governmental action has a secular purpose, whether its principal or primary effect advances religion, and whether it fosters an excessive entanglement with religion.[272] Indiana justified its Good Friday law as accomplishing the secular purpose of providing a "spring holiday."[273] Although there is no legislative history explaining the original reason for the Good Friday holiday, the court accepted the State's argument that it continues to recognize it in order to provide a vacation day during the four month period between Martin Luther King, Jr.'s birthday, observed in January, and Memorial Day, observed in May.[274] More generally, the State presented evidence that it believes generous holidays help to bolster employee efficiency and morale.[275] In addition, because many schools and many employers are closed for Good Friday, this provides a logical day to accommodate those state employees whose children are out of school and/or spouses who are off work.[276]

Although four years ago the Seventh Circuit invalidated an Illinois statute making Good Friday a legal holiday in the Illinois public school system,[277] the court distinguished that case based on the different secular interest advanced.[278] Illinois had argued the holiday was justified to save the school the expense of staying open when few teachers and students would be in attendance, but the state failed to present any evidence as to the number of students and teachers who actually would absent themselves on that day.[279] In contrast, the Seventh Circuit in *Bridenbaugh* cited two recent cases upholding a Good Friday holiday in Hawaii and Kentucky where the states, like Indiana, justified their laws based on the secular purpose of providing a spring holiday.[280] The court specifically rejected the argument that this was a "sham" secular purpose.[281] Further, because it accepted the asserted secular purpose for the holiday, it also concluded that the

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270. 185 F.3d 796 (7th Cir. 1999), *cert. denied*, 2000 WL 240481 (Mar. 6, 2000).

271. *See* IND. CODE § 1-1-9-1 (1998).

272. *Bridenbaugh*, 185 F.3d at 798.

273. *Id.* at 799.

274. *See id.* at 796.

275. *See id.*

276. *See id.* (noting that 30% of schools in Indiana and 44% of the employees in a nine-state region, including Indiana, are off on Good Friday).

277. *See* Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995).

278. *See Bridenbaugh*, 185 F.3d at 798.

279. *See id.*

280. *See id.* at 799; *see also* Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999) (upholding a Good Friday holiday for public schools in Maryland), *cert. denied*, 120 S. Ct. 938 (2000).

281. *Bridenbaugh*, 185 F.3d at 801.

law did not have the "principal" effect of advancing or endorsing religion.[282] The court explained that the mere fact that the state holiday may make it easier for some people to practice their faith is not dispositive because the government itself "has not used its own activities and influence to advance religion, it has not established a religion by giving a holiday on Good Friday."[283]

The Indiana Court of Appeals, in *Myers v. State*,[284] rejected an Establishment Clause challenge to an Indiana statutory provision that permits institutions of higher learning accredited by the North Central Association ("NCA"), including religiously affiliated institutions, to appoint university police officers.[285] Bristol Myers, a law student at Valparaiso University, contended that the statute violated the Establishment Clause because the State had conferred significant governmental power on religious institutions. The U.S. Supreme Court in *Larkin v. Grendel's Den, Inc.*,[286] indeed held that the government may not confer sovereign power on churches to veto liquor licenses. The Indiana court distinguished *Larkin*, finding first that Valparaiso University is neither a church nor even a religious institution because the religious character is not "so pervasive that a substantial portion of its functions are subsumed in the religious mission."[287] In addition, unlike *Larkin*, the State of Indiana was not giving Valparaiso University authority to exercise uncircumscribed civic power that could be used to advance its own religious interests.[288]

Applying the three-part establishment clause analysis, the court concluded that the statute had a secular legislative purpose—namely to provide all NCA accredited institutions of higher learning with the ability "to protect persons and property located on or near their premises."[289] Second, the primary effect of the statute neither advanced nor inhibited religion. Rather, the primary benefit which flowed from the grant of this authority to form a police force was strictly secular in nature.[290] Third, the statute did not foster excessive entanglement with religion, both because the institution is not pervasively religious and because the delegation of power in no way fused religious and governmental functions.[291]

The plaintiff also contested the fact that university police officers are not subject to the law enforcement training requirements established by Indiana statute.[292] Although the court of appeals challenged the wisdom of exempting

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282. *Id.* at 802.

283. *Id.*

284. 714 N.E.2d 276 (Ind. Ct. App. 1999).

285. *See* IND. CODE § 20-12-3.5-1 (1998).

286. 459 U.S. 116 (1982).

287. *Myers*, 714 N.E.2d at 282.

288. *See id.* at 283.

289. *Id.* at 281.

290. *See id.*

291. *See id.*

292. *See id.* at 283. It was conceded that the arresting officer did not complete the training required of police officers pursuant to IND. CODE § 5-2-1-9(d) (1998). However, the Code refers only to officers or employees hired by political subdivisions and thus private institutions, like

university officers from this type of rigorous training, and indeed Judge Sullivan in a concurring opinion suggested that this was due to statutory oversight, the Indiana legislature's failure to mandate training was not itself unconstitutional.[293] In short, this was an argument better addressed to the general assembly, not the courts.

Although there were no U.S. Supreme Court decisions addressing government acknowledgment of religion last term, this Term the Court has agreed to revisit the controversial question of prayer in public schools. Since the 1960s, the Supreme Court has closely adhered to the principle that prayer in public schools is prohibited by the Establishment Clause. This is the rule regardless of whether school officials or students deliver the prayer or whether the prayer ceremony is voluntary.[294] In *Lee v. Weisman*,[295] the Court, in a 5-4 decision, held that the Establishment Clause outlaws the practice of public schools inviting clergy to deliver non-sectarian prayers at graduation ceremonies. Justice Kennedy found that graduation prayers bore the imprint of the "State and thus put school-age children who objected in an untenable position."[296] He emphasized the heightened concern with protecting freedom of conscience from subtle, coercive pressure in the elementary and secondary school setting.[297]

Despite *Lee*, the Fifth Circuit in 1993 sustained a public school district's resolution permitting high school seniors to deliver non-sectarian, non-proselytizing invocations at graduation ceremonies. The court reasoned that its conduct did not coerce students to participate in religion and, therefore, did not violate the Establishment Clause.[298] The Fifth Circuit recently revisited this issue in a case challenging the extension of the policy to permit student led prayers over the public address system at football games.[299] The Fifth Circuit held that the extension violated the Establishment Clause because it could not be argued that the prayer was necessary to solemnize the event, since this was a football game and not a graduation ceremony.[300] Further, "[r]egardless of whether the prayers are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and

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Valparaiso University, are not regulated by the provision.

293. *See id.* at 284-85.

294. *See* School Dist. of Abington Township. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

295. 505 U.S. 577 (1992).

296. *Id.* at 590.

297. *See id.* at 592-96.

298. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993). This case was rejected by *Harris v. Joint School District*, 41 F.3d 447 (9th Cir. 1994).

299. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir.), *reh'g en banc denied*, 171 F.3d 1013 (5th Cir.), *cert. granted in part*, 120 S. Ct. 494 (1999), *and aff'd*, 120 S. Ct. 2266 (2000). The Court's holding will be discussed in next year's Survey Issue.

300. *See id*. at 816.

have the authority to stop the prayers."[301] In granting certiorari, the Supreme Court has limited its review to the question of "[w]hether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."[302] Although the district sought review of its policy regarding graduation ceremonies, the Court has not agreed to review that issue. This is a critical question in that many schools across the country have avoided the *Lee* decision where the prayer ceremony was student-initiated and student-led. The question is whether this eliminates the subtle coercion referred to in *Lee* or whether it will still be viewed as government endorsement of a religious message. *Lee* was a 5-4 decision in which four Justices invalidated the graduation program based on endorsement and Justice Kennedy added the critical fifth vote based on his subtle coercion analysis. Thus, both endorsement and coercion issues will no doubt be addressed by the Court.

*3. First Amendment Defense to Suits Brought Against Religious Employers.*—The U.S. Supreme Court in *Employment Division v. Smith*[303] held that a state may enforce laws of general applicability even where the statutes infringe upon the free exercise of religion, provided such laws are rational.[304] Congress attempted to undo this decision by enacting the Religious Freedom Restoration Act,[305] which required the government to prove a compelling interest whenever it substantially burdened a person's exercise of religion.[306] This Act, however, was short lived. The Court found it to be unconstitutional in *City of Boerne v. Flores*.[307] Thus, because state laws prohibiting breach of contract, fraud, as well as federal anti-discrimination laws are generally applicable and rational, religious entities sued under these laws will not be permitted to avail themselves of a meaningful free exercise defense.[308] On the other hand, the courts have long recognized a "ministerial exception" to employment claims, which is grounded not in the Free Exercise Clause, but in the Establishment Clause prohibition against government entanglement in religious matters. For example, the Indiana Court of Appeals in *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*[309] held that the ministerial exception precluded claims brought by

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301. *Id*. at 823.

302. *Sante Fe Indep. Sch. Dist.*, 120 S. Ct. at 494.

303. 494 U.S. 872 (1990).

304. *See id.* at 879.

305. 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994).

306. *See id.* § 2000bb(a).

307. 521 U.S. 507 (1997).

308. *See, e.g.*, Area Plan Comm'n of Evansville & Vanderburgh County v. Wilson, 701 N.E.2d 856 (Ind. Ct. App. 1998) (Evansville zoning code that required property owners to secure a special use permit before using their property as a school or church was a generally applicable, neutral regulation that did not impose an unreasonable burden and thus did not violate the free exercise clause; the ordinance listed 33 "special uses" and it was validly applied to a person who wished to operate a church on his property.), *trans. denied*, 714 N.E.2d 171 (Ind.), *and cert. denied*, 120 S. Ct. 527 (1999).

309. 714 N.E.2d 253 (Ind. Ct. App. 1999).

a pastoral associate against her parish and Diocese. Brazauskas alleged breach of her employment contract, fraud, promissory estoppel, intentional infliction of emotional distress, and defamation.[310] The Diocese claimed that it fired Brazauskas for expressing unorthodox views and for engaging in conduct that was offensive to church teaching. The Indiana Court of Appeals reasoned that whenever officials of a religious organization state their rationale for an employment decision "in ostensibly ecclesiastical terms,"[311] here fitness for the clergy, the First Amendment effectively prohibits civil courts from reviewing these decisions.[312] To allow courts to ascertain whether statements are defamatory or capable of a religious interpretation would effectively thrust the judiciary "into the forbidden role of arbiter of a strictly ecclesiastical dispute over the suitability of a pastoral employee to perform her designated responsibilities."[313]

In sharp contrast, the district court in *Guinan v. Roman Catholic Archdiocese of Indianapolis*,[314] rejected application of the ministerial exception. Guinan, a fifth grade elementary school teacher employed at a Catholic institution who taught primarily secular courses, contended that although she was not a minister, she was a "Catechist" qualified to teach religion classes by virtue of her having attended a Catholic college and having taken several hours of theology.[315] She also organized the Mass at school once a month, which required selecting the music and assigning students to read passages from the Bible.[316] Nonetheless, the court rejected the institution's First Amendment ministerial defense to Guinan's Age Discrimination in Employment Act lawsuit. Although acknowledging that the ministerial exception is triggered whenever an employee's primary duties consist of spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship, here the vast majority of Guinan's duties involved her teaching secular courses.[317] Non-ministers may sometimes trigger this exception to liability, but this is reserved for those positions that come "close to being exclusively religious based."[318]

Although the court in *Guinan* focused on the technical status of the employee, arguably an Establishment Clause problem arises only where the rationale given by the employer for the adverse employment action would require a civic court to review church doctrine. The Archdiocese terminated Guinan's contract because it felt her teaching was weak and her classroom was in disorder.[319] Because the validity of these assertions can be examined without

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310. *See id.* at 256.
311. *Id.* at 262.
312. *See id.*
313. *Id.* at 263.
314. 42 F. Supp.2d 849 (S.D. Ind. 1998).
315. *Id.* at 850.
316. *See id.* at 850-51.
317. *See id.* at 852.
318. *Id.* at 853.
319. *See id.*

regard to church doctrine, Guinan's claim of age bias did not raise an entanglement problem.[320]

Finally, in *McEnroy v. St. Meinrad School of Theology*,[321] the Indiana Court of Appeals dismissed claims of a theology professor for breach of contract, tortious interference with contract, and breach of implied covenant of good faith and fair dealing. The professor claimed she was discharged by the Roman Catholic Seminary for having publicly dissented from Pope John Paul II's position on the ordination of women.[322] The court held that adjudicating McEnroy's case would require it to interpret and apply religious doctrine and ecclesiastical law in assessing whether the archabbot properly exercised his jurisdiction over the seminary, whether the professor's conduct constituted public dissent or caused her to be "seriously deficient," and whether cannon law required the archabbot to remove the professor from her teaching positions. The court reasoned that inquiry into all of these questions would excessively entangle the trial court in religious affairs in violation of the First Amendment.[323] A certiorari petition asking whether a civil court is prohibited from applying neutral principles of law solely because a school is a religious institution was denied by the U.S. Supreme Court.

320. *See id.* at 854. The court subsequently determined that the Archdiocese had not violated the Act. *See* 50 F. Supp.2d 845 (S.D. Ind. 1999).

321. 713 N.E.2d 334 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 313 (Ind.) (mem.), *and cert. denied*, 120 S. Ct. 1675 (2000).

322. *See id.* at 336.

323. *See id.*