STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

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INTRODUCTION

This Article explores state and federal constitutional law developments over the past year. Part I examines state civil constitutional law cases, while the remaining parts focus on recent developments in the United States Supreme Court, as well as on significant Indiana state and federal cases addressing federal constitutional issues.

I. DEVELOPMENTS REGARDING THE EQUAL PRIVILEGES AND DUE COURSE OF LAW CLAUSES OF THE STATE CONSTITUTION

A. Martin v. Richey

Although the Indiana Supreme Court, under the tutelage of Chief Justice Randall T. Shepard, has re-examined the Indiana Constitution as a potential source for the protection of civil liberties,[1] the court has also made it clear that it is not anxious to usurp the legislative role of the General Assembly, and has

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

repeatedly cautioned that state statutes will be presumed constitutional. A constitutional challenger carries a heavy burden of proving a well-grounded historical rationale for judicial activism.[2] Reflecting its reluctance to invalidate state laws, the Indiana Supreme Court, by a narrow 3-2 vote, upheld Indiana's two-year occurrence-based medical malpractice statute of limitations but determined it was 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.[3] In *Martin v. Richey*,[4] the court left the statute intact on its face but held that its application to Martin's situation violated article I, section 23 of the state constitution,[5] 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."[6] In addition, the *Martin* court held that application of the statute violated article I, section 12 of the state constitution,[7] 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."[8] Because *Martin* was the first case in recent years in which either of these constitutional provisions was successfully invoked, it sent shock waves through the legal community.

Under the equal privileges analysis, the Indiana Supreme Court, in a 1994 ruling, set forth a two-prong test requiring that any disparate treatment be reasonably related to inherent characteristics that distinguish the unequally treated classes and that the preferential treatment be uniformly applicable and equally available to all persons similarly situated.[9] Previous attempts to invalidate state legislative enactments under this provision had been

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2. For example, in *Mahowald v. State*, 719 N.E. 2d 421, 425-426 (Ind. Ct. App. 1999), the court upheld the Legislators' Retirement System, which grants a legislator who has served for a total of ten years including service on April 30, 1989, a retirement benefit of at least $400 per month. Mahowald served in the Indiana General Assembly for ten years, but he completed his service in 1975. Thus, he could not take advantage of the new statute and instead was awarded only $36 per month. The court emphasized that the judiciary must afford the legislature "'wide latitude in determining public policy.'" *Id*. at 424 (quoting Boehm v. Town of St. John, 675 N.E.2d 318, 321 (Ind. 1996)). The state can rationally distinguish between retired legislators and current and future legislators and is entitled to consider the fiscal implications of an all-inclusive retirement system. "[F]iscal considerations are a legitimate basis for legislative 'line-drawing.'" *Id.* at 426. The court emphasized that even if the statute was "born of unwise, undesirable or ineffectual policies," the judiciary was not permitted to substitute its belief as to the wisdom of the law for that of the legislature. *Id*. at 426 (citing State v. Rendleman, 603 N.E.2d 1333, 1334 (Ind. 1992)).

3. *See* Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999).

4. *Id.*

5. *See id.* at 1285.

6. IND. CONST. art. I, § 23.

7. *See Martin*, 711 N.E.2d at 1285.

8. IND. CONST. art I, § 12.

9. *See* Collins v. Day, 644 N.E.2d 72, 78-79 (Ind. 1994).

unsuccessful[10] because the Indiana Supreme Court in *Collins* emphasized that substantial deference must be given to legislative judgment and that only where the legislature drew lines in an arbitrary and manifestly unreasonable manner could the court intervene.[11] Nonetheless, Justice Selby, writing for the majority in *Martin*, found that medical malpractice victims who cannot through due diligence discover their injury during the statutory limitation period are denied preferential treatment given to other malpractice victims.[12] The statutory goal of lowering medical costs by encouraging prompt filing of claims becomes irrational as to this group of medical malpractice plaintiffs.[13] Although Justice Selby stated that the statute was unconstitutional only as applied, in his dissent, Chief Justice Shepard opined that he could not envision any cases where the statute would be constitutional. He explained that the very purpose of the statute was to "adopt an event-based limit rather than a discovery-based limit."[14] Thus, although the majority purported to limit its decision to malpractice victims who suffer from a "medical condition with a long latency period which prevents [early discovery]," the crux of the holding is the impermissibility of applying the statute to any malpractice victim who cannot with due diligence discover the tort at an earlier point in time.[15]

In addressing the due course of law claim raised in *Martin*, Justice Selby acknowledged a long line of cases which allow the legislature to modify or abrogate common law rights.[16] Nonetheless, she 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."[17] The court reasoned that to apply the statute of limitations in this context "would impose an impossible condition on plaintiff's access to courts and ability to pursue an otherwise valid tort claim."[18] Since Martin was unaware she had a malignancy and her doctor had assured her that the mass in her breast was non-life threatening fibrocystic breast disease, applying the statute of limitations to her action would indeed be requiring her "to file a claim before such claim existed."[19]

The court further explicated its *Martin* decision in a companion decision, *Van Dusen v. Stotts*.[20] In *Van Dusen*, the court ruled that plaintiffs like Martin

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10. *See, e.g.*, Mahowald v. State, 719 N.E.2d 421 (Ind. Ct. App. 1999).

11. *See Collins*, 644 N.E.2d at 80 (referencing Chaffin v. Nicosia, 310 N.E.2d 867, 869 (Ind. 1974)).

12. *Martin*, 711 N.E.2d at 1281-82.

13. *See id.*

14. *Id*. at 1286 (Shepard, C.J., dissenting).

15. *Id.* at 1277.

16. *See id.* at 1283 (citing State v. Rendleman, 603 N.E.2d 1333 (Ind. 1992); Sidle v. Majors, 341 N.E.2d 763 (Ind. 1976)).

17. *Id*. at 1284.

18. *Id*.

19. *Id*. at 1285.

20. 712 N.E.2d 491 (Ind. 1999).

have two years from the time they discover or should have discovered the malpractice and resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice to file their claim.[21] The *Van Dusen* analysis allowed several litigants to successfully litigate medical malpractice claims previously barred by the restrictive statute of limitations.[22]

Despite the majority's reluctance to invalidate the medical malpractice statute of limitations on its face, *Martin* clearly breathed new life into sections 12 and 23 of article I of the Indiana Constitution, 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 denial of common law rights. On the other hand, because only two justices, Dickson and Boehm, joined Justice Selby's opinion in *Martin*, and Justice Selby soon thereafter stepped down from the court, much uncertainty remains as to the viability of state constitutional arguments brought under these provisions.

B. Application of Martin *to Other Medical Malpractice Cases*

The Indiana Supreme Court re-examined its holding in *Martin* in *Boggs v. Tri-State Radiology, Inc.*[23] *Boggs* presented the court with a woman who discovered the malpractice within the two-year period—eleven months before the time period expired—but whose surviving spouse did not file a claim until several months outside the limitations period.[24] As detailed by the court of appeals, the plaintiff was told following a mammogram that there was no abnormality, but subsequently she learned she had stage IV breast cancer and died a year later at the age of fifty-two.[25] Because, unlike *Martin*, the plaintiff in *Boggs* was not denied a meaningful opportunity to bring a claim, the appellate

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21. *See id.* at 499.

22. *See, e.g.*, Ling v. Stillwell, 732 N.E.2d 1270, 1274-75 (Ind. Ct. App. 2000) (holding that it is unconstitutional to apply two-year statute of limitations to plaintiff who could not reasonably have been expected to discover that his mother's death could have been the result of misconduct or medical malpractice until after the limitations period had passed; events surrounding investigation into mother's death prior to the expiration of the limitations period did not put plaintiff on notice that malpractice was involved); Weinberg v. Bess, 717 N.E.2d 584, 589-90 (Ind. 1999) (finding 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 was not time barred); Halbe v. Weinberg, 717 N.E.2d 876, 881-82 (Ind. 1999) (deciding same ruling upon identical fact pattern as *Bess*). *Cf.* Burton v. Elskens, 730 N.E.2d 1281, 1285 (Ind. Ct. App. 2000) (two-year statute of limitations for medical malpractice action of patient who sustained a stroke following surgery should not be tolled where patient did not suffer from disease with long latency; patient's condition was not one which patient, in the exercise of reasonable diligence, could not have discovered within two-year statutory period).

23. 730 N.E.2d 692 (Ind. 2000).

24. *See id.* at 695.

25. *See* Boggs v. Tri-State Radiology, Inc., 716 N.E.2d 45, 46 (Ind. Ct. App. 1999), *superseded by* 730 N.E.2d 692 (Ind. 2000).

court found no violation of the due course of law provision.[26] The court reasoned, however, that since *Van Dusen* allowed malpractice victims two years in which to file if they discover the wrongdoing even one day outside the limitations period, it would be arbitrary and irrational to disallow those who discover the malpractice one day or one hour before the end of the two years to lose their claim unless they act immediately.[27] Thus, Boggs argued he was entitled to the same two year period from the date of discovery that was afforded Van Dusen and Martin.

The Indiana Supreme Court rejected Boggs' argument and refused to address the hypothetical plaintiff who discovers the malpractice on the eve of the two-year cutoff.[28] Focusing on the specific facts in *Boggs*, Justice Boehm, who joined the majority opinion in *Martin*, posed the question as "whether the statute of limitations is constitutional as applied to patients who discover the malpractice well before the expiration of the limitations period, but some time after the act of malpractice."[29] The court determined that the fact that medical malpractice plaintiffs will often have varying amounts of time within which to file their claims is not sufficient to create an impermissible classification under article I, section 23. The court recognized the far reaching impact of affirming the appellate court's reasoning:

> All statutes of limitations are to some degree arbitrary. The logic of the Court of Appeals would render every statute of limitations or repose a discovery-based statute as a matter of constitutional law. This would significantly undermine the fundamental objective of limitations periods, which recognizes value in the certainty generated by a known date after which a claim is either asserted or expires.[30]

Because Boggs had an eleven-month window to file the medical malpractice claim and it was not impractical or impossible for him to do so, the law was constitutional as applied.[31] Addressing the appellate court's hypothetical plaintiff, the court recognized that there might be situations when discovering and presenting the claim within the time demanded by the statute might not be reasonably possible, but this was simply not such a case.[32]

In dissent, Justice Sullivan, who disagreed with *Martin*, nonetheless reasoned that *Van Dusen* mandated that medical malpractice victims be given two years

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26. *See id.* at 48.

27. *See id*. at 50.

28. *See Boggs*, 730 N.E.2d at 697-98.

29. *Id.* at 697.

30. *Id.*

31. *See id.* at 698; *see also* Coffer v. Arndt, 732 N.E.2d 815, 819-22 (Ind. Ct. App. 2000) (holding that application of two-year occurrence-based limitations period to patient who learned of malpractice two months after malpractice but did not file until twenty-six months after occurrence was time-barred; because patient had twenty-two-month window in which to file, application of the limitations period was constitutional).

32. *See Boggs*, 730 N.E.2d at 697-98.

from the time of discovery in which to file. Thus, the majority opinion created a class of plaintiffs to whom the statute of limitations is not uniformly applicable. Justice Sullivan reasoned that "we cannot make the two-year medical malpractice statute of limitations available to plaintiffs who do not discover the malpractice until more than two years after occurrence but deny it to those who discover it within two years of occurrence."[33] Because Justice Selby rejected a facial attack and determined the limitations period was unconstitutional only *as applied*, the majority approach of making case by case assessments regarding arbitrariness and irrationality is arguably consistent with *Martin*. It does, however, create uncertainty regarding victims who do not discover the malpractice until weeks or days before the two-year period expires.

C. Court Refuses to Extend Martin's *Rationale to Products Liability Claims*

Attempts to expand the rationale of *Martin* outside Indiana's Medical Malpractice Act have not been successful. On May 26, 2000, the Indiana Supreme Court rejected the *Martin* rationale as applied to the ten-year statute of repose in Indiana's Product Liability Act.[34] The Indiana Supreme Court ruled in *Dague v. Piper Aircraft Corp.*,[35] that the statute did not violate section 12's requirement that "[all] courts shall be open."[36] In *McIntosh*, the plaintiff was injured in an accident involving a skid steer loader that had been purchased some thirteen years earlier. Indiana law requires product liability actions be commenced "within ten (10) years after delivery of the product to the initial user or consumer."[37] Emboldened by *Martin*, the plaintiff contended the statute violated the right-to-remedy clause of section 12 as well as the equal privileges requirement of section 23. The court, in a 3-2 opinion, rejected both claims.[38]

The court held that the open courts requirement of section 12 was not violated because the General Assembly retains the power "to identify legally cognizable claims for relief."[39] It reasoned that in *Martin* the cause of action accrued before the plaintiff was aware of the cause whereas here, "the statute extinguished any cause of action before the plaintiffs' claims accrued."[40] Also, "[t]he legislature has provided that after the product is in use for 10 years, no further claims accrue."[41] The majority emphasized that there is no right to redress every injury nor is there a constitutional right to any particular remedy. In essence, the court drew a distinction between a statute of limitations that limits a claim within a certain period of time and a repose statute that says a person has

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33. *Id.* at 700 (Sullivan, J., dissenting).
34. *See* McIntosh v. Melroe Co., 729 N.E.2d 972 (Ind. 2000) (Boehm, J.).
35. 418 N.E.2d 207, 213 (Ind. 1981).
36. IND. CONST. art. I, § 12.
37. IND. CODE § 34-20-3-1(b)(2) (2000).
38. *See McIntosh*, 729 N.E.2d at 973.
39. *Id*. at 976.
40. *Id.* at 978.
41. *Id*.

no remedy even before the action occurs. In *Martin*, the court ruled that a claim that exists cannot be barred before it is knowable, whereas in *McIntosh* the law simply provides "that products that produce no injury for ten years are no longer subject to claims under the Product Liability Act."[42]

Finally, although the court recognized that section 12 is analogous to federal substantive due process in requiring that legislation be rationally related to a legitimate government goal, it found no difficulty concluding that the law was justifiable. The law simply reflects the notion that "in the vast majority of cases, failure of products over ten years old is due to wear and tear or other causes not the fault of the manufacturer."[43] Further, the statute "serves the public policy concerns of reliability and availability of evidence after long periods of time, and the ability of manufacturers to plan their affairs without the potential for unknown liability."[44]

Addressing the section 23 claim, the court relied on the same findings—the distinction drawn between persons injured by products less than ten years old and those injured by products more than ten years old—to find that the law is rationally related to the legislative goals. The court cautioned that a broader interpretation of section 23 to invalidate statutes that permit remedies for some losses but not other similar losses "is a truly startling proposition" that "would invalidate a host of regulatory statutes."[45] The court also found that the statute did not violate the *Collins* requirement that preferential treatment be provided to all similarly situated persons. Unlike the situation in *Martin*, the McIntoshes did not belong to a subset class that was treated differently in that all persons injured more than ten years after a product is initially sold receive similar treatment. Most significantly, the majority rejected the dissent's assertion that less deference needs to be given the legislative judgment as to this second prong in *Collins*.[46]

In a stinging dissent, Justice Dickson, joined by Justice Rucker, found that the statute violated both the due course of law provision of section 12 as well as the equal privileges and immunities clause of section 23.[47] Specifically, Justice Dickson argued that the majority opinion "strips *Martin* of its rationale and restricts it to the narrowest possible holding."[48] Tracing the historical roots of section 12, Justice Dickson advocated finding that section 12 provides "a substantive right to remedy for injuries suffered."[49] Under his reasoning, although such a right could be qualified, it may not be totally abrogated. Because the repose provision bars claims even when products are designed and expected to last for decades, it should be held unconstitutional. As Justice Dickson

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42. *Id.* at 979.
43. *Id.* at 980.
44. *Id.*
45. *Id.* at 982.
46. *See id.* at 983.
47. *See id.* at 985 (Dickson, J., dissenting).
48. *Id.* at 989 n.17.
49. *Id.* at 988.

reasoned, the statute "is especially pernicious to those economically disadvantaged citizens who must rely on older or used products rather than new ones."[50]

Comparing the case to *Martin*, Justice Dickson found that the statute in *McIntosh* similarly required plaintiffs to file a claim before they were able to discover the allegedly negligent conduct and resulting injury, thus imposing an impossible condition on access to the courts.[51] In addition, he found that by "artificially distinguishing as a separate class those citizens injured by defective products more than ten years old," the statute violates the Equal Privileges and Immunities Clause.[52] Unlike the majority, Justice Dickson focused on the unequal treatment of different classes of people, rather than classes of products.[53]

Obviously, the stark differences in interpretation of the Indiana Constitution reflect a split on the court, which leaves some uncertainty as to how the constitutional provisions will be interpreted in the future. Justices Dickson and Rucker clearly favor a broad reading of both section 12 and section 23, whereas Justice Boehm, whose vote was critical in *Martin*, has clearly decided to proceed more cautiously in evaluating constitutional restrictions on the General Assembly's authority to legislate. His opinion in *McIntosh*, as well as the subsequent ruling in *Boggs*, suggest that plaintiff's attorneys have an uphill battle to fight in building on the *Martin* rationale.

D. Looking to the Future

One of the most critical questions raised in the wake of *McIntosh* is the amount of deference the court will give to legislative restrictions on remedies. In *Sims v. U.S. Fidelity & Guaranty Co.*,[54] the court of appeals addressed the constitutionality of a provision in the Worker's Compensation Act which gives exclusive jurisdiction to the Worker's Compensation Board to adjudicate whether an employer or worker's compensation insurance carrier "has acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling [a worker's compensation claim]."[55] John Sims, who was injured while working at a construction site, contacted the defendant carrier to schedule medical care and to secure payment of temporary total disability benefits. After receiving no response for some four weeks, Sims filed a complaint accusing the defendant of gross negligence, intentional infliction of emotional distress, and intentional deprivation of statutory rights under the Worker's Compensation Act for denying him benefits and also constructively denying him access to timely medical care and physical therapy.[56] The trial court dismissed Sim's complaint

50. *Id.* at 990.
51. *See id.* at 989 n.17.
52. *Id.* at 991.
53. *See id.* at 991-92.
54. 730 N.E.2d 232 (Ind. Ct. App. 2000).
55. IND. CODE § 22-3-4-12.1(1) (2000).
56. *See Sims*, 730 N.E.2d at 234.

based on the statutory exclusion.

In 1992 the Indiana Supreme Court ruled that the exclusive remedy provision in the Worker's Compensation Act did not apply to the right of an employee to assert actions against third parties such as the insurance carrier.[57] However, after *Sims*, the statute was amended to exclude such claims.[58] In fact, as the court of appeals conceded, the statute may have been passed in reaction to this prior case law.[59] Nonetheless, the court concluded that the statute violated article I, section 12 in that the legislature unreasonably and impermissibly denied the right of access to the courts. The statute's impact is "to deprive injured workers who have been *subsequently* harmed by the malfeasance of the insurer the right to a complete tort remedy."[60] The court reasoned that the purpose of the act was to compensate workers for injuries sustained on the job whereas here the injury arose from subsequent, additional injuries. Therefore, it would be illogical to utilize the act to shield insurers from liability for their own independent torts.[61] In addition, the court found that the statute violated the right to trial by jury protected by article I, section 20 of the Indiana Constitution. Although the right to a jury trial applies only to actions "triable by a jury at common law . . ., actions for injuries to the person caused by another's negligence were actionable under the common law of England and triable by jury."[62]

In dissent, Judge Baker raised several arguments. First, he noted that plaintiff's tort action would not even exist but for the Worker's Compensation Act.[63] Second, unlike *Martin*, the act does not totally foreclose access to the courts, but simply imposes a trip to the compensation board as a pre-requisite to an appeal through the court system. In this sense the statute operates no differently than the Medical Malpractice Act, which requires aggrieved plaintiffs to first take their claims to a review board before filing suit in court. "[The] statute is not unconstitutional merely because it alters or restricts the manner of achieving a remedy in the court system."[64] Third, Judge Baker cited to *McIntosh* as reaffirming the General Assembly's authority to modify the common law.[65] Fourth, he accused the majority of erroneously relying on cases decided *before* the statute came into effect.[66] Finally, he found no violation of the right to jury trial because lack of a jury trial was simply "one of the policy trade-offs involved in guaranteeing to workers a system of compensation superior to that which preceded it."[67] On the other hand, the dissent expressed its concern for the

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57. *See* Stump v. Commercial Union, 601 N.E.2d 327, 331-32 (Ind. 1992).
58. *See* IND. CODE § 22-3-4-12.1 (2000).
59. *See Sims*, 730 N.E.2d at 238 (Baker, J., dissenting).
60. *Id*. at 236 (emphasis in original).
61. *See id.* at 236-37.
62. *Id*. at 237 (internal citations omitted).
63. *See id.* at 238-39 (Baker, J., dissenting).
64. *Id.* at 238.
65. *See id.* (citing McIntosh v. Melroe Co., 729 N.E.2d 972, 977-78 (Ind. 2000)).
66. *See id.* at 238 n.3.
67. *Id*. at 239.

$20,000 limitation set forth in this statute, which might very well preclude meaningful recovery in some cases. Judge Baker urged the legislature "to consider raising the $20,000 limitation on recovery to avoid constitutional challenges in the future."[68]

II. THE DUE PROCESS CLAUSE

Although the text of the Due Process Clause appears to ensure only procedural fairness, the U.S. Supreme Court has long recognized that it 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 Supreme Court has ruled that parents have a fundamental right to guide the upbringing of their children and that government interference with this right must be strictly scrutinized.[69] This term, in *Troxel v. Granville*,[70] the Supreme Court decided that this right—"perhaps the oldest of the fundamental liberty interests recognized by this Court"—trumps the interest of grandparents who seek visitation.[71] However, a majority could only agree that the law's sweeping breadth and application in this case violated the mother's constitutional rights.[72] Thus, the opinion provides little guidance to other states, all of which in recent years have enacted Grandparent Visitation Statutes.

At issue in *Troxel* was a Washington law that permitted "any person" to petition for visitation rights "at any time" whenever such visitation would be in the child's best interest.[73] Paternal grandparents sought to obtain visitation of their deceased son's two young daughters, who were in the custody of their mother. The father had never married the mother and her new husband adopted the children. The mother was willing to grant the grandparents visitation of one day per month plus participation in holiday celebrations, but the grandparents wanted more. The trial court granted them one weekend of visitation per month, one week in the summer, and time on the grandparents' birthdays. The Washington Supreme Court declared the statute unconstitutional on its face because it interfered with parental rights without any showing of harm.[74]

The Supreme Court, in a splintered decision, ruled that the trial court violated the mother's fundamental right to make decisions concerning the care, custody and control of her children.[75] In writing the plurality opinion, Justice O'Connor termed the statute "breathtakingly broad" because it "effectively permits any

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68. *Id*.

69. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

70. 120 S. Ct. 2054 (2000).

71. *Id.* at 2060.

72. *See id.* at 2064.

73. WASH. REV. CODE § 26.10.160(3) (2000).

74. *See Troxel*, 120 S. Ct. at 2057-58.

75. *See id.* at 2061.

third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to a state-court review."[76] The trial court infringed on the mother's substantive due process rights by ignoring the traditional presumption that fit parents act in the best interest of their children.[77] The trial court appeared to require the mother to disprove that visitation by the grandparents would be in her daughters' best interest. Justice O'Connor reasoned that as long as a parent adequately cares for her children "there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[78] There were no "special factors" here, i.e., unfitness of a parent or total denial of visitation that might justify state interference with the mother's fundamental right.[79]

Because of the sweeping breadth of the statute and the application in this case, Justice O'Connor refused to address the core constitutional question of "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."[80] She left unanswered the basic question of whether use of a "best interest" test is constitutionally permitted. Nor did she address who should have standing to assert visitation rights, nor even the primary question of whether grandparents have any substantive due process liberty interest in visitation rights. She simply concluded that the problem was that the law as applied here gave no deference to the mother's views. The "breathtakingly narrow" scope of Justice O'Connor's plurality opinion leaves the fate of dozens of state laws in doubt.

In a separate concurrence, Justice Souter would have affirmed the state's Supreme Court's decision to invalidate the visitation statute on its face because it allowed interference with parental rights without a showing of harm.[81] Justice Thomas concurred, emphasizing that because the statute infringed on fundamental rights, it must be subjected to strict scrutiny. He found that the state lacked any compelling interest in "second-guessing a fit parent's decision regarding visitation with third parties."[82]

Three dissenters argued that the law was neither facially invalid nor invalid as applied. Justice Stevens would not have required a showing of actual or potential harm to the child before allowing visitation over a parent's objection. He argued that the Washington Supreme Court ignored the fundamental liberty interest of the child—there may be situations where the child has a stronger interest than mere protection from serious harm caused by termination of

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76. *Id.*
77. *See id.* at 2061-62.
78. *Id*. (citation omitted).
79. *See id.*
80. *Id*. at 2064.
81. *See id*. at 2065-66 (Souter, J., concurring).
82. *Id*. at 2068 (Thomas, J., concurring).

visitation by a person other than a parent.[83] He contended that the Due Process Clause allows a state to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interest of the child.[84] Similarly Justice Kennedy said the Washington Supreme Court erred "by announcing a categorical rule that third parties who seek visitation must always prove the denial of visitation would harm the child," instead of basing the decision on the child's best interest.[85] Justice Scalia deemed the extension of the doctrine of Substantive Due Process inappropriate to this context, and he chastised the majority for creating "a new regime of judicially prescribed, and federally prescribed, family law."[86] He argued that issues touching on parents' rights to direct the upbringing of their children are best left to the state legislature.[87]

Although there was no majority opinion, the *Troxel* decision clearly affects the Grandparent Visitation Laws enacted by all fifty states between 1966 and 1986. The Court recognized the fundamental right of parents, not grandparents or state court judges, to decide what is best for their children. On the other hand, the ruling leaves open the door to visitation rights for non-parents who have strong bonds with children. Although the decision does not declare all laws unconstitutional simply because they use a "best interest of the child" approach, it clearly directs that in applying their statutes, state judges must weigh the parents' interest more heavily.

Prior to *Troxel*, Indiana courts had sustained Indiana's Grandparent Visitation Act,[88] which, unlike the Washington statute, provides more specificity for when it can be invoked (e.g., only where parents have divorced, one parent has died, a child is born out of wedlock, or in certain adoption situations).[89] In *Sightes v. Barker*,[90] an Indiana appellate court held that the Act, dating back to 1981, did not unconstitutionally burden the parents' right to raise their children. The court reasoned that even under strict scrutiny, the state had a compelling interest in protecting the welfare of a child.[91] It stressed that the burden was on the grandparents to demonstrate by a preponderance of the evidence that visitation is in the child's best interest, and, that even "[i]f such a showing is made, it falls to the court to evaluate the evidence, assess the circumstances, and carefully devise a visitation schedule that is in the children's best interest."[92] The

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83. *See id*. at 2069-70 (Stevens, J., dissenting).

84. *See id.* at 2071.

85. *Id*. at 2076 (Kennedy, J., dissenting).

86. *Id.* at 2075 (Scalia, J., dissenting).

87. *See id.*

88. IND. CODE § 31-17-5-1 (2000).

89. The Act was amended in 1997 to cut off visitation rights to a paternal grandparent of a child born out of wedlock if the child's father has not established paternity. *See* IND. CODE § 31-17-5-1(b).

90. 684 N.E.2d 224 (Ind. Ct. App. 1997).

91. *See id.* at 233.

92. *Id.* at 230.

court specifically noted that judicial oversight will ensure protection against "an unwarranted intrusion into the fundamental liberty of the parents and child."[93] Because visitation would be granted only if after careful scrutiny, the court determined such visitation was in the child's best interest, the Act was no more intrusive than necessary.[94] Although *Troxel* challenges whether the best interest of the child can suffice to trump parents' rights,[95] the more restricted scope and narrow construction of the law may mean that it at least can survive a facial challenge.

Although the Supreme Court in *Troxel* did not invalidate the Washington statute on its face, it did rule that the Washington trial judge erred in failing to give sufficient weight to the parents' interest.[96] Indiana courts have not taken this approach. In *Swartz v. Swartz*,[97] the court ruled that a trial court judge abused his discretion in granting grandparents regular, overnight visitation. The St. Joseph Superior Court had awarded the grandparents visitation with a nine- year-old child every other weekend, alternating among the grandparents' three homes, since one set of grandparents had divorced and remarried new spouses. Each grandparent also was granted one week of visitation during the summer.[98] The appellate court found that this schedule would require the child to live outside of her mother's home seventy-three days per year and thus would "fundamentally alter the relationship between Mother and C.S., which by all accounts was close, healthy, and loving."[99] Additionally, the child would be living in four different households on alternating weekends. The court emphasized that this was not a case of access, since the mother had agreed to unsupervised daytime visitation with the grandparents, but rather was simply a matter of degree, and here the trial court overstepped its bounds.[100] In light of the subsequent *Troxel* decision, it would appear the court of appeals was correct in its reasoning.

Reiterating the holding in *Sightes*, the court in *Swartz*, while finding an impermissible application of the Act, held the visitation rights conferred by the statute did not substantially infringe on parents' fundamental right to raise their children because it "only contemplates occasional, temporary visitation as found to be in the best interest of the child" and thus met even strict scrutiny analysis.[101]

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93. *Id.* at 231.

94. *See id.* at 233.

95. The court specifically acknowledged a Tennessee Supreme Court decision holding that states cannot interfere with parental rights unless substantial harm threatens a child's welfare. The court found that this same standard does not apply under the federal constitution in the absence of a substantial infringement by the state on a family relationship, and it found that Indiana's Grandparent Visitation Statute did not impose this type of substantial burden. *See id*. at 231, 232 n.2 (citing Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn. 1993)).

96. *See* Troxel v. Granville, 120 S. Ct. 2054, 2060-61 (2000).

97. 720 N.E.2d 1219 (Ind. Ct. App. 1999).

98. *See id.* at 1221.

99. *Id*. at 1222.

100. *See id.* at 1222-23.

101. *Id.* at 1222.

Although *Troxel* has cast doubt on the broad, undifferentiated use of a "best interest" test to override parental rights, it appears that Indiana courts have cautiously applied the law, giving significant weight to parents' wishes.[102]

A second, far more contentious substantive due process case addressed the question of whether states may bar a widely used second-trimester abortion procedure.[103] The Nebraska statute in question banned any procedure that involved "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child."[104] The procedure has been tagged "partial birth" abortion by its opponents. Under the Nebraska statue, violation of the law is a felony, carrying a penalty of up to twenty years in prison, a fine of up to $25,000, and it provides for automatic revocation of a convicted doctor's state license to practice medicine.[105] Dr. LeRoy Carhart is the only physician in the state of Nebraska who performs second-term abortions. He contested the constitutionality of the law and, following a trial, a federal court judge agreed that the ban was unconstitutional because it forced the doctor to use a riskier surgery on some patients.[106] The Eighth Circuit affirmed, and the state, supported by some thirty states that have enacted similar laws, appealed.[107]

Eight years ago the Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[108] upheld the basic principle of *Roe v. Wade*,[109] that the Constitution protects a woman's right to terminate a pregnancy.[110] *Casey* determined, however, that a state has the right to regulate the abortion decision before fetal viability provided it does not impose an "undue burden," i.e., it does not have the purpose or effect of placing a substantial obstacle in a woman's attempt to obtain an abortion.[111] The precise meaning of the "undue burden" test has created much uncertainty. In *Casey* only one of several contested provisions (a requirement of spousal notice), was found to impose a constitutionally

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102. *See, e.g.*, *In re* Visitation of J.P.H., 709 N.E.2d 44, 47 (Ind. Ct. App. 1999) (granting visitation to paternal grandparents of child born out of wedlock but later legitimated against the wishes of the parents would have constituted unwarranted encroachment into right of custodial parents to raise their child as they sought fit); Lockhart v. Lockhart, 603 N.E.2d 864, 867 (Ind. Ct. App. 1992) ("As a pure matter of law, the statute clearly requires that grandparents may not obtain visitation against the wishes of a custodial parent;" thus visitation would not be permitted where the grandparents' son was awarded custody.).

103. Stenberg v. Carhart, 120 S. Ct. 2597 (2000).

104. *Id.* at 2605 (citing NEB. REV. STAT. § 28-328(1) (Supp. 1999)).

105. *See* NEB. REV. STAT. § 328(2) (Supp. 1999).

106. *See Stenberg*, 120 S. Ct. at 2610.

107. *See id.* at 2634.

108. 505 U.S. 833 (1992).

109. 410 U.S. 113 (1973).

110. *See Planned Parenthood of S.E. Pa.*, 505 U.S. at 852-53.

111. *Id.* at 878.

impermissible "undue burden."[112] After viability, the state, in promoting its interest to protect potential human life, may regulate, and "even prescribe, abortion except where it is necessary, inappropriate medical judgment, for the preservation of the life or health of the mother."[113]

The Court in *Stenberg* held that the Nebraska law violated both of these basic principles because it lacked any exception for the preservation of a mother's health, and its definition of the prescribed procedure was so broad as to include the most frequently used second-trimester abortion method, thus imposing an undue burden.[114] The statute did not distinguish between abortions performed before or after viability, but it failed both tests because it did not provide any health exception for pre- or post-viable abortions. "[A] State may promote but not endanger a woman's health when it regulates the methods of abortion."[115] Despite significant conflicting medical evidence, the Court reasoned that the district court's determination that the prescribed method was the safest procedure under some circumstances was supported by the record.[116] Further, even if the statute's basic target was to ban dilation and extraction (D & X), whereby the fetus is delivered through the cervix feet first, and the skull is then collapsed and extracted through the cervix, the statutory language made clear that it covered a much broader category of procedures.[117] The district court judge conducted extensive fact finding and established that the law would have the effect of prohibiting the most common form of abortion (dilation and evacuation) and that the intended effect was to prohibit a procedure (dilation and extraction) that was the safest procedure for late pre-viable abortions.[118]

In a separate concurrence, Justice O'Connor pointed out that

> [b]y restricting their prohibitions to the D & X procedure exclusively, the Kansas, Utah, and Montana statutes avoid a principal defect of the Nebraska law . . . a ban on partial-birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.[119]

Although Justice O'Connor's dictum is a non-binding opinion, her vote was critical in forming a majority. Hence, states will have to determine whether their own laws are more like the broad statute enacted by Nebraska, or the more narrow prohibitions, which arguably would muster majority support on this Court.

Three of the four dissenters argued that *Casey* was wrongly decided and should be overturned. Justice Kennedy, although he co-authored the plurality

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112. *See id.* at 893-94.

113. *Id.* at 879.

114. *See* Stenberg v. Corhart, 120 S. Ct. 2597, 2609 (2000).

115. *Id*.

116. *See id.* at 2610-13.

117. *See id*. at 2614.

118. *See id*. at 2610-13.

119. *Id*. at 2619-20 (O'Connor, J., concurring).

opinion in *Casey*, determined that because the D & X method more strongly resembled infanticide, "Nebraska could conclude the procedure presents a greater risk for disrespect for life and a consequent greater risk to the profession and society."[120] Justice Kennedy thought the Court lacked authority to second guess the states' determination. The majority opinion was a victory for the pro-choice movement—the opinion invalidated restrictions on abortions adopted by many states in favor of protecting a woman's "fundamental individual liberty," a term carefully avoided in *Casey*, which instead discussed the "core" liberty interest.[121] However, it is likely that O'Connor's concurrence in *Stenberg* means that state abortion laws will be upheld in the future even using the "undue burden" test she fashioned in *Casey*.

III. EQUAL PROTECTION

Most litigation brought under the Equal Protection Clause addresses bias against a "discrete and insular" minority. In recent years, however, there has been a proliferation of suits alleging selective enforcement of civil laws against individuals for reasons unrelated to their membership in any group. This Term the Supreme Court entered the fray, holding in *Village of Willowbrook v. Olech*,[122] that a single individual constituting a "class of one" may assert an equal protection claim where conduct by municipal government lacks a rational basis.[123] Olech, a homeowner, alleged that the Village violated her rights when it demanded a thirty-three-foot easement on her property for connection to the municipal water supply whereas other similarly situated property owners were required to grant only a fifteen-foot easement.[124] Olech contended that the demand was "irrational and wholly arbitrary."[125] She claimed the Village was discriminating against her because she had previously successfully sued the Village on another matter. The Seventh Circuit reasoned that to prevent a flood of litigation, such zoning denial cases could proceed only where the plaintiff alleged subjective ill-will or spite.[126] The Supreme Court in a brief five-paragraph per curiam decision held that Mrs. Olech stated a proper Equal Protection Claim when she alleged that she was intentionally treated differently from others similarly situated and there was no rational basis for the difference in treatment. The Court ruled that, "[t]hese allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis."[127] However, the opinion failed to articulate what Mrs. Olech must prove in order to prevail.

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120. *Id*. at 2626 (Kennedy, J., dissenting).
121. *Casey*, 505 U.S. at 852.
122. 120 S. Ct. 1073 (2000) (per curiam).
123. *Id.* at 1074.
124. *See id.*
125. *Id*.
126. *See id.*
127. *Id*. at 1075.

In a separate concurrence, Justice Breyer argued that requiring the additional factor of "vindictive action," "illegitimate animus," or "ill-will" relied on by the Seventh Circuit is important "to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right."[128] Indeed in the wake of *Olech* the Seventh Circuit has reaffirmed the need to show some "illegitimate animus" as a necessary element in proving so-called vindictive action equal protection claims. In *Hilton v. Wheeling*,[129] the court reasoned that *Olech* did not clarify the precise role of motive because it did not reach the theory of subjective ill-will in the context of challenges to police enforcement of the law.[130] Following Justice Breyer's lead, Judge Posner reasoned that something more must be proved so as not to improperly mire federal courts in "local enforcement of petty state and local laws."[131] Thus, although *Olech* appeared to open the federal court doors to challenging arbitrary, irrational government abuse of power, it remains to be seen how extensively the Equal Protection Clause will actually be used.

IV. FREEDOM OF SPEECH AND ASSOCIATION

Despite a continuously shrinking docket (only seventy-seven cases were decided this term) the Supreme Court ruled on about a half a dozen First Amendment cases that covered a wide variety of topics.

A. The Right to Protest

It is well recognized that a central purpose of the First Amendment is to prevent government from punishing speech on the basis of its content. Where government is seeking to suppress a particular message or a particular speaker, a strict scrutiny standard must be met—the regulation must be necessary to serve a compelling interest and it must be no more extensive than necessary.[132] Conversely, where government does not seek to suppress the content, but merely to control the time, manner, or place of the speech, a less restrictive standard is applied.[133] In *Hill v. Colorado*,[134] the Court, in a 6-3 decision, upheld a Colorado statute making it unlawful for any person within one hundred feet of a health care facility entrance "to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill, displaying a sign, or engaging in oral protest, education, or counseling'" with that person.[135] The majority concluded that the law was a content neutral regulation, whereas three dissenters argued that the statute was an unconstitutional content-

128. *Id*. (Breyer, J., concurring).
129. 209 F.3d 1005 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 781 (2001).
130. *See id.* at 1008.
131. *Id*.
132. *See* Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 101-02 (1972).
133. *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).
134. 120 S. Ct. 2480 (2000).
135. *Id.* at 2484 (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).

based regulation aimed at pro-life protesters.[136]

In 1997, in *Schenck v. Pro-Choice Network of Western New York*,[137] the Court held that a judge-issued injunction creating a speech-free "floating buffer zone" with a fifteen-foot radius violated the First Amendment.[138] In *Hill* the Court reviewed a Colorado Supreme Court decision upholding the state's eight-foot buffer zone law.[139] In affirming the state ruling, the Court found there was much more than a seven-foot difference to distinguish the two cases.

Before passage of the Colorado Act, plaintiffs had engaged in "sidewalk counseling" on the public ways and sidewalks surrounding abortion clinics.[140] They challenged the statute as an unconstitutional content-based regulation because the content of their speech had to be examined in order to determine whether the speech "constitutes oral protest, counseling and education."[141] Further, they argued that the statute was overbroad because it substantially affected their ability to engage in oral communication and to distribute leaflets in a "quintessential" public forum.[142]

The Supreme Court recognized the strong competing interests in this case—namely the States' right to protect the health and safety of its citizens versus the plaintiffs' right to engage in traditionally protected protest speech. It found, however, a "significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication."[143] The Court recognized an important privacy interest in avoiding "unwanted communication" as well as citizens' right of "passage without obstruction."[144] The Court explained that "the First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."[145]

The most contested ruling was the majority's finding that this was a content neutral law. Justice Stevens reasoned that it did not regulate speech, but "[r]ather it is a regulation of the places where some speech may occur."[146] The statute was not adopted because of disagreement with the message it conveyed, and the statutory language made no reference to the content of the speech. Further, "the State's interest in protecting access and privacy . . . [were] . . . unrelated to the content of the demonstrators' speech."[147] For these reasons, Justice Stevens concluded that the statute represented a content neutral restriction that only had

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136. *See id.* at 2488, 2503.
137. 519 U.S. 357 (1997).
138. *See Hill*, 120 S. Ct. at 2487 (quoting *Schenck*, 519 U.S. at 361).
139. *See* Hill v. City of Lakewood, 911 P.2d 670, 672 (1995).
140. *Hill*, 120 S. Ct. at 2485.
141. *Id.*
142. *Id.* at 2486.
143. *Id*. at 2489.
144. *Id*. at 2489-90.
145. *Id*. at 2489 (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772-73 (1994).
146. *Id.* at 2491.
147. *Id.*

to meet the less stringent *Ward* standard. The fact that the law may have been enacted in response to the activities of anti-abortion protestors did not mean that the statute was content based since the statute on its face was not limited to those who oppose abortion.[148]

The Court applied the *Ward* analysis and found that the Colorado law was a valid "time, place, and manner regulation" because it served a significant government interest, it was content neutral, and it was narrowly tailored to serve those interests and left open ample alternative channels for communication.[149] In regard to the "narrow tailoring" requirement, the Court emphasized that in contrast to the injunction in *Schenck*, the statute here did not require a speaker to move away from anyone passing by.[150] Further, unlike the fifteen-foot zone in *Schenck*, an eight-foot zone allows a speaker to communicate at a "normal conversational distance." Finally, the statute contained a scienter requirement to protect speakers who inadvertently violate the statute.[151] The Court emphasized that under *Ward*, the government need not select the least intrusive means of serving the statutory goal and noted that "[a] bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, protect speech itself."[152] Finally, the Court noted that the restriction left ample room for communication because signs, pictures, and the human voice can clearly cross an eight-foot gap.[153]

The Court reasoned that the comprehensiveness of the statute was actually a virtue because it defeated any concerns of discriminatory governmental motives. Justice Stevens further emphasized that persons attempting to enter healthcare facilities are often in a particularly vulnerable physical and emotional state and that Colorado responded "by enacting an exceedingly modest restriction on the speakers' ability to approach."[154]

In a stinging dissent, Justice Scalia, joined by Justice Thomas, opined that the statute was clearly a speech regulation directed against the opponents of abortion. "[I]t blinks reality to regard this statute, in its application to oral communications, as anything other than a content-based restriction upon speech in the public forum. As such, it must survive that stringent mode of constitutional analysis our cases refer to as 'strict scrutiny.'"[155] He reasoned that whether a speaker needs permission to approach within eight feet depends entirely on what the speaker intends to say. Further, he argued that protecting people from unwelcome communication is not a compelling government interest.

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148. *See id*. at 2494.

149. *Id*. Note that the Court reintroduced the adjective "ample" despite post-*Ward* decisions suggesting that the test is met provided government can point to "reasonable alternative avenues of communication." *E.g.*, Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53 (1986).

150. *See Hill*, 120 S. Ct. at 2485.

151. *Id*. at 2495.

152. *Id.* at 2496.

153. *See id.*

154. *Id*. at 2496.

155. *Id*. at 2507 (Scalia, J., dissenting).

Indeed the state itself disavowed that interest.[156] Rather, Colorado contended that the law was passed in order to preserve "unimpeded access to health care facilities."[157] As to that interest, Scalia argued that the eight-foot buffer zone was not narrowly tailored, but rather substantially burdened the plaintiffs' ability to counsel and educate, something which cannot reasonably be done at an eight-foot distance.[158] The law, reasoned Scalia, thus cut off the most effective place for the speech, and the majority's opinion was a "distortion of our traditional constitutional principles"—all done in the name of aggressively protecting abortion rights.[159]

Justice Kennedy agreed that the decision was an unprecedented departure from the Court's teachings: "The result is a law more vague and overly broad than any criminal statute the Court has sustained as a permissible regulation of speech."[160] Kennedy was most critical of the majority's emphasis on the right of individuals to be protected from unwanted speech. Although the Supreme Court has recognized such a right in the privacy of one's home or in a closed environment where one is a captive audience, generally the Court has refrained from extending this notion outside the sanctuary of the home.[161] The *Hill* case clearly demonstrates the internal conflict in First Amendment Doctrine, which requires that laws be drafted sufficiently broad so as to be viewed as content neutral and yet be narrowly tailored so as not to intrude unnecessarily on protected speech.

The Seventh Circuit followed the Supreme Court's analysis in *Hill* in upholding an Indianapolis ordinance targeting street begging.[162] Although the Supreme Court has not directly resolved the constitutionality of laws that apply to this form of solicitation, appellate courts in the past have struck down city-wide bans on panhandling.[163] In *Gresham* the court addressed an Indianapolis ordinance that prohibited all "aggressive panhandling" and generally imposed time and place restrictions.[164] Specifically, panhandling was barred after dark and solicitation could not occur at bus stops, in public transportation vehicles or facilities, or within twenty feet of any ATM or bank entrance.[165] The ordinance imposed a civil penalty of up to $2500 per violation. The parties assumed that the restriction was content neutral, even though violation of the ordinance

156. *See id*. at 2058.

157. *Id.* at 2510.

158. *See id*. at 2511.

159. *Id*. at 2515.

160. *Id*. at 2519 (Kennedy, J., dissenting).

161. *See id.* at 2523-24.

162. Gresham v. Peterson, 225 F.3d 899 (7th Cir. 2000).

163. *See, e.g.*, Loper v. N.Y. City Police Dep't, 999 F.2d 699, 705 (2nd Cir. 1993) (finding that a prohibition on begging in all public places cannot meet the narrowly tailored test). *Compare* Smith v. City of Ft. Lauderdale, 177 F.3d 954, 956 (11th Cir. 1999) (upholding total ban on pan handling on a five-mile area of public beach).

164. *Gresham*, 225 F.3d at 901.

165. *See id.* at 901-02.

depended on whether a solicitor asked for cash rather than for something else.[166] Citing *Hill*, the court reasoned that "the inquiry into content neutrality . . . turns on the government's justification for the regulation."[167] Because the parties agreed that the regulations were content neutral, the court did not need to determine whether the law could be justified "without reference to the content of the regulated speech."[168] Instead, it applied the *Ward* analysis.

The court first determined that the city had "a legitimate interest in promoting the safety and convenience of its citizens on public streets"[169]—an interest quite similar to that used to uphold the Colorado statute in *Hill*.[170] The court then ruled that the law was narrowly tailored, even though it totally banned nighttime verbal requests for funds.[171] Relying on *Ward*, the court reasoned that a government regulation will be considered narrowly tailored "'so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.'"[172] Because vocal requests for money can create a threatening environment which can be enhanced at night and in certain locations, and Indianapolis limited where request for funds could be made only to those certain times and places where citizens would feel most insecure, the city narrowed the application of the law in compliance with First Amendment doctrine.[173]

Finally, the court ruled that the ordinance leaves open ample alternative channels of communication because panhandlers can engage in their conduct during daylight hours and may solicit at night so long as they do not vocally request money.[174] The ordinance allowed beggars and other solicitors to passively stand or sit with a sign requesting money or to engage in street performances. "[T]hey may solicit in public places on all 396.4 square miles of the city, except those parts occupied by sidewalk cafes, banks, ATMs, and bus stops."[175] Thus, the ordinance met all prongs of the *Ward* test.

The *Gresham* decision provides important guidance to other cities in the process of revitalizing their downtown areas in order to promote new family-friendly urban environments. Keeping streets safe for downtown visitors, especially at night, was a key goal of the *Gresham* statute, and Indianapolis' ordinance may well serve as a model for other mayors. Significantly, the ordinance bans not only the poor and homeless from seeking contributions, but any solicitor. As in the *Hill* case, Indianapolis sought to draft its ordinance broadly enough to avoid the content neutrality problem and yet focused on those

166. *See id*. at 905.
167. *Id.* at 905-06.
168. *Id.* at 906.
169. *Id.*
170. *See* Hill v. Colorado, 120 S. Ct. 2480, 2491 (2000).
171. *Gresham*, 225 F.3d at 906.
172. *Id*. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).
173. *See id.*
174. *See id.* at 907.
175. *Id.*

times and places where panhandling creates the greatest threat, or at least the greatest nuisance, to other citizens.

B. Restrictions on Sexually Explicit Speech

Despite the Court's concern for content-based regulations, it has recognized an exception where government seeks to regulate sexually explicit expression. For example, in *Barnes v. Glen Theatre, Inc.*,[176] the plurality held that the State of Indiana could regulate nude dancing, even if the ban on nudity made the erotic message less graphic.[177] However, because there was no majority opinion in *Barnes*, the status of such regulation remained uncertain. In *City of Erie v. Pap's A.M.*,[178] the Pennsylvania Supreme Court held that because the U.S. Supreme Court Justices failed to agree on any single rationale in *Barnes*, the Pennsylvania Supreme Court would reevaluate its own ban on nudity.[179] Ultimately, the lower court concluded that the ordinance was an impermissible content-based restriction on speech.[180] When the case was heard on appeal by the U.S. Supreme Court, the Court failed to reach a consensus as to its rationale, but nevertheless overturned the Pennsylvania ruling.[181]

Justice O'Connor wrote for only four Justices, but was joined by Justice Souter in her determination that this case be evaluated under the *O'Brien* test, which applies when the government seeks to regulate conduct that has an expressive element.[182] If the statutory ban on nudity is not aimed at suppressing expression, then the statute need only satisfy the less stringent *O'Brien* test, which requires the government prove only an important, rather than a compelling, interest in its regulation.[183] On its face, the ordinance in *City of Erie* banned all nudity regardless of whether accompanied by expressive activity; however, the preamble to the ordinance explained that, in part, its purpose was to limit "a recent increase in nude live entertainment."[184] From this statement of intent, the Pennsylvania Supreme Court erroneously found that a ban on this type of activity "necessarily has the purpose of suppressing the erotic message of the dance,"[185] even though it earlier held one of the goals of the ordinance was to combat the negative secondary effects of such nude expression.[186] The *City of Erie* plurality cautioned that judges should not seek out illicit motives.[187]

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176. 501 U.S. 560 (1991).
177. *See id.* at 572.
178. 529 U.S. 277 (2000).
179. *See id.* at 277-78.
180. *See id.* at 279-80.
181. *See id.* at 284.
182. *See id.* at 299.
183. *See id*. at 289.
184. *Id*. at 290.
185. *Id.* at 291-92.
186. *See id*. at 291.
187. *See id*. at 292.

Applying the *O'Brien* test, the plurality determined that the regulation furthered an important interest—"combating the harmful secondary effects associated with nude dancing."[188] The plurality reasoned that the city did not have to "conduct new studies or produce evidence independent of that already generated by other cities" regarding secondary effects so long as the studies relied on were "reasonably believed to be relevant to the problem" addressed.[189] In any event, the city also relied on its own findings that "lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety, and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity."[190] The plurality specifically rejected Justice Souter's opinion that would require Erie to develop a more specific evidentiary record supporting its ordinance, contrary to the position that Justice Souter took in *Barnes*.[191] Additionally, Justice O'Connor found that the ban on nude dancing would further the government interest in preventing the secondary effects.[192] She acknowledged that requiring dancers to wear pasties and G-strings "may not greatly reduce these secondary effects," but it sufficed that the regulation would further such interests.[193] Finally, Justice O'Connor found that the regulation was no more restrictive than necessary.[194] She described the requirement that dancers wear pasties and G-strings as a "minimal restriction in furtherance of the asserted government interests" that leaves "ample capacity to convey the dancer's erotic message."[195]

Justices Scalia and Thomas initially argued the issue before the Court was moot.[196] However, because they concurred in the judgment but disagreed with the analysis, they wrote separately. They argued that "a general law regulating conduct and not specifically directed at expression . . . is not subject to First Amendment scrutiny at all."[197] Even if the ordinance singled out nude dancing, there would be no First Amendment violation unless "it was the communicative character of [the] nude dancing that prompted the ban."[198]

Justice Souter argued in partial dissent that although the *O'Brien* analysis applied, the city had not presented evidence of any secondary effects so as to justify the law.[199] The city failed to present evidence of either the seriousness of the threatened harm or the efficacy of its remedy. He advocated remand to the

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188. *Id*. at 296.
189. *Id.* (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986)).
190. *Id*. at 297.
191. *See id.* at 299-300.
192. *See id.* at 300-01.
193. *Id.* at 301.
194. *See id.*
195. *Id*.
196. *See id.* at 302 (Scalia, J., concurring).
197. *Id.* at 307-08 (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991)).
198. *Id*. at 310.
199. *See id*. at 310-11 (Souter, J., dissenting in part).

state court to determine whether the ordinance was "reasonably designed to mitigate real harms."[200]

Justices Stevens and Ginsburg argued in dissent that because of the ordinance's censorial purpose, the test applied by the plurality and the level of the state interest necessary to satisfy that test were incorrect.[201] The ordinance operated as a total ban on protected expression, whereas the secondary effects analysis had been limited to cases involving only the location of adult entertainment establishments.[202] Justice Stevens noted that this was the first time a majority of the Supreme Court had held that secondary effects alone may justify total suppression of protected speech, rather than merely regulation of the location.[203]

Despite the lack of a majority opinion, five Justices (the Justice O'Connor plurality plus Justice Souter) in *City of Erie* agreed that the less stringent *O'Brien* analysis should apply to ordinances that restrict nude dancing.[204] Further, a

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200. *Id.* at 317.

201. *See id.* at 323 (Stevens, J., dissenting).

202. *See id*. at 317, 319.

203. *Id.* at 317-18.

204. *Cf.* United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878 (2000). There, a five Justice majority struck down section 505 of the Telecommunications Act of 1996, which required cable operators who provided channels "'primarily dedicated to sexually-oriented programming' either to 'fully scramble or otherwise fully block' those channels or to limit their transmission to hours when children are unlikely to be viewing," i.e., between 10:00 p.m. and 6:00 p.m. *Id.* at 1882. Although the government argued that it was trying to shield children from "signal bleed," this did not suffice to support the blanket ban because protection could have been obtained by a less restrictive alternative. *Id.* at 1888. Indeed, section 504 of the Act already required cable operators upon request of a cable service subscriber to, without charge, fully scramble or otherwise fully block any channel the subscriber did not wish to receive. Thus, cable systems already had the capacity to block unwanted channels on a household-by-household basis. This type of targeted blocking was less restrictive than a flat ban on speech. *See id.*

Further, there was little evidence as to how widespread or serious the problem of signal-bleeding really was. In sharp contrast to the analysis in *Pap's A.M.*, the majority here maintained that "[t]he First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this." *Id*. at 1889. Even accepting the government's argument that society has an independent interest aside from parents who may fail to act, the majority held the government's interest was not sufficiently compelling to justify such a widespread restriction on speech. *Id*. at 1892-93.

Four dissenters stressed that since the law concerned only the regulation of "commercial actors who broadcast virtually 100% sexually explicit material," the "narrow tailoring concerns seen in other cases" should not be a problem. *Id*. at 1900 (Breyer, J., dissenting). In short, the majority would require the government to use the technology that is the most effective and least restrictive of First Amendment freedoms, whereas the dissent would give greater deference in light of the less protected nature of the speech in question.

The need to protect children from pornography was also partially at issue in *American Amusement Machine Association v. Kendrick*, 115 F. Supp.2d 943 (S.D. Ind. 2000). In that case,

different majority (the plurality plus Justices Thomas and Scalia), agreed that government need not produce its own evidence demonstrating a problem with secondary effects or that its regulation will be effective in combating such secondary effects.[205] As to the latter, Justice Stevens commented in dissent: "To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible."[206] The majority's willingness to defer to the government, both as to its stated purpose and to its assessment of appropriate means, suggests that courts will be unlikely to interfere in legislative efforts to regulate adult entertainment establishments.[207] As the dissent laments, "the plurality opinion concludes that admittedly trivial advancement of a State's interests may provide the basis for censorship."[208]

C. Freedom of Association

Although the First Amendment does not expressly protect freedom of association, the Supreme Court has long recognized that both freedom of intimate association and freedom of expressive association are protected by the Constitution.[209] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[210] the Court invoked the right to associate so that the Veteran's

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the court refused to enjoin, on First Amendment grounds, an Indianapolis ordinance restricting minors' access to video games containing "graphic violence" or "strong sexual content." *Id.* at 945-46. Although the Supreme Court has addressed the states' right to restrict children's access to pornography, it has not ruled on "graphic violence." The district court, however, saw no "principled constitutional difference between sexually explicit material and graphic violence, at least when it comes to providing such material to children." *Id.* at 946. Unlike the Telecommunications Act, the Indianapolis ordinance did not significantly limit adults' access to the material in question. The court, therefore, refused to preliminarily enjoin the statute's enforcement. *Id.* Subsequently, the video vendors appealed this decision to the Seventh Circuit.

205. *See* City of Erie v. Pap's AM, 529 U.S. 277, 296 (2000).

206. *Id.* at 323 (Stevens, J., dissenting) (emphasis added). *See also id.* at 321 n.4 (noting that no study has suggested that "the precise costume worn by the performers" is tied to secondary effects).

207. *See, e.g.*, Schultz v. City of Cumberland, 228 F.3d 831, 847 (7th Cir. 2000) (finding that provisions of local ordinance that restrict hours of operation, ban full nudity, require inspection prior to licensing, etc., do not violate First Amendment; however, provision that restricted movements and gestures of the erotic dancer unconstitutionally burdened expression because it "deprives the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance."); DiMa Corp. v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (upholding mandatory closing hours for adult bookstores); DCR, Inc. v. Pierce County, 964 P.2d 380 (Wash. App. 1998), *cert. denied*, 529 U.S. 1053 (2000) (upholding regulation restricting the proximity between customers and dancers).

208. *Pap's AM*, 529 U.S. at 318 (Stevens, J., dissenting).

209. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

210. 515 U.S. 557 (1995).

Council would not have to allow the Gay, Lesbian and Bi-sexual Group of Boston to participate in their parade. The group sued under the Massachusetts public accommodations statute that prohibits discrimination based on sexual orientation.[211] The Supreme Court ruled that speakers have autonomy to choose the content of their own message.[212] However, the Court has rejected claims of the Jaycees that the forced admission of women into their organization unconstitutionally infringed on their First Amendment free association rights. In *Roberts v. United States Jaycees*,[213] the Court ruled that the State's purpose of eliminating gender discrimination was a compelling state interest and that the Jaycees had not demonstrated that the Act imposed any serious burdens on the male members' freedom of expressive association.[214]

In *Boy Scouts of America v. Dale*,[215] the Boy Scouts of America (BSA) asserted this same right to exclude persons who might infringe on the group's freedom of expressive association. The Boy Scouts were sued under a New Jersey public accommodation law after they revoked James Dale's adult membership in the organization.[216] Dale had been an "exemplary Scout" who eventually won approval as an assistant Scoutmaster.[217] When the organization learned that Dale was co-President of Rutgers University's Lesbian/Gay Alliance and that he had openly discussed the need for gay role models, it determined that he could no longer serve as an assistant scoutmaster.[218] The New Jersey Supreme Court rejected the Boy Scouts' First Amendment expressive association defense, finding that Dale's inclusion in the organization would not significantly affect the ability of members to carry out their purposes and that, in any event, "New Jersey [has] a compelling interest in eliminating the destructive consequences of discrimination."[219] The Supreme Court reversed in a 5-4 decision authored by Chief Justice Rehnquist. The majority reasoned that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[220]

The Court initially determined that the BSA engages in expressive association because its core goal is to inculcate youth members with its value system.[221] The Court stressed that the group need not associate for the purpose of disseminating a particular message to be protected, nor must every member agree on the issue in order for the group's policy to be "expressive

211. *See id.* at 561.
212. *See id.* at 573.
213. 468 U.S. 609 (1984).
214. *See id.* at 626.
215. 120 S. Ct. 2446 (2000).
216. *See id.* at 2449-50.
217. *Id.* at 2449.
218. *See id.*
219. *Id.* at 2450.
220. *Id*. at 2451 (citations omitted).
221. *See id.* at 2452.

association."[222] In general, the organization should be the master of its own message, and the Court should defer "to an association's assertions regarding the nature of its expression."[223]

Having met this preliminary test, the Court then determined that forcing BSA to include Dale would significantly affect the organization's ability to advocate certain view points. It found that homosexual conduct was inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean."[224] In 1978, the organization issued a policy statement that homosexuality was inconsistent with its value system, and the Court found no reason to doubt that the Boy Scouts sincerely held this view.[225] The Court determined that requiring Dale to be reinstated as a leader would significantly burden the BSA's expressive rights because Dale's very presence as an assistant scoutmaster would force the Scouts to send a message that it accepted "homosexual conduct as a legitimate form of behavior."[226] Although Dale had argued that the Court should apply a less stringent intermediate scrutiny, the majority relied on *Hurley* and determined that New Jersey's interest, embodied in its public accommodation law, did not justify the significant burden imposed on the organization's right to oppose or disfavor homosexual conduct.[227] In short, the Boy Scouts had a First Amendment right to exclude gay rights activists from its ranks.

Four dissenting Justices argued that the Boy Scout's policy statements did not support its claim that New Jersey's anti-discrimination law would impose any serious burdens on efforts to promote its values: "there is no indication of any shared goal of teaching that homosexuality is incompatible with being 'morally straight' and 'clean'."[228] Further, they argued that application of the state law would not force the Boy Scouts to communicate any message that it did not wish to endorse.[229] They attacked the majority for giving deference to the association regarding the nature of its expression and its view that Dale's mere presence as a scoutmaster would impair its expression.[230] They opined that the majority's highly deferential approach would convert the right of expressive association into a right to discriminate.[231]

In one sense, the Court's decision is very limited since only New Jersey has extended its public accommodations laws to include the Boy Scouts. Further, no federal law forbids discrimination based on sexual orientation. Although the Supreme Court gives significant weight to the right to exclude others, thus far it

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222. *Id*. at 2455.
223. *Id.* at 2453.
224. *Id.* at 2452.
225. *See id.* at 2453.
226. *Id*. at 2454.
227. *See id.* at 2457.
228. *Id*. at 2465 (Stevens J., dissenting).
229. *See id.* at 2460.
230. *See id.*
231. *See id.* at 2471.

has respected this expressive association right only in the context of permitting discrimination against gays. This is evident when one compares the Court's decisions in *Dale* and *Hurley* with *Jaycees*, as well as with *Board of Directors of Rotary International v. Rotary Club of Duarte*,[232] where it rejected the right of the Rotary Clubs to exclude women after finding that their admission into the organization would not significantly affect the "existing members' ability to carry out their various purposes."[233] Arguably, in the context of gender or race-bias, the state's compelling interest in prohibiting these forms of discrimination could trump any freedom of expressive association claim.

Related to the right not to associate is the right not to speak or to subsidize speech. In *Abood v. Detroit Board of Education*,[234] the Court held that teachers could not be forced to pay dues to subsidize a union's political activity. Similarly, in *Keller v. State Bar of California*,[235] the Court held that attorneys could not be forced to subsidize mandatory state bars to the extent that the money supported causes other than self policing or improving the profession.

The question raised in *Board of Regents of University of Wisconsin System v. Southworth*,[236] was whether the aforementioned case precedent could be invoked by Christian Law Students at the University of Wisconsin who challenged mandatory student fees that they alleged primarily supported left-leaning activists. The Justices unanimously rejected the students' claim that they were required to endorse any ideas.[237] The Court explained that the student activity fees were used to support various campus services and extra-curricular student activities and that any group could obtain funding without regard to its views.[238] Resolving disagreement among the circuits, Justice Kennedy stressed that the case did not involve the University's right to use its own funds to advance its own or any particular message; rather, the money went into a pool from which an array of campus groups could draw support.[239] Although the Court recognized that students cannot be required to pay subsidies for speech of other students without some First Amendment protection, it nonetheless determined that the viewpoint neutrality requirement of the University program (it was stipulated that applications for funding were treated in a viewpoint-neutral way) was sufficient to protect the rights of the objecting students.[240] Unlike bar associations or labor union members, students were not paying activity fees to subsidize a single viewpoint. The Court reasoned that it was inevitable that subsidies would go toward speech that some students found objectionable or

232. 481 U.S. 537 (1987).
233. *Id.* at 548.
234. 431 U.S. 207 (1977).
235. 496 U.S. 1 (1990).
236. 120 S. Ct. 1346 (2000).
237. *See id.* at 1350.
238. *See id.* at 1350-51.
239. *See id.* at 1354.
240. *See id.*

offensive to their personal beliefs.[241] If each student could list those causes that he or she would or would not support, the University's mission in exposing students to a wide range of discussion on philosophical, religious, scientific, social, and political subjects would be thwarted.[242] However, the Court found that one aspect of the program might violate the viewpoint neutrality requirement, namely the student referendum provision, which appeared to permit funding or defunding by majority vote of the student body.[243] The key feature distinguishing this case from *Keller* and *Abood* was that the University itself was not the speaker and the student fees were used to support a wide array of viewpoints. If, by majority vote of the student body, a particular group may be funded or defunded, the viewpoint neutrality principle that is central to the Court's First Amendment jurisprudence would be violated.[244]

V. THE ESTABLISHMENT CLAUSE

The most frequently litigated cases under the Establishment Clause involve aid to parochial education and prayer in public schools. Both of these issues were addressed by the United States Supreme Court this Term. Locally, federal courts addressed the question of whether government may display religious symbols, such as the Ten Commandments, in public places.

A. Aid to Parochial Education

One of the most controversial and recurring constitutional issues raised under the Establishment Clause is whether parochial education may be funded by taxpayer dollars. The Supreme Court reopened the debate in a 1997 decision, *Agostini v. Felton*,[245] when it 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.[246] The Court emphasized that providing this remedial education, pursuant to Title I of the 1965 Elementary and Secondary Education Act,[247] would neither supplant the cost of regular education nor create a financial incentive to undertake religious education.[248]

This Term, in *Mitchell v. Helms*,[249] the Court addressed another provision of Title I, Chapter 2 of the Education Consolidation and Improvement Act of 1981,[250] which channels federal funds to state and local education agencies for

241. *See id.* at 1355.
242. *See id.* at 1355-56.
243. *See id.* at 1357.
244. *See id.*
245. 521 U.S. 203 (1997).
246. *See id.* at 229.
247. 20 U.S.C. §§ 6301-8962 (1994 & Supp. III 1997).
248. *See Agostini*, 521 U.S. at 229.
249. 120 S. Ct. 2530 (2000)
250. 20 U.S.C. §§ 7301-7373 (2000).

the purchase of educational materials and equipment.[251] Under the Act, state-owned instructional equipment, including computers and software, is loaned to public and private elementary and secondary schools. The statute requires that materials provided to private schools be "secular, neutral, and nonideological."[252] The Fifth Circuit ruled, nonetheless, that such assistance violated the Establishment Clause because the equipment could readily be used to advance the sectarian mission of the schools.[253]

In recent years, several Justices have vociferously argued that the Court's strict separationist approach to church-state relations should be replaced by a more "accommodationist" approach. Under the standards used in the 1970s, the United States Supreme Court invalidated most forms of direct assistance to parochial schools, other than textbooks.[254] In *Lemon v. Kurtzman*[255] the Court ruled that any government program must have a secular purpose, an effect that neither advances nor inhibits religion, and does not foster "an excessive government entanglement with religion."[256] The Court strictly applied these three prongs and frequently found that if aid was given to schools without any limitations to ensure that only secular interests were advanced, there would be a violation of the Establishment Clause. On the other hand, where funds were closely supervised to ensure they would not be used to advance religion, the Court found such aid violated the entanglement prong. In a splintered 4-2-3 decision, the United States Supreme Court in *Mitchell* upheld this law, even though thirty percent of the Chapter 2 funds spent in Jefferson Parish, Louisiana, were allocated to private schools, most of which are Catholic.[257]

Applying the analysis set forth in *Agostini*, six Justices agreed that the primary effect of the Act was not to advance religion, and thus the aid program did not violate the Establishment Clause.[258] They also agreed to overrule two earlier Supreme Court cases holding that programs which provided the same types of materials and equipment as Chapter 2 were unconstitutional, reasoning that these decisions had created an unworkable, inconsistent jurisprudence in school aid cases.[259] Under the *Agostini* framework, the Court looked to whether a statute "has a secular purpose" and a "primary effect" that neither advances nor inhibits religion.[260] Government aid is disallowed under this standard only if it results in governmental indoctrination, define[s] its recipients by reference to

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251. *See id.* § 7351(b)(2).

252. *Id.* § 7372(a)(1).

253. *See* Helms v. Picard, 151 F.3d 347 (5th Cir. 1998), *rev'd sub nom.* Mitchell v. Helms, 530 U.S. 793 (2000).

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

255. 403 U.S. 602 (1971).

256. *Id*. at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

257. *See Mitchell*, 120 S. Ct. at 2538.

258. *See id.* at 2540, 2555-56.

259. *See id.*

260. *See id.* at 2540 (citing Agostini v. Felton, 521 U.S. 203, 222-23 (1997)).

religion, or create[s] an excessive entanglement."[261] The absence of excessive entanglement was not disputed; therefore, the plurality focused on the indoctrination question and concluded that the aid here was permissible because it "is offered to a broad range of groups or persons without regard to their religion."[262] Further, the program determined eligibility for aid neutrally and allocated aid based on the private choices of parents.[263]

As to the second criterion under *Agostini*, the program again passed constitutional muster because it did not define recipients by reference to religion.[264] Here the focus was on whether the criteria for allocating aid creates a financial incentive to undertake religious indoctrination, which was absent here.[265] Justice Thomas reasoned that even direct aid did not impermissibly support religion provided it was neutrally available and passed through the hands of private citizens who made private choices as to the aid.[266] The plurality also rejected the argument that public aid to sectarian schools is permissible only when it cannot be diverted to religious use: "The issue is not divertibility of aid but rather whether the aid itself has an impermissible content."[267] Finally, Justice Thomas declared that neither the fact that a program generates "political divisiveness" nor that the recipient is "pervasively sectarian" is constitutionally relevant, and he attacked the dissent's use of a multiplicity of standards that created a "perverse chaos" in this area of the law.[268]

Although a majority of the Court agreed that this program was constitutional, Justice Thomas' attempt to further restrict the Establishment Clause to permit the inclusion of sectarian schools in otherwise "neutral" aid programs did not win the votes of either Justice O'Connor or Justice Breyer. In a separate concurrence, Justice O'Connor contested the "unprecedented breadth" of the plurality's test for evaluating Establishment Clause challenges to government school-aid programs.[269] Although she agreed that neutrality is an important criterion for upholding government-aid programs, she wrote that the Court has "never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."[270] Justice O'Connor also disagreed with Justice Thomas' abandonment of the distinction between direct and indirect aid.[271] Justice O'Connor emphasized several features of the Chapter 2 program that in her view justified upholding the Act. First, the Act required state and local agencies to distribute funds "only to supplement the

261. *Id.* at 2540.
262. *Id.* at 2541.
263. *See id.* at 2541-42.
264. *See id.* at 2552.
265. *See id.* at 2553-54.
266. *See id.*
267. *Id.* at 2548.
268. *Id.* at 2550.
269. *Id.* at 2556 (O'Connor, J., concurring).
270. *Id.* at 2557 (emphasis in original).
271. *See id.* at 2556.

funds otherwise available to a religious school" and it expressly prohibited the use of such funds to supplant funds from non-federal sources.[272] Second, no dollars ever reached the coffers of a religious school and the statute specifically provided that the public agency retained title to the materials and equipment, thus ensuring that "religious schools reap no financial benefit by virtue of receiving loans of materials and equipment."[273] Third, all materials had to be "secular, neutral, and nonideological."[274] Justice O'Connor complained that the plurality opinion "foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives."[275] Joining her concern, Justice Souter, writing for three dissenters, lamented that the plurality's "evenhandedness neutrality" test would in essence end "the principle of no aid to the schools' religious mission."[276]

Lurking in the background is the controversial question of whether parochial education may be funded by government vouchers issued to parents to pay tuition at the school of their choice. In 1998, the Supreme Court denied certiorari in the case of *Jackson v. Benson*,[277] leaving intact the Wisconsin Supreme Court ruling that such voucher systems are constitutional, at least where eligibility criteria are religion neutral.[278] On the other hand, state and federal courts in Vermont, Maine, Ohio, and Puerto Rico have invalidated voucher programs.[279] Justice O'Connor's reluctance to join the plurality opinion and her decision favoring a highly nuanced, case-by-case assessment of aid to parochial education, leaves the constitutionality of such voucher systems in doubt.[280] Unlike the aid involved in *Mitchell*, voucher schemes do supplant the cost of regular education, in that dollars actually flow into the coffers of religious schools, and voucher checks are signed over to the schools by parents without any restrictions as to how the funds will be expended.

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272. *Id.* at 2562.

273. *Id.*

274. *Id.* Although Justice O'Connor acknowledged that there was some evidence that aid had been diverted to religious instruction, she concluded that it was "*de minimis*." *Id.* at 2570.

275. *Id.* at 2560.

276. *Id.* at 2596 (Souter, J., dissenting).

277. 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998).

278. *See id.* at 632.

279. *See* Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999); Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539 (Vt.), *cert. denied*, 528 U.S. 1066 (1999); Asociacion de Maestros de P.R. v. Torres, No. AC-94-371, AC-94-326, 1994 WL 780744 (P.R. Nov. 30, 1994).

280. In *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), the court relied on Justice O'Connor's concurring opinion in *Mitchell* to support the view that neutrality alone is not sufficient to avoid an Establishment Clause problem. *See id.* at 959. The court ruled that Ohio's school voucher system which put no restraint on the school's use of tuition and whose tuition cap effectively channeled the overwhelming majority of participants to religious schools with lower tuition, had the primary effect of advancing religion and endorsing sectarian education in violation of the Establishment Clause. *See id.* at 963.

B. Prayer in Public Schools

Since the 1960's, the Supreme Court has closely adhered to the principle that prayer in public schools is prohibited by the Establishment Clause. This rule applies regardless of whether school officials or students deliver the prayer or whether the prayer ceremony is voluntary. In *Lee v. Weisman*,[281] the Court reaffirmed, in a 5-4 decision, the prohibition on government-sponsored prayer and held that the Establishment Clause also outlaws the practice of public schools inviting clergy to deliver non-sectarian prayers at graduation ceremonies. Justice Kennedy reasoned that graduation prayers "bore the imprint of the State and thus put school-age children who objected in an untenable position."[282] He emphasized the "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[283]

Since *Lee*, many school districts have tried to avoid its impact by adopting policies that appear to leave the question of school prayer up to individual students. The Santa Fe Independent School District in Texas was notorious for engaging in blatant "proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises."[284] In addition, student "chaplains" were allowed "to read Christian invocations and benedictions . . . at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games."[285] After a law suit was filed, the school district adopted a new policy, entitled "Prayer At Football Games," which sought to insulate its practice at athletic events.[286] The policy authorized a student referendum to determine first whether "invocations" should be delivered at games and then to select the speaker.[287]

In a 6-3 decision, the Court ruled that the District's policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause.[288] The Court reiterated the principle stated in *Lee* that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[289] The Court rejected the argument that there was no coercion because the messages were private student speech, noting that the invocations were in fact "authorized by a government policy and [took]

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281. 505 U.S. 577 (1992).
282. *Id*. at 590.
283. *Id*. at 592.
284. Sante Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2271 (2000).
285. *Id*. at 2271-72 (footnote omitted).
286. *Id.* at 2273.
287. *Id.*
288. *See id.* at 2275.
289. *Id*. (citing Lee v. Weisman, 505 U.S. 577, 587 (1992)).

place on government property at government-sponsored school-related events."[290] The student referendum did not insulate the practice from constitutional challenge because "'fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'"[291]

More significantly, the District had not separated itself from the religious content because the policy involved both perceived and government's actual endorsement of religion:

> Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or vocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."[292]

The Court reasoned that this invites and encourages religious messages because prayer "is the most obvious method of solemnizing an event."[293] Further, "the students understood that the central question before them was whether prayer should be a part of the pregame ceremony."[294] In light of the text as well as the history of this policy, Justice Stevens concluded that "members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration"[295] and that "an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[296]

In addition to finding impermissible endorsement, the Court also found unconstitutional coercion, as it had in *Lee*. Even though the pregame messages were the product of a student election and attendance at extracurricular events was voluntary, the Court nonetheless concluded that students should not be forced to choose between attending games or facing a personally offensive religious ritual: "The constitutional command will not permit the District 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game."[297] Further, the whole election mechanism encouraged divisiveness along religious lines in a public school setting, contrary to one of the key goals of the Establishment Clause, which is to remove such debate from governmental supervision or control.[298] The mere fact that government bestows this power on students is itself unacceptable.[299]

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290. *Id*.
291. *Id*. at 2276 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).
292. *Id*. at 2277.
293. *Id.*
294. *Id.* at 2278.
295. *Id.*
296. *Id.*
297. *Id*. at 2280-81.
298. *See id.* at 2283.
299. *See id.* at 2280.

In a stinging dissent, Justice Rehnquist argued that the majority opinion "bristles with hostility to all things religious in public life."[300] He lamented that the majority applied the most rigid, separationist interpretation of the Establishment Clause, and contended that the Court should have deferred to the District's expression of a plausible secular purpose for the enactment.[301]

The Court's decision will affect lower court rulings addressing the policy of allowing high school students to vote on whether their graduation ceremonies should include unrestricted student messages, which may include prayer. The decision in *Santa Fe* suggests that issues regarding prayer should not be submitted to majority vote by the student body. However, the particular background of this Texas community, with its long history of school involvement in religion, may provide a basis for distinguishing future cases.[302] Arguably, the divisiveness along religious lines encouraged by a majoritarian approach to school prayer is equally offensive at a graduation ceremony or a football game. On the other hand, the need to solemnize a football game appears less plausible. As the lower court ruled, football games are "hardly the sober type of annual event that can be appropriately solemnized with prayer."[303] At minimum, the decision means that a school district cannot implicitly favor prayer even pursuant to a referendum determined by majority student vote. The question remains, however, as to whether a truly neutral referendum, without the historical backdrop of the Santa Fe District, where government retains no control over the content of the student's speech, would pass constitutional muster. If truly "private" speech is advancing religion, there is no Establishment Clause problem and, indeed, the Free Speech Clause would then protect the expressive rights of the individual.[304]

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300. *Id.* at 2283 (Rehnquist, C.J., dissenting).

301. *See id*. at 2286.

302. *See, e.g.*, Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir.), *vacated and remanded*, 121 S. Ct. 31 (2000) (originally holding public school district's policy of allowing high school students to vote on whether their graduation ceremonies will include unrestricted student messages, which may include prayer, does not violate the Establishment Clause).

303. Doe v. Sante Fe Indep. Sch. Dist., 168 F.3d 806, 823 (5th Cir. 1999).

304. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822-23 (1995) (finding university violated students' First Amendment rights when it refused to subsidize a student-run newspaper published with a religious viewpoint); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 757-59 (1995) (holding that the State violated the Klan's First Amendment rights when it prohibited it from displaying a cross on Capitol Square, a traditional open, public forum); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387-88 (1993) (holding that school that opened its grounds after school hours to social and political organizations could not deny access to a religious group that wished to display films promoting a Christian perspective on family values). *Cf.* Good News Club v. Milford Cent. Sch., 202 F.3d 502, 504 (2d Cir.), *cert. granted*, 121 S. Ct. 296 (2000) (holding that school district could deny religious club access to school facilities after hours where the speech involved religious prayer and instruction rather than simply discussion of morals from a religious viewpoint).

C. Government Display of the Ten Commandments

In *Stone v. Graham*,[305] the Supreme Court held that Kentucky legislation requiring the posting of the Ten Commandments in the back of every classroom was unconstitutional because it had no valid purpose. Although small print at the bottom of the display stated that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States," the Supreme Court said the purpose was "plainly religious in nature," because the Ten Commandments is "undeniably a sacred text in the Jewish and Christian faiths."[306] The Court indicated that some displays of the Ten Commandments might pass constitutional muster, but here the State made no attempt to mitigate the religious nature of the display.[307] Since *Graham*, the Supreme Court has somewhat tempered its approach to government display of religious symbols. The Court continues to examine the purpose to determine whether it is a sham, but later decisions suggest that the Court is not as apt to question the legitimacy of a stated government reason.[308] Even if the purpose is secular, however, the current test also asks whether the effect of the display is to convey a message of government endorsement of religion.[309]

Two federal District courts in Indiana applied this test, which examines purpose and effect, and reached diametrically opposed conclusions regarding government display of the Ten Commandments. In *Books v. City of Elkhart*,[310] Judge Sharp ruled that display of the Ten Commandments near the entrance of City Hall in Elkhart had a secular purpose, namely to "[promote] morality among [the city's] youth . . . a legitimate aim of government and traditionally part of the police powers of the state."[311] The City had accepted the monument from the Fraternal Order of Eagles (FOE) in 1958 as part of its National Youth Guidance Program.[312]

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305. 449 U.S. 39 (1980).

306. *Id*. at 41.

307. *See id.* at 41-42.

308. Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2286 (2000) (Rehnquist, J., dissenting).

309. *See, e.g.*, *Capitol Square Review*, 515 U.S. at 753. In *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), the court ruled that display of a fifteen-foot statue of Jesus Christ on a parcel of land, once part of a public park, next to the main highway violated the Establishment Clause even though the city sold the parcel to a private group. The court determined that the display still impermissibly conveyed a message of government endorsement. *See id.* at 495-96.

310. 79 F. Supp. 2d 979 (N.D. Ind. 1999), *rev'd*, 235 F.3d 292 (7th Cir. 2000).

311. *Id*. at 996.

312. *See id.* at 982. The District Court followed the reasoning of the Colorado Supreme Court in *State v. The Freedom from Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995), which found a secular purpose for the State's display of an identical FOE Ten Commandments Monument in the state park adjacent to the state capital building. *See Books*, 79 F. Supp. 2d at 995. *Cf.* Doe v.

Having met the secular purpose test, the court proceeded to find that the effect of the display was not the impermissible endorsement of religion. Even though the monument was shaped in the form of two large, stone tablets and was located on a grass lawn near the entrance to a municipal building, the court noted that other historical monuments were also maintained by the City.[313] It reasoned that the monument was not "obtrusive" and thus was constitutional in this context.[314] Following Supreme Court guidance, the district court judge looked to content, context, and location of the display to determine whether a reasonable observer might think the City was endorsing religion.[315] He noted that the monument itself contained a myriad of religious symbols, including an "all-seeing eye" inside of a pyramid, which had both religious and secular meaning, two Jewish symbols, and a symbol representing Christ that was used in the early Catholic Church.[316] In addition, it contained an eagle and a flag, both generally accepted as patriotic symbols, and an inscription at the bottom stating that it was donated by the Fraternal Order of the Eagles.[317] Further, on the other side of the sidewalk stood a Revolutionary War Monument donated by the Daughters of the American Revolution and a Freedom Monument, collectively referred to as the War Memorial.[318] Although the court conceded that "the text of the Ten Commandments dominated the monument," it nonetheless concluded that the message could not be regarded as "exclusively religious."[319] More significantly, the court stated that, "[l]ocal municipalities should be granted some latitude by the federal courts in how they arrange artistic displays in the space they have available."[320] In short, the court determined that it is not an unconstitutional endorsement of religion for the City to acknowledge the importance of the Ten Commandments in the legal and moral development of our country by displaying the Monument on the lawn of the Municipal Building.[321]

After the decision in *Books*, the Indiana General Assembly adopted House Bill 1180, which authorizes the display of the Ten Commandments on real property owned by the state or a political subdivision as part of an exhibit

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Harlan County Sch. Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000) (finding that the display of the Ten Commandments on public grounds lacks a secular purpose and thus is unconstitutional in public schools); ACLU of Ky. v. Pulaski County, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (finding that the display of the Ten Commandments on public grounds lacks a secular purpose and thus is unconstitutional in courthouse). The Kentucky courts ruled that defendants' attempt to flank the commandments with other documents in the face of litigation did not eliminate the constitutional problem. *See ACLU of Ky.*, 96 F. Supp. 2d at 693 n.1.

313. *See Books*, 79 F. Supp. 2d at 984.

314. *Id.* at 1002.

315. *See id.*

316. *Id.*

317. *See id.*

318. *See id.* at 984.

319. *Id.* at 1002.

320. *Id.*

321. *See id.* at 1002-03.

displaying other documents of historical significance that formed and influenced the United States legal or governmental system.[322] The Act took effect on July 1, 2000, and the Governor of Indiana announced his intent to put up a limestone monument of the Ten Commandments on the State House lawn. The Indiana Civil Liberties Union immediately filed suit to block display of the monument. In *Indiana Civil Liberties Union, Inc. v. O'Bannon*,[323] Judge Barker granted plaintiffs' motion for a preliminary injunction to prevent the state from proceeding to erect this proposed monument, which was being donated by the Indiana Limestone Institute. In order to comply with the state statute, the monument was to contain not only the Ten Commandments, but also the Preamble of the 1851 Indiana Constitution and the federal Bill of Rights. The Monument was designed as a four-sided structure approximately seven feet high, composed of two large blocks of Indiana limestone weighing almost 11,500 pounds. It was to be erected where a former Ten Commandments monument stood which, like the one in Elkhart, was donated by the Fraternal Order of the Eagles.[324]

Addressing the purpose prong, the court determined that the State, at oral argument, had not shown that the display was to serve only as a reminder of the nation's core values and ideals. The State could not cite any historical link between most of the commandments and "ideals animating American government."[325] Judge Barker distinguished *Books*, where the stated purpose was to provide a code of conduct for youngsters. She stated that the design of the monument as well as its words belied any secular purpose.[326] The Ten Commandments would be displayed on one side of the monument, not physically linked to the other text on the display, nor was there any indication on the monument that the commandments were being displayed for their historical significance.[327]

Although recognizing that impermissible religious purpose alone would suffice to justify the injunction, the court proceeded to address the effects prong, examining, as Judge Sharp had, the content of the message, its context, and its location.[328] Judge Barker concluded that "a reasonable person would perceive in this display a message of government endorsement of religion."[329] The text of the Ten Commandments was prominently located on one side of the seven-foot tall monument and a person would have to walk completely around it to read the other messages. Further, the lettering of the Ten Commandments was significantly larger than that of the other documents and thus a viewer would see

322. *See* IND. CODE § 4-20.5-21-2 (2000).
323. 110 F. Supp. 2d 842 (S.D. Ind. 2000).
324. *See id.* at 844.
325. *Id*. at 851.
326. *See id.* at 852.
327. *See id.*
328. *See id.* at 853.
329. *Id*. at 858.

this as the most prominent message being displayed.[330] In addition, the Monument was located on the lawn of the Statehouse at the seat of government for the entire State.[331] Finally, the court noted that this was a permanent display, unlike the seasonal displays upheld by the Supreme Court in earlier cases.[332] The Court expressed disagreement with the conclusion in *Books* that displaying the Ten Commandments near the seat of government does not convey the government's stamp of approval. "[W]e say respectfully that we likely would not share that assessment."[333]

Both decisions were appealed to the Seventh Circuit. In December, 2000, the court overturned Judge Sharp's ruling in *Books* and found that the Ten Commandments display in front of the Municipal Building in Elkhart violated the Establishment Clause.[334] Judge Ripple applied the "endorsement" test and determined that the display had both the purpose and the effect of impermissibly endorsing religion. As to purpose, he relied on the Supreme Court's decision in *Stone*[335] and found that the Ten Commandments is clearly a religious document and that the record did not disclose any serious attempt by the City to present the text in a way that might diminish its religious character.[336] At the initial dedication of the monument in 1958, the speakers included a minister, a priest, and a rabbi, who generally urged the people of Elkhart to embrace the "religious code of conduct taught in the Ten Commandments."[337] Although the city in 1999 passed a Resolution proclaiming a secular purpose—to recognize the historical and cultural significance of the Ten Commandments—Judge Ripple concluded that even if entitled to some deference, the fact that the Resolution was issued on the eve of litigation negated its sincerity.[338]

In addition, Judge Ripple found that the display had the principle effect of advancing religion. He admonished that religious displays at the seat of government should be subjected to particularly careful scrutiny, and, in addition, the monument was a permanent fixture, not a mere seasonal display.[339] The monument could not be characterized as simply a component of a comprehensive display of the cultural heritage of the people of Elkhart; rather, it stood "as a sole and stark reminder of the specific injunctions contained in the

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330. *See id.* at 857.

331. *See id.* Subsequently Judge Barker ruled in *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856, 873 (S.D. Ind. 2000) that placing the same monument at the county courthouse raised similar constitutional problems and thus she preliminarily enjoined placement of the monument at this new site.

332. *See* O'Bannon, 110 F. Supp. 2d at 858.

333. *Id*.

334. Books v. City of Elkhart, 235 F.3d 292, 294 (7th Cir. 2000), *cert. denied*, No. 00-1407, 2001 U.S. LEXIS 4120, at *1 (May 29, 2001).

335. Stone v. Graham, 449 U.S. 39, 101 (1980).

336. *See Books*, 235 F.3d at 302-03.

337. *Id.* at 303.

338. *See id.* at 304.

339. *See id.* at 305-06.

Commandments."[340] Finally, he concluded that the average person approaching the seat of government would perceive this as government endorsing religion.[341]

Interestingly, as to remedy, the court hesitated to mandate immediate removal. Instead, Judge Ripple cautioned that Elkhart authorities should have "a reasonable time to address in a responsible and appropriate manner the task of conforming to the letter and spirit of the constitutional mandate."[342]

Judge Ripple's analysis raises several difficult questions. First, is the secular purpose to be decided at the time a monument is first erected or when it is challenged? Second, how closely should courts examine purpose to ascertain whether such is "sham" or "sincere," especially when the secular interest is not advanced until litigation has been commenced? Third, if one purpose is religious, but there are valid secular reasons as well, should the court sustain such a display? Finally, to what extent can the religious message be tempered and thus Establishment Clause problems allayed by surrounding a religious symbol by secular objects?

In a lengthy dissent, Judge Manion rejected Judge Ripple's answers to all of these questions. He argued that the city's resolution was not a sham and that the timing was totally reasonable since it was not until 1999 that a demand was made to remove the monument.[343] Further, he stated that even if the city had a religious purpose in displaying the Ten Commandments, the fact that it presented several secular justifications should avoid a constitutional problem. Indeed, the City originally accepted the Ten Commandments from the Eagles "in order to further the Eagles' goal of providing 'youths with a common code of conduct that they could use to govern their actions.'"[344] Further, the dissent contended that the primary effect was not to advance religion but rather this case, like *Allegheny*, involved a monument of the Ten Commandments as part of a larger historical and cultural display. "[T]he Ten Commandments monument is not given special placement by the City . . . [r]ather [it] is one of multiple monuments closely placed in the available, yet small walkway leading into the municipal building."[345] The monument also included secular objects, including the flag, the eagle, and the all-seeing eye, and it was surrounded by two other monuments. Thus, a reasonable citizen would not believe that Elkhart was endorsing religion, which is why, the dissent opines, no one challenged its existence during the forty years it stood outside the Municipal Building.[346] Finally, Judge Manion complained that there can be no remedy other than removal because of the court's determination that the display lacks a secular purpose.[347] Thus, no matter what the city did to dilute the religious aspects of the display, the absence of a

340. *Id.* at 306.

341. *See id.* at 306-07.

342. *Id.* at 307-08.

343. *See id.* at 313-14 (Manion, J., concurring in part and dissenting in part).

344. *Id.* at 315.

345. *Id.* at 319.

346. *See id.* at 320-21.

347. *See id.* at 325-26.

secular purpose alone would require that the monument be removed. Because the debate in Indiana is part of a nationwide push to display the Ten Commandments in public venues, it is likely that the controversy will ultimately be settled by the Supreme Court.