STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

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INTRODUCTION

This Article explores state and federal constitutional law developments over the past year. Parts I-III examine both U.S. Supreme Court cases and significant Indiana state and lower federal court cases addressing federal constitutional issues. Part IV will focus on state civil constitutional law cases.

I. FIRST AMENDMENT SPEECH CASES

During the 2000 term the U.S. Supreme Court decided several cases raising First Amendment issues. In addition, both the district courts in Indiana and the Seventh Circuit Court of Appeals were called upon to assess First Amendment challenges to Indiana statutes. A recurring theme is the extent to which government may regulate speech in order to protect children.

A. Regulating Commercial Speech to Protect Minors

In *Lorillard Tobacco Co. v. Reilly*,[1] the tobacco industry successfully challenged various Massachusetts regulations governing the advertising of tobacco products. State regulations, promulgated by the Attorney General, prohibited the outdoor advertising of smokeless tobacco or cigars within 1000 feet of a school or playground.[2] Further, they proscribed indoor, point-of-sale advertising of cigars and smokeless tobacco "placed lower than five feet from the floor of any retail establishment which is located within a thousand foot radius" of any school or playground.[3] Despite the state's obviously strong interest in protecting its children from the ills of tobacco use, the Court reasoned that the regulations went too far.

After striking the cigarette advertising regulations on pre-emption grounds,[4] Justice O'Connor applied a four-prong analysis established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[5] to test the smokeless tobacco regulations. Under the first prong, the court determines whether the expression is protected at all, since the state may ban commercial speech if it is

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1. 533 U.S. 525 (2001).

2. *Id.* at 545.

3. *Id.* at 566 (quoting MASS. REGS. CODE tit. 940, §§ 21.04(5)(b), 22.06(5)(b) (2000)).

4. *Id*. at 553-57. The Court relied on the Federal Cigarette Labeling and Advertising Act, which prescribes mandatory health warnings for cigarette packaging and advertising. The Court rejected the Attorney General's argument that pre-emption should not apply because the regulations targeted youth exposure to tobacco, rather than the health-related content of advertising. The Court found the two concerns "intertwined." *Id.* at 526-27.

5. 447 U.S. 557 (1980).

false, deceptive, or misleading, or if it concerns unlawful activity.[6] The second prong asks whether the asserted governmental interest is substantial.[7] The third and fourth prongs require the court to determine whether the regulation directly advances the asserted governmental interest and whether the regulation is more extensive than necessary to serve that interest.[8] The first two prongs were conceded by the parties and the Court found "ample documentation" of a problem with underage use of smokeless tobacco and cigars, which could be ameliorated by preventing campaigns targeted at juveniles.[9] The Court concluded, however, that the ban on outdoor advertising failed the fourth prong because it was more extensive than necessary to advance the state's interest in preventing underage tobacco use.[10] The Court expressed concern that the regulations made no distinctions based on the size of the sign, nor did the regulations differentiate between rural, suburban, or urban locales, which "demonstrates a lack of tailoring."[11] The Court noted that in some areas the regulations "would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers."[12] The Court reiterated the firmly established principle that the government's interest in protecting children from harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults."[13]

As to the prohibition on indoor point-of-sale advertising, the Court concluded that this regulation failed both the third and fourth prongs of the *Central Hudson* analysis because it neither advanced the goal of preventing minors from using tobacco products, nor curbed the demand for such activity.[14] The five-foot rule would not curb demand for the product since children can obviously look up and see the ads, and there was not a "reasonable fit" between the restriction and the goal of targeting advertising that entices children.[15] Further, the Court rejected a "de minimis" exception for even limited restrictions on advertising, where the restrictions lack sufficient tailoring.[16]

The concurring opinions of Justices Kennedy, Scalia, and Thomas expressed concern with the *Central Hudson* test. Justice Kennedy, joined by Justice Scalia, opined that "the test gives insufficient protection to truthful, nonmisleading

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6. *Id.* at 566.
7. *Id.*
8. *Id.*
9. *Lorillard*, 533 U.S. at 563.
10. *Id.* at 566.
11. *Id.* at 564.
12. *Id.*
13. *Id.* at 565 (quoting Reno v. ACLU, 521 U.S. 844, 875 (1997)).
14. *Id.* at 566. The Court, however, did sustain regulations requiring "tobacco retailers to place tobacco products behind counters and require customers to have contact with a sales-person before they are able to handle a tobacco product." *Id*. at 568.
15. *Id.* at 567.
16. *Id.*

commercial speech."[17] Justice Thomas flatly stated that he would subject all advertising regulations that restrict truthful speech to strict scrutiny analysis.[18] As to the state's interest in protecting minors, Justice Thomas emphasized that the state did not focus its ban on "youthful imagery."[19] More basically, he emphasized that the state cannot pursue its interest in regulating speech directed at children "at the expense of the free speech rights of adults."[20]

Justice Stevens, joined by Justice Ginsberg and Justice Breyer, would have remanded the case for a trial to better assess whether the measures were properly tailored to serve the government's compelling interest in "ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance."[21] Because there was some doubt in the record as to the impact the advertising ban would have, particularly in the state's largest cities, the breadth of the ban was potentially problematic. However, the dissenters would have upheld the point-of-sale advertising restrictions as not significantly implicating First Amendment concerns.[22]

Lorillard is significant for several reasons. The decision triggered nine separate opinions, including four rather convoluted concurring opinions. Nonetheless, *Central Hudson* remains intact, despite the urging of some members of the Court that truthful, nonmisleading commercial speech should enjoy the full First Amendment protection afforded non-commercial speech. On the other hand, the decision indicates that the *Central Hudson* test is not toothless and that the government will not be permitted to impose broad advertising bans to discourage the use of legal but disfavored products, even where a child welfare argument is invoked.[23] Either government must enact generally applicable

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17. *Id.* at 570 (Kennedy, J., concurring). *But see* Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 233 F.3d 981, 994 (7th Cir. 2000) ("The government can directly regulate deceptive advertising without any further justification.").

18. *Lorillard*, 533 U.S. at 570 (Thomas, J., concurring).

19. *Id.* at 574.

20. *Id.* at 575-76.

21. *Id.* at 587 (Stevens, J., concurring in part and dissenting in part).

22. *Id.* at 590.

23. The Supreme Court's strict analysis of advertising bans is also reflected in *Thompson v. Western States Medical Center*, 122 S. Ct. 1497 (2002). The Court ruled 5-4 that the government could not prohibit the advertising of compounded drugs even when the government, in return, exempted such drugs from FDA standard drug approval requirements. The Court conceded that the prohibition on wide advertising of compounded drugs where such drugs did not first undergo safety testing might advance the government's interest in discouraging broad use of such drugs. However, the new law failed to meet *Central Hudson*'s requirement that the means be no more restrictive than necessary: "If the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Id.* at 1506. Again the Court reiterated the principle that government cannot halt the dissemination of truthful commercial information simply to keep members of the public from making bad decisions with this information. *Id.* at 1507.

zoning ordinances that apply to all products, or it must take special care that its restrictions are limited to advertising with special appeal to minors in especially problematic geographical locations, in order to meet the narrow tailoring requirement.

B. Regulating to Protect Minors from Violence

It is well established that obscene materials are unprotected by the First Amendment. Further, even material that does not meet the adult standard of obscenity may be proscribed for minors based on the potential harm such material might cause to the psychological or ethical development of children.[24] On the other hand, the Supreme Court has never addressed the constitutionality of laws aimed at shielding minors from depictions of graphic violence, despite a growing body of evidence that such material is also harmful to minors. In *American Amusement Machine Ass'n v. Kendrick*,[25] the Seventh Circuit was called upon to address this issue in the context of an Indianapolis ordinance aimed at limiting children's access to video games that depict violence.

Under an Indianapolis ordinance, establishments which feature five or more coin-operated arcade games containing graphic violence or strong sexual content were required to both segregate such games to ensure access only by adults and to obtain parental consent prior to allowing a minor to play such games.[26] The ordinance specifically targeted amusement machines that predominantly appeal "to minors' morbid interest in violence or minors' prurient interest in sex, [that are] patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years," and that lack "'serious literary, artistic, political or scientific value as a whole for persons under' that age."[27] The portion of the ordinance aimed at sexually explicit material closely tracks a similar statute that was sustained by the Supreme Court in 1968.[28] The plaintiffs, manufacturers of video games and their trade association, challenged only the "graphic violence" aspect of the ordinance, which targeted "an amusement machine's visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration [disfigurement]."[29] Violations triggered potential

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24. *See* Ginsberg v. New York, 390 U.S. 629, 639-43 (1968).

25. 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 462 (2001).

26. *See id.* at 573.

27. *Id.* (quoting INDIANAPOLIS, IN, CITY-COUNTY GENERAL ORDINANCE No. 72, § 831.1 (2000)).

28. In *Ginsberg*, the Court upheld a statute that forbade any representation of nudity that "predominantly appeal[ed] to the prurient, shameful or morbid interest of minors," that was "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors" and that was "utterly without redeeming social importance for minors." *Ginsberg*, 390 U.S. at 633.

29. *Am. Amusement Mach. Ass'n*, 244 F.3d at 573 (alteration in original) (quoting

suspension or revocation of the right to operate the machines as well as monetary penalties.[30]

The district court upheld the Indianapolis ordinance.[31] It applied a rational basis analysis and concluded that empirical studies by psychologists, which found that playing violent video games tends to make young persons more aggressive in their attitudes and behaviors, sufficiently justified the enactment.[32] Further, the district court believed that the fact that the ordinance tracked the conventional standard for obscenity eliminated any due process vagueness concerns.[33]

The Seventh Circuit rejected both the district court's analysis and its conclusion. It reasoned that the ordinance had to be subjected to strict scrutiny and, because it found that Indianapolis could not meet this heightened standard, it ordered entry of a preliminary injunction prohibiting enforcement of the law.[34]

A core question in the case was whether the city appropriately relied on the analogy to obscene material. Arguably, depictions of violence may be even more harmful to minors than sexually explicit material and, thus, if the former may be regulated, why not the latter? Judge Posner rejected the city's attempt "to squeeze the provision on violence into a familiar legal pigeonhole, that of obscenity."[35] He reasoned that the U.S. Supreme Court has sustained regulation of obscenity not on grounds that it is harmful, but on grounds that it is offensive.[36] Government need not prove that obscene material is likely to affect anyone's conduct before the material can be proscribed, because it is sheer offensiveness that justifies the restriction.[37] On the other hand, because the city argued a link to harmful consequences as the basis for restricting violent speech, it was required to present some proof of a causal connection to some harm.[38] While conceding that "protecting people from violence is at least as hallowed a role for government as protecting people from graphic sexual imagery," the court found that the city had failed to create a record demonstrating that violent video games led youthful players to breach the peace.[39]

Judge Posner found the psychological studies relied on by the city unpersuasive because they failed to show that violent video games are any more harmful to the public safety than violent movies or other violent entertainment readily accessible to minors.[40] He reasoned that video games are no different

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INDIANAPOLIS, IN, CITY-COUNTY GENERAL ORDINANCE, No. 72, § 831.1 (2000)).

30. *Id.*
31. *See* Am. Amusement Mach. Ass'n v. Cottey, 115 F. Supp. 2d 943 (S.D. Ind. 2000).
32. *Id.* at 964-66.
33. *Id.* at 978-81.
34. *Am. Amusement Mach. Ass'n*, 244 F.3d at 580.
35. *Id.* at 574.
36. *Id.*
37. *Id.* at 575.
38. *Id.* at 576.
39. *Id.* at 575.
40. *Id.* at 578-79.

from literature; many games have story lines and even ideologies, just as books and movies do.[41] The facts that violent video games constitute a "tiny fraction" of the media violence to which American children are exposed and the characters in the video games are "cartoon characters" who could not be mistaken for real people further persuaded Judge Posner that the ordinance's curtailment of free expression could not be offset by any justification "'compelling' or otherwise."[42] Although access to such games was permitted when minors were accompanied by their parents, the court concluded that the parental accompaniment requirement would deter children from playing games and that most parents were simply too busy to accompany their children, even if they thought their children could be exposed to violent video games without suffering any harm.[43]

The Indianapolis ordinance was addressed in the context of a preliminary injunction, and, thus, the court did not discuss whether a more narrowly drawn ordinance might survive a constitutional challenge. Judge Posner, however, implied that a sufficiently narrow statute must restrict itself to games that use actors in simulated real death and mutilation convincingly or to games that lack any story line and instead consist merely of "animated shooting galleries."[44] It can be questioned, however, whether strict scrutiny must be the analysis applied when government seeks to protect children. Certainly, as Judge Posner conceded, the Supreme Court has allowed greater government regulation where speech is targeted at children.[45] Further, the Court has applied a somewhat more deferential approach where the speech has little communicative value and appears to lie at the periphery of the First Amendment. For example, the Court has allowed much greater regulation of sexually explicit material, even where such material does not meet the strict legal definition of obscenity.[46] Arguably,

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41. *Id.* at 578.

42. *Id.* at 579.

43. *Id.* at 578.

44. *Id.* at 579.

45. For discussion of *Ginsberg*, see *supra* note 28.

46. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), a plurality held that a city's concern for the highly detrimental effects of lewd, immoral activities justified a ban on nudity as applied to nude dancing. The plurality specifically rejected the suggestion that the city had to develop a more specific evidentiary record of harm in order to justify its statute. *Id.* at 299-300. Similarly, in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the Court upheld restrictive zoning of adult establishments, based on the alleged secondary effects associated with such businesses, without mandating that the city conduct its own new studies proving adverse secondary effects. The Court found that it sufficed that the studies relied on were "reasonably believed to be relevant to the problem" addressed. *Id.* at 51-52.

Further, in *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (2002), the Court in a 5-4 ruling held that a city could reasonably rely on studies correlating crime patterns with the concentration of adult businesses in single-use establishments to support an ordinance prohibiting more than one adult entertainment business in the same building. The Ninth Circuit held that the lack of more specific empirical data regarding multiple-use adult establishments was fatal to the zoning ordinance. 222 F.3d 719 (9th Cir. 2000). Relying on *Renton*, Justice O'Connor criticized

violent video games can be said to fall within this less protected category.

Judge Posner asserted that the ordinance could not meet even a lesser standard because "[c]ommon sense says that the City's claim of harm to its citizens from these games is . . . at best wildly speculative."[47] He did so, however, only after flatly rejecting the psychological studies, because the games used in the studies were purportedly not similar enough to those marketed in game arcades in Indianapolis, and because the studies found only that the games triggered aggressive feelings, but not necessarily violent conduct.[48] Judge Posner's concept of "common sense" may not necessarily comport with that of other reasonable minds. He claims that children cannot "become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble[,]"[49] but common sense does not dictate that the development of minors will be impeded or that minors will be left "unequipped to cope with the world as we know it,"[50] simply because they are denied access to violent video games unless accompanied by an adult. Although concerns for the First Amendment perhaps warrant a closer analysis than the reasonable basis test imposed by the district court, it is difficult to understand the notion that

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the court below for setting too high a bar on municipalities that were simply addressing the secondary effects of protected speech. *Id.* at 1736. *Renton* required only that the city's evidence "fairly support the municipality's rationale for its ordinance." *Id.* Justice O'Connor cautioned that cities could not rely on "shoddy data or reasoning" to enact zoning ordinances, but concluded that plaintiffs must cast doubt on the city's rationale by either demonstrating that its evidence does not support its rationale or by furnishing evidence that disputes the city's factual findings. At least at the summary judgment stage, plaintiffs had not produced such evidence and the city, therefore, met *Renton*'s evidentiary requirement. *Id.* In a concurring opinion, Justice Kennedy emphasized that in the zoning context, cities have significant power to target the secondary effects of speech, and provided the purpose of the ordinance is "to limit the negative externalities of land use," the usual presumption that content-based restrictions on speech are unconstitutional does not apply. *Id.* at 1741; *see also* Blue Canary Corp. v. City of Milwaukee, 270 F.3d 1156 (7th Cir. 2001). The Seventh Circuit held the city's denial of a permit for nude dancing at a burlesque theatre in a residential district did not violate the First Amendment because it only barred the operation in proximity to a residential neighborhood, leaving abundant convenient locations within the city. Further, the court rejected the argument that the zoning commissioner was given too much discretion in administering the zoning law, reasoning that "some degree of discretion is an unavoidable feature of law enforcement." *Id*. at 1158. In an earlier ruling upholding the city's refusal to renew the plaintiff's liquor license, the court reasoned that "[t]he impairment of First Amendment values is slight to the point of being risible, since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value." Blue Canary Corp. v. City of Milwaukee, 251 F.3d 1121, 1124 (7th Cir. 2001). Although the subsequent request did not involve the sale of alcohol, the court still found the same minimal impairment of free speech. *See Blue Canary Corp.*, 270 F.3d at 1157.

47. *Am. Amusement Mach. Ass'n*, 244 F.3d at 579.

48. *Id.* at 578-79.

49. *Id*. at 577.

50. *Id.*

government has a sufficiently important interest in restricting the exposure of juveniles to sexually explicit material, but cannot restrict their access to video games that depict graphic violence. Concerns of vagueness are always an issue in the First Amendment context but, as the district court appropriately noted, the Indianapolis ordinance tracks the definition for regulating sexually explicit material aimed at minors that has been sustained by the Supreme Court. Further, the definition of proscribed material is quite detailed.

Judge Posner concluded that the ordinance was overly broad because it was not restricted to games using more realistic actors and more realistic depictions of death and mutilation, or games lacking any story lines.[51] Further, he contended that the ordinance was under-inclusive because it was aimed only at video games and not at violent movies and television.[52] Concerns of over and under-inclusiveness are a well established aspect of strict scrutiny analysis; however, the Supreme Court has been less apt to apply this stringent analysis when the speech is targeted only at minors and has limited First Amendment value, and the state is exercising its power to protect minors.[53] Further, his analogy to violent movies and television is inapt. Unlike television, it is feasible for a city to restrict access to violent video games without affecting adult access,[54] and movies already have a rating system that denies minors access to unsuitable films. The fact that parental rights are protected by allowing access when children are accompanied by their parents, similar to the motion picture industry, further supports the validity of the ordinance. Indianapolis appealed the ruling, but its certiorari petition was denied.[55] The issue, however, is unlikely to go away, as many state legislatures and municipalities have either enacted or are in the process of enacting similar legislation.[56]

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51. *Id.* at 579-80.

52. *Id.* at 578-79.

53. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 633-34 (1979) (four-Justice plurality recognizing that the rights of minors cannot be equated with those of adults due to their peculiar vulnerability, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing).

54. Unlike the cigarette advertising ban previously discussed, this ordinance need not adversely affect the rights of adults. *See* discussion *supra* Part I.A.

55. *See* Kendrick v. Am. Amusement Mach. Ass'n, 122 S. Ct. 462 (2001).

56. The Connecticut legislature passed similar legislation in May 2001, that was vetoed by the governor. *See* S.B. 119, 2001 Gen. Assem., Reg. Sess. (Conn. 2001). A bill targeting business owners who allow children to operate video games with "point and shoot" simulated firearms is pending in the New York Assembly. *See* A.9019, 224th Leg., Reg. Sess. (N.Y. 2001). Tennessee has recently amended its statute governing the sale, loan, or exhibition to minors of material that depicts sexual conduct to include "excess violence." TENN. CODE ANN. §§ 39-17-911, 39-17-914 (2000). Similar legislation is pending in Oklahoma, Minnesota, Chicago and Honolulu. Indiana is considering enacting a similar provision. *See* H.R. 1649, 112 Leg., First Session (Ind. 2001) (referred to Senate on March 6, 2001). Finally, St. Louis County, Missouri, is currently defending an ordinance which requires parental permission for children to buy violent or sexually explicit video games. *See* Interactive Digital v. St. Louis Co., No. 00-CV-2030, 2000 WL 826822 (E.D.

The First Amendment has also posed an obstacle to Indiana lawmakers seeking to protect children from violence through curfew laws. In July 2000, a federal district court ruled that Indiana's first attempt to enact such a statute was unconstitutional because it interfered with the First Amendment rights of minors.[57] Although the statute created certain exceptions for work, school events and religious activities, the court found that it did not allow for other important, protected activities that take place after hours.[58] The court reasoned that "without a general First Amendment activities exception, a curfew law is overbroad."[59]

In response, the Indiana Legislature redrafted the law in May 2001 and broadened the exceptions in order to avoid intrusion on the First Amendment rights of minors. The new statute allows all First Amendment activity (free speech, the right of assembly, and freedom of religion) to be asserted as a defense to an arrest under the curfew statute.[60] The Indiana Civil Liberties Union has challenged the new law as an even greater intrusion on First Amendment rights, because it requires minors to come forward and assert a defense.[61] It contends that the possibility of arrest will deter youths from exercising their federally protected rights during curfew hours.[62] A district court last fall refused to enjoin enforcement of the statute.[63] Judge Tinder reasoned that the ICLU failed to show "a realistic threat" that minors would be arrested on curfew violations when they were exercising their First Amendment rights.[64] Judge Tinder agreed that an exception for First Amendment activity was constitutionally mandated.[65] The judge, however, was not troubled by the fact that the exemption in the ordinance appeared as an affirmative defense, rather than as an exception, since state and federal law requires an arresting officer to consider the totality of circumstances, including the First Amendment activity defense.[66] Further, he ruled that, even if the law burdened some First Amendment conduct, the ordinance was narrowly

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Mo. 2002).

57. *See* Hodgkins v. Goldsmith, No. IP99-1528-C-T/G, 2000 WL 892964 (S.D. Ind. July 3, 2000).

58. *See id.* at *9-10.

59. *Id*. at *16. Subsequently, in *Hodgkins v. Peterson*, No. IP00-1410-C-T/G, 2000 WL 33128726 (S.D. Ind. 2000), the court rejected a challenge based on the substantive due process rights of parents to raise and control their children without undue government interference. Although the court applied intermediate scrutiny, it concluded that, at the preliminary injunction stage, the parents had not made a clear showing that the ordinance was invalid in light of the city's substantial interests in protecting its youth from victimization and protecting the city from crimes committed by youth during curfew hours. *See id.* at *13-15.

60. *See* IND. CODE § 31-37-3-3.5 (2001).

61. Hodgkins *ex rel.* Hodgkins v. Peterson, 175 F. Supp. 2d 1132 (S.D. Ind. 2001).

62. *Id.* at 1145.

63. *Id.* at 1167.

64. *Id*. at 1149.

65. *Id.* at 1140-44.

66. *Id.* at 1147.

tailored to serve the government's interest "in providing for the safety and well-being of its children and combating juvenile crime."[67]

In addition, the district court rejected the argument that the law interfered with the parents' right to guide the upbringing of their children, reasoning that "a parent's right to allow his or her minor children to be in public with parental permission during curfew hours" should not be viewed as a fundamental privacy right.[68] The court applied the "intermediate scrutiny" standard of review, because of the significance of the parental rights at stake, but concluded that the curfew law was substantially related to the city's interests in "protecting its youth from victimization and protecting others from crimes committed by youth during curfew hours."[69] Indeed, the court concluded that the curfew law would also satisfy strict scrutiny.[70] The judge's decision has been appealed to the Seventh Circuit.

Several cities have enacted similar legislation, and the litigation demonstrates that the lower courts are divided as to both the standard of review that should apply to such laws and as to the core question of whether the state's interest in protecting juveniles from crime on the streets outweighs any potential First Amendment harm.[71] In general, however, curfew laws that do not broadly exempt First Amendment activity have been disallowed, whereas ordinances that insulate First Amendment activity have been sustained.[72]

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67. *Id*. at 1150.

68. *Id*. at 1161.

69. *Id.* at 1164.

70. *See id.* at 1166.

71. *See, e.g.*, Hutchins v. Dist. of Columbia, 188 F.3d 531, 534 (D.C. Cir. 1999) (finding that a curfew statute with an explicit First Amendment exception does not implicate any fundamental rights of minors or their parents, but ordinance could be sustained even under strict scrutiny analysis); Schleifer v. City of Charlottesville, 159 F.3d 843, 847-49 (4th Cir. 1998) (holding that, because minors' rights are not co-extensive with those of adults, the appropriate standard to use is intermediate scrutiny, and that the city was justified in believing the curfew ordinance advanced the state's interest); Qutb v. Strauss, 11 F.3d 488, 492-96 (5th Cir. 1993) (holding that, because freedom of movement is a fundamental right under the Equal Protection Clause, strict scrutiny applies, but the ordinance was narrowly tailored to meet the state's compelling interest in protecting juveniles from crime on the streets, especially in light of the exemptions for First Amendment activities and traveling); *cf.* Nunez v. City of San Diego, 114 F.3d 935, 949 (9th Cir. 1997) (applying strict scrutiny because fundamental rights are implicated, and finding that the city could not show its curfew law to be narrowly tailored, because it included few exceptions for otherwise legitimate First Amendment activity).

72. Note that the curfew laws upheld in *Hutchins*, *Schleifer*, and *Qutb*, *supra* note 71, all contained this exemption, contrary to the law struck in *Nunez*. The laws in *Hutchins* and *Qutb* also used the term "defense," but, unlike the Indianapolis ordinance, required the arresting officer to specifically determine that no defense existed before making an arrest. *See Hutchins*, 188 F.3d at 535; *Qutb*, 11 F.3d at 490-91.

C. Regulating Access to Public Forums

The Supreme Court this term revisited the question of how to resolve the conflict that occurs when religious groups seek access to government-owned property. In *Capitol Square Review and Advisory Board v. Pinnette*,[73] the Court in 1995 ruled that prohibiting the Ku Klux Klan from erecting a large Latin cross in the park across from the Ohio State House violated the Klan's free speech rights and that allowing the religious display on public property would not violate the Establishment Clause. The Court emphasized that government cannot discriminate based on the content of the speech or the identity of the speaker in a public forum that is open to everyone.[74] Even where government has not indiscriminately opened its property for public use, and thus needs not allow persons to engage in every type of speech, the Court has ruled that any regulation in a so-called "limited public forum" must be reasonable and viewpoint neutral.[75] In two recent cases the Supreme Court has ruled that discrimination against religious groups seeking the use of a limited public forum is impermissible viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free School District*,[76] the Court held that a school district violated the First Amendment by precluding a group from presenting films at the school after school hours based solely on the religious perspective of the films. Similarly, in *Rosenberger v. Rector & Visitors of University of Virginia*,[77] the Court held that the university violated the First Amendment by refusing to fund a student publication solely because it addressed issues from a religious perspective.

Despite these earlier rulings, the Milford Central School District denied the request of the Good News Club, a private Christian organization for children ages six to twelve, to hold weekly after-school meetings in the school cafeteria. Because there are some 4600 local clubs and approximately 500 of these meet on public school property, the Court's ruling in *Good News Club v. Milford Central School*[78] is significant. The Good News Clubs are sponsored by a national organization called Child Evangelism Fellowship, which states that its mission is to evangelize boys and girls with the gospel of the Lord Jesus Christ. The Milford Central School District adopted a community use policy allowing residents to use the school for "social, civic, and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community,"

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73. 515 U.S. 753 (1995).

74. *Id.* at 761.

75. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993); Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 806 (1985). Note that the requirements of reasonableness and viewpoint neutrality apply even to the regulation of speech in non-public forums, i.e., government property that has not been opened for First Amendment activity.

76. 508 U.S. 384 (1993).

77. 515 U.S. 819 (1995).

78. 533 U.S. 98 (2001).

but it prohibited uses that involved religious worship.[79] The school determined that the activities of the Good News Club were the equivalent of religious instruction and worship.[80] The district court and the Second Circuit had both ruled that the school could deny the club access without engaging in unconstitutional viewpoint discrimination because the school had never allowed other groups to provide religious instruction and because the meetings here were "quintessentially religious," and thus fell outside the bounds of pure moral and character development from a religious perspective.[81]

The Supreme Court, in a 6-3 opinion, rejected the analysis of the lower courts. First, the Court assumed that the school was a limited public forum and thus was not required to "allow persons to engage in every type of speech."[82] The school could reserve use of its property for certain groups or certain topics provided, however, that it did not discriminate on the basis of viewpoint and that the restrictions were reasonable in light of the purpose of the forum.[83] The Court then concluded that the exclusion of the Good News Club was impermissible viewpoint discrimination.[84] Affirming its earlier holdings, the Court stated that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."[85] Justice Thomas reasoned that, like other permitted users such as the Boy Scouts and the 4-H Club, the Good News Club was engaged in teaching morals and character, but was excluded simply because its viewpoint was religious: "we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."[86] The Court expressly disagreed with the idea that something that is "quintessentially religious" cannot also be characterized as the teaching of morals and character development from a particular viewpoint.[87]

Assuming the existence of viewpoint discrimination, Milford nonetheless argued that its interest in not violating the Establishment Clause outweighed the club's interest in gaining equal access to the school's facility.[88] The Supreme Court in recent years has failed to agree on how to analyze Establishment Clause

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79. *Id.* at 102.

80. *Id.*

81. *Id.* at 99.

82. *Id.* at 106.

83. *Id.*

84. *Id.* at 107.

85. *Id.* at 112.

86. *Id.* at 111.

87. *Id. See also* DeBoer v. Village of Oak Park, 267 F.3d 558, 568 (7th Cir. 2001) (holding that the village engaged in impermissible viewpoint discrimination by refusing to allow use of the village hall for residents participating in a National Day of Prayer; the village's belief that prayer and singing hymns could not be viewed as a civic activity violated the speech rights of those who use these forms of expression to convey their viewpoint on matters relating to government).

88. *Good News Club*, 533 U.S. at 113.

claims. While some Justices contend that the clause is violated only where the government exercises coercive pressure or discriminates among religious organizations,[89] others, led by Justice O'Connor, assert that the appropriate inquiry is whether the government has endorsed or demonstrated affirmative approval of religion.[90] In rejecting the school's Establishment Clause defense, Justice Thomas invoked both of these "tests," while also emphasizing a neutrality or equal access principle that he would have the Court adopt.[91]

Justice Thomas focused on the facts that "the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent."[92] He then reasoned that allowing the club to use the facilities would ensure, rather than threaten, neutrality toward religion.[93] As to the coercion argument, Justice Thomas observed that, because the children could not attend without their parents' permission, there could not be coercion to engage in the club's religious activities.[94] Finally, as to the endorsement test, Justice Thomas reasoned that, even if elementary school children are more impressionable than adults, the danger of children misperceiving the endorsement of religion was no greater than the danger of their perceiving a hostility toward religious viewpoints were the club excluded from the school.[95]

Justice Scalia would paint with a broader brush; he asserted that there is no Establishment Clause issue where the speech is purely private and occurs in a public forum open to all on equal terms.[96] In sharp contrast, Justice Stevens, in dissent, argued that government is permitted to distinguish between religious speech that is simply about a particular topic from a religious point of view and religious speech that amounts to worship or proselytizing.[97] Justice Stevens concluded that a school district should be permitted to allow the first type of religious speech while disallowing the second.[98] Similarly, Justice Souter, joined by Justice Ginsberg, stated that it was clear that the Good News Club intended to use public school premises "for an evangelical service of worship calling children to commit themselves in an act of Christian conversion."[99] Justice Souter's dissent also emphasized that only four outside groups met at the school and that the Good News Club was the only one whose instruction followed immediately on conclusion of the school day, thus raising a concern of endorsement.[100]

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89. Lee v. Weisman, 505 U.S. 577 (1992) (opinion written by Justice Kennedy).
90. Wallace v. Jaffree, 472 U.S. 38, 75-76 (1985) (O'Connor, J., concurring).
91. *Good News Club*, 533 U.S. at 114.
92. *Id.* at 113.
93. *Id.* at 113-14.
94. *Id.* at 115.
95. *Id.* at 117-18.
96. *Id.* at 120-21 (Scalia, J., concurring).
97. *Id.* at 130 (Stevens, J., dissenting).
98. *Id.* at 130-31 (Stevens, J., dissenting).
99. *Id.* at 138 (Souter, J., dissenting).
100. *Id.* at 144 (Souter, J., dissenting).

Good News Club is significant for several reasons. First, it establishes that government aid to even "pervasively sectarian" or religious practices will not inevitably be impermissible; rather, neutrality and equal access appear to be the watchwords of this Court. Second, the majority noted that it "would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the [benefit] at a particular time."[101] Both of these determinations may be critical in assessing the validity of school vouchers, an issue currently pending before the Supreme Court.[102] Third, the decision extends the equal access principle to include use of facilities where young children are involved, despite the argument that they may erroneously assume that everything that occurs in a school is done under the auspices of school authority.

Justice Thomas emphasized that the club reached students only after school hours, with parental permission, and in the context of sharing facilities with other groups, such as 4-H Clubs and the Scouts.[103] Further, Justice Thomas found no evidence in the record that children misperceived the club's activities as school sponsored and stated that such a belief was unlikely because meetings were held not in classrooms but in a special education room, public school teachers did not participate as instructors, and children in the club were not of the same age as in the normal classroom setting.[104] Although these factors leave open the possibility that "endorsement" could pose a problem in a different context and that more than "neutrality" may be required on the part of government, it is significant to note that five Justices were willing to assess this question in the context of a summary judgment motion. Justice Breyer parted company with the majority, opining that the majority assumed facts not in evidence and that the endorsement question should have been remanded for a fuller factual development.[105]

This same clash between First Amendment values and the Establishment Clause arose in a somewhat unique context at Indiana University-Purdue University Ft. Wayne, when the University gave its permission for use of its studio theater for a student-directed play, titled *Corpus Christi*. In *Linnemeier v. Indiana University-Purdue University Ft. Wayne*,[106] the plaintiffs sought to enjoin the production, contending that the play constituted an "undisguised attack on Christianity and the founder of Christianity, Jesus Christ," and that allowing this production violated the Establishment Clause.[107] In response, the university argued that the studio theater was a limited public forum and that denying access

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101. *Id.* at 119.

102. *See* Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 122 S. Ct. 23 (2001).

103. *Good News Club*, 533 U.S. at 136.

104. *Id.* at 118.

105. *Id.* at 128-29 (Breyer, J., concurring in part).

106. 155 F. Supp. 2d 1034 (N.D. Ind. 2001), *motion for stay denied*, 260 F.3d 757 (7th Cir. 2001).

107. *Id.* at 1035-36.

would be viewpoint discrimination in violation of the First Amendment.[108]

In denying the plaintiffs' motion for a preliminary injunction, Judge Lee agreed with the university that exclusion of this play would constitute impermissible viewpoint discrimination.[109] Further, he rejected the plaintiffs' argument that performance of the play would send a message of government endorsement.[110] Judge Lee cautioned that courts must distinguish between the government's permitting speech and endorsing speech.[111] The endorsement argument was weakened by a disclaimer in the playbill, which read "[t]his play was selected for its artistic and academic value. The selection and performance of the play do not constitute an endorsement by Indiana University Purdue University Fort Wayne or Purdue University of the viewpoints conveyed by the play."[112] The court distinguished recent cases involving display of the Ten Commandments, where an Establishment Clause violation was found, by emphasizing that this was a university setting, "a place citizens traditionally identify with creative inquiry, provocative discourse, and intellectual growth."[113]

II. FIRST AMENDMENT RELIGION CASES

A. Government Display of Religious Symbols

As discussed in the previous section, the key Supreme Court decision last term addressing the Establishment Clause arose in the context of a school district's denying access to its facilities based on a concern that allowing religious worship to occur on school premises would violate the Establishment Clause. In *Good News Club* the Supreme Court rejected the notion that allowing access to religious groups, in the context of a limited public forum open to a variety of groups and subject matters, would send a message of government endorsement of religion.[114] Where, however, it is government itself that is sponsoring the religious observance or display, arguably a more difficult Establishment Clause question is raised. Two recent Indiana cases address this question in the context of the government's display of the Ten Commandments.

The Seventh Circuit, in *Books v. City of Elkhart*,[115] ruled that displaying the Ten Commandments near the entrance of the city hall in Elkhart violated the Establishment Clause because it had both the purpose and the effect of impermissibly endorsing religion. In finding a religious purpose, the court relied on the dedication ceremony in 1958, wherein religious leaders urged the people

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108. *Id.* at 1037 n.5.
109. *Id.* at 1041.
110. *Id.* at 1041-42.
111. *Id.* at 1042-43.
112. *Id.* at 1043.
113. *Id*. at 1042. The Ten Commandments cases are discussed *infra*, Part II.A.
114. *Supra* notes 78-105 and accompanying text.
115. 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001).

of Elkhart to embrace the religious code of conduct taught in the Ten Commandments.[116] As to the effect prong of the analysis, Judge Ripple expressed his view that displaying religious symbols at the seat of government must be subjected to particularly careful scrutiny, especially where the symbol represents a permanent fixture, rather than a mere seasonal display.[117]

The appellate court's decision was appealed to the U.S. Supreme Court, but the certiorari petition was denied.[118] The denial, however, triggered comments by three Supreme Court Justices who vehemently criticized the Seventh Circuit's analysis of the Ten Commandments issue. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, argued that the Court should have taken the case "to decide whether a monument which has stood for more than 40 years, and has at least as much civic significance as it does religious, must be physically removed from its place in front of the city's Municipal Building."[119] In response, Justice Stevens wrote that the graphic emphasis of the words "THE TEN COMMANDMENTS—I AM the LORD thy God," which appear at the top of the monument and "in significantly larger font than the remainder," is "rather hard to square with the proposition that the monument expresses no particular religious preference."[120]

At the same time that *Books* was making its way through the courts, the Indiana General Assembly adopted a statute, which authorized the display of the Ten Commandments on real property owned by the state or a political subdivision as part of an exhibit displaying "other documents of historical significance that have formed and influenced the United States legal or governmental system."[121] The law took effect on July 1, 2000, and the Governor of Indiana immediately announced his intent to erect a seven-foot limestone monument of the Ten Commandments, which was to be donated to the state, on the state house lawn. In compliance with the state statute, the monument was designed as a four-sided structure, displaying the Ten Commandments, the Federal Bill of Rights, and the Preamble of the 1851 Indiana Constitution. Although the state argued that the display was intended to serve only as a reminder of the nation's core values and ideals, the district court enjoined the Governor from moving forward with his plans, finding that the state was unable to cite any historical link between most of the Ten Commandments and "ideals

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116. *See id.* at 303.

117. *Id.* at 305-06.

118. City of Elkhart v. Books, 532 U.S. 1058 (2001). Note that the Seventh Circuit remanded with instructions that the district court should fashion a remedy that would not intrude on the authority of local government, while at the same time correcting the condition that offended the Constitution. *See Books*, 235 F.3d at 308-09. The Seventh Circuit also stayed the district court's mandate while the issue was appealed to the U.S. Supreme Court. Books v. City of Elkhart, 239 F.3d 826, 829 (7th Cir. 2001).

119. *Books*, 532 U.S. at 1063 (Rehnquist, C.J., dissenting).

120. *Id.* at 1059. Because only three Justices voted in favor of granting certiorari and the vote of a fourth is required, the Court skirted the issue for now.

121. *See* IND. CODE § 4-20.5-21-2 (2000).

animating American government."[122] Last summer the Seventh Circuit affirmed this ruling.[123]

In *Indiana Civil Liberties Union, Inc. v. O'Bannon*,[124] the Seventh Circuit agreed that the state's articulated purpose could not be viewed as secular, even if some of our secular laws parallel the Ten Commandments.[125] Further, the fact that secular text would be displayed together with the Ten Commandments did not lead the court to find a secular purpose, because the Ten Commandments is an "inherently religious text."[126] This case could not be distinguished from *Books*, where the city alleged that providing a "Code of Conduct" constituted a secular purpose. The court reasoned that the Ten Commandments indisputably addresses subjects that were beyond the scope of any government and involve instead the relationship of the individual and God.[127] Further, since the display of the Ten Commandments would actually stand apart from the other secular texts, the design belied any suggestion that the texts were all presented simply to "remind viewers of the core values and legal ideals of our nation."[128]

Focusing on the endorsement test, the court found that in light of the permanence of the exhibit as well as its content, design, and context, a reasonable person would believe that the display amounted to an endorsement of religion.[129] Factors supporting this conclusion were that the state house grounds are the seat of Indiana government, the limestone display would stand seven feet tall, six feet, seven inches wide, and four feet, seven inches deep, and the limestone blocks are tablet-shaped. These factors suggested the religious nature of the monument to observers even from a distance, and the lettering of the Ten Commandments would be larger than that of the Bill of Rights inscribed on the other side.[130] Since the secular text would appear on different sides of the monument, observers would be inhibited from visually connecting the texts, and nothing else in the context of the monument or the surrounding grounds mitigated the religious message conveyed.[131] Further, an observer who viewed the entire monument might reasonably believe that it impermissibly links religion and law since the Bill of Rights and the 1851 preamble are located so close to the sacred text, thus sending a message of endorsement.[132]

The ruling in *O'Bannon* was not surprising in light of *Books*. On the other hand, the U.S. Supreme Court has taken a contextual, highly fact-specific

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122. Ind. Civil Liberties Union, Inc. v. O'Bannon, 110 F. Supp. 2d 842, 851 (S.D. Ind. 2000), *aff'd*, 259 F.3d 766 (7th Cir. 2001), *cert. denied by* 122 S. Ct. 1173 (2002).

123. Ind. Civil Liberties Union, Inc. v. O'Bannon, 259 F.3d 766 (7th Cir. 2001).

124. *Id.*

125. *Id.* at 771.

126. *Id.*

127. *Id.*

128. *Id.* at 771-72.

129. *Id.* at 772-73.

130. *Id.*

131. *Id.* at 773.

132. *Id.*

approach in assessing Establishment Clause cases and in determining whether a reasonable person would see a particular government display of religion as an endorsement. Since the central theme in *Books* was that the Ten Commandments is a religious document, it was apparent that the State of Indiana in *O'Bannon* carried a heavy burden in demonstrating that the religiosity had been overcome. In essence, the location of the monument at the seat of all branches of state government made this display more problematic than that in *Books*. Nonetheless, Judge Coffey argued in dissent that the monument would serve "as a well-deserved recognition of our country's legal, historical, and religious roots."[133] Judge Coffey emphasized that any endorsement was muted by the fact that the monument appeared on the state house lawn with at least twelve other secular monuments recognizing historic figures, such as Christopher Columbus, George Washington, former Indiana governors, and significant historic events, including the Civil War.[134]

Although only three justices appear ready to address this issue, it is unlikely to go away. The Elkhart display was one of hundreds donated by the Fraternal Order of the Eagles (FOE) in the 1950s.[135] The planned display in *O'Bannon* was intended to replace a similar FOE display that was on the state house grounds in Indianapolis until its destruction by vandals in 1991, and a similar display triggered litigation in Lawrence County.[136]

B. Government Entanglement with Religion

In addition to the cases involving display of the Ten Commandments, Indiana courts tackled Establishment Clause issues in two other contexts. In *Moore v. Metropolitan School District of Perry Township*,[137] a district court judge enjoined Perry Township from continuing its religious education program, which allowed students in grades four and five to leave school for approximately thirty minutes per week to attend religious instruction. Students who chose not to attend remained at school with a teacher, and they were not permitted to do schoolwork, purportedly because parents who sent their children for religious instruction expressed concern that their children might fall behind in their studies.[138] The

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133. *Id.* at 781 (Coffey, J., dissenting).

134. *Id.* at 778-79.

135. *See* Ind. Civil Liberties Union v. O'Bannon, 110 F. Supp. 2d 842, 844 (S.D. Ind. 2000).

136. Kimberly v. Lawrence County, 119 F. Supp. 2d 856, 873 (S.D. Ind. 2000). *See also* ACLU of Ky. v. McCreary County, 145 F. Supp. 2d 845 (E.D. Ky. 2001) (ordering immediate removal of Ten Commandments from display entitled "The Foundations of American Law and Government Display," which included Magna Carta, Declaration of Independence, the Bill of Rights to the U.S. Constitution, Star Spangled Banner, Mayflower Compact of 1620, National Motto and Preamble to Kentucky Constitution; reasoning that use of Ten Commandments was permissible only in displays that demonstrate respect for law givers, and this display did not qualify).

137. 2000 WL 243292 (S.D. Ind. 2001).

138. *Id.* at *5.

court held that this restriction was motivated by a desire to encourage participation in the religious program, and thus violated the first prong of the *Lemon* test,[139] which mandates that any government program have a secular purpose.[140] In addition, the court determined that a reasonable person would perceive the township's insistence on the silent reading program as an endorsement of religion, in violation of the second prong of the *Lemon* test.[141] At least at the preliminary injunction stage, the evidence suggested some likelihood of success on the merits.[142]

The court also ruled that the township's practice of allowing the religious program to take place in trailers on school property and then paying the electric bills for at least some of the trailers violated both the Establishment Clause as well as Indiana law, which specifically prohibits the expenditure of public funds for religious instruction.[143] Although the township agreed to move the trailers off school property by March 1, 2001, the court enjoined the practice for the remaining one month period.[144]

In the second case, *Brazauskas v. Ft. Wayne-South Bend Diocese, Inc.*,[145] the Indiana Court of Appeals ruled that the First Amendment barred a former diocese employee from bringing suit against the diocese and parish priest for various claims, including blacklisting and tortious interference with a business relationship. The court relied upon well-established law that prohibits the judiciary from resolving doctrinal disputes or determining whether a religious organization acted in accordance with its canons and bylaws.[146] The court recognized that it may apply neutral principles of law to churches without violating the First Amendment, but in this case it would be required to actually interpret Catholic precepts and procedures to determine whether the tortious behavior was undertaken in compliance with religious teaching.[147] The defendants argued that religious doctrine commands that church officials remain "in close communion"[148] with one another, and that the conduct of church officials in urging Notre Dame not to hire the plaintiff had "an ostensibly ecclesiastical basis," which is not subject to judicial review.[149] The court reasoned that since the defendants presented ostensibly ecclesiastical justifications for their actions, it lacked subject matter jurisdiction over the claims.[150] The Indiana Supreme Court has granted transfer and vacated the

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139. Lemon v. Kurtzman, 403 U.S. 602 (1971).
140. *Moore*, 2000 WL 243282 at *5.
141. *Id.*
142. *Id.*
143. *Id*. at *4.
144. *Id.*
145. 755 N.E.2d 201, 208 (Ind. Ct. App. 2001).
146. *Id*. at 205.
147. *Id.*
148. *Id.* at 208.
149. *Id.*
150. *Id.*

decision.[151]

C. The Free Exercise of Religion

The previous discussion suggests that the Supreme Court has moved toward a more "accommodationist" approach regarding claims brought under the Establishment Clause. A majority of the Justices would allow greater interaction between church and state, allowing, for example, religious groups access to government forums.[152] On the other hand, the Court has exhibited a much more restrictive approach when the group seeking accommodation is a minority faith bringing claims under the Free Exercise Clause. Purportedly, this dichotomy is reconciled by the theory of neutrality. Where government allows religious groups to use its facility in conjunction with other speakers, it has simply adopted a neutral stance towards religion. In *Employment Division, Department of Human Resources v. Smith*,[153] the Supreme Court, in 1990, held that when government enforced neutral laws of general applicability, it was adhering to the same position of neutrality—even where such laws significantly infringed upon the free exercise rights of minority faiths. In *Smith*, the Supreme Court ruled that facially neutral laws are constitutional provided government has a rational basis. Government need not meet the strict scrutiny standard applied to laws that intentionally burden fundamental rights or even the intermediate scrutiny test applied in the free speech context with regard to government statutes not intended to burden freedom of expression, but which have this effect.[154]

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151. 2002 Ind. LEXIS 350 (Ind. May 3, 2002).

152. *See supra* notes 78-95 and accompanying text. The government aid issue will be revisited by the Supreme Court this Term. Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *cert. granted* 122 S. Ct. 23 (2001). The Sixth Circuit struck down Ohio's school voucher program primarily because the program provided no means of guaranteeing that the state aid, derived from public funds, would be used for exclusively secular purposes. In addition, no public schools chose to participate in the program, and the overwhelming majority of private school participants were sectarian.

153. 494 U.S. 872 (1990).

154. *See, e.g.*, Hill v. Colo., 530 U.S. 703, 719 (2000) (holding that where a statute is a content neutral restriction on speech the government must show a substantial interest and narrowly tailored means, rather than the compelling interest and no less speech restrictive alternatives standard imposed where government is regulating in order to suppress a particular message or a particular speaker). *But see* Cosby v. State, 738 N.E.2d 709 (Ind. Ct. App. 2000) (rejecting a free exercise claim where the accused was charged with driving without a license on his way to church); United States v. Indianapolis Baptist Temple, 224 F.3d 627 (7th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001) (rejecting a religious-based claim brought by the Indianapolis Baptist Temple that it should not have to file federal employment tax returns or pay federal employment taxes). The court in *Cosby* determined that this was a neutral law of general applicability, enacted for reasons of public safety rather than for the purpose of restraining persons from traveling to their place of worship, and thus the rational basis standard applied and was met. *Cosby*, 738 N.E.2d at 711-12. Relying on *Smith*, the court in *Indianapolis Baptist Temple* concluded that tax laws are neutral laws of general

In adopting the rational basis analysis in *Smith*, Justice Scalia distinguished earlier free exercise cases that utilized a strict scrutiny approach by contending that in those cases other "constitutional protections" were asserted in conjunction with the free exercise claim.[155] For example, cases brought by Jehovah's Witnesses challenging licensing systems or taxes on the dissemination of religious ideas also raised free speech questions.[156] Similarly, a case invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school also raised the right of parents to direct the upbringing of their children.[157] This so-called hybrid claim exception to *Smith* was addressed by the Indiana Supreme Court in the case of *City Chapel Evangelical Free, Inc. v. City of South Bend*.[158]

City Chapel filed suit against South Bend after it instituted condemnation proceedings to acquire the church's property for redevelopment. The City of South Bend argued that the condemnation proceedings represented a "permissible use of religious-neutral laws of general applicability,"[159] and thus under *Smith* it was not required to demonstrate a compelling government interest. City Chapel contended that its claim was based on the Free Exercise Clause in conjunction with the right to freedom of association, and thus it fell within the hybrid exception to *Smith*.[160] South Bend's taking of its church building was therefore governed by the compelling interest test.[161] Although several courts have recognized this hybrid exception,[162] others have rejected it outright pending further clarification by the Supreme Court,[163] or have rejected it where the companion claim did not involve a fundamental right.[164] South Bend relied on a Third Circuit decision that held that freedom of association to worship was

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application that did not run afoul of the Free Exercise Clause even if they burden religious practices. Last fall, Judge Barker issued an order for the church to surrender its property to satisfy this judgment, and the Seventh Circuit refused to intervene. United States v. Indianapolis Baptist Temple, 2000 WL 1449856 (S.D. Ind. 2000).

155. *Smith*, 494 U.S. at 881.

156. *Id.* (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943)).

157. *See id.*

158. 744 N.E.2d 443, 451 (Ind. 2001).

159. *Id.*

160. *Id.*

161. *Id.*

162. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694 (10th Cir. 1998) (recognizing hybrid claim where free exercise and parental rights were asserted, but concluding that claim failed because parental right to direct school criteria did not present a colorable claim); Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995) (recognizing hybrid claim where free exercise rights were asserted in conjunction with the parental right to direct upbringing of children).

163. *See, e.g.*, Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (declining to recognize hybrid claim exception until clarified by Supreme Court).

164. *See, e.g.*, Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) (recognizing hybrid claim, but holding that companion claim must be a violation of a fundamental right).

merely a derivative right of the free exercise of religion and not a separate right that can be used to trigger the hybrid exception.[165] Chief Justice Shepard and Justice Boehm agreed with the Third Circuit approach, while Justice Rucker and Justice Dickson agreed with City Chapel that it qualified for the hybrid claim exception. Justice Sullivan broke the tie by siding with the City of South Bend, but not on grounds of the hybrid exception, which he did not address.

Justice Dickson carefully traced the language in *Smith*, which specifically envisioned a hybrid case where freedom of association grounds would reinforce the Free Exercise Clause claim. More specifically, *Smith* referred to an earlier case that cited freedom to worship as an example of the right of expressive association.[166] Justice Dickson, joined by Justice Rucker, concluded that there was no basis in *Smith* for disqualifying hybrid exception claims where freedom of expressive association was linked to religious expression.[167]

Chief Justice Shepard, joined by Justice Boehm, agreed instead with the Third Circuit that "assembling for purposes of worship is a derivative of free exercise of religion," and thus City Chapel was not entitled to a higher level of First Amendment protection.[168]

Justice Sullivan failed to break the 2-2 split on the issue. He reasoned that City Chapel only asked that a hearing be conducted wherein it could raise its First Amendment claims, but then it failed to provide a basis for a hearing under any body of law, federal or state.[169] Justice Sullivan argued that there was no reason to address free exercise rights if City Chapel was not entitled to a hearing.[170] Further, any arguments City Chapel would make at this hearing had already been raised during oral argument on the original motion for an evidentiary hearing.[171] Justice Sullivan could see no point in granting an additional hearing.[172] Unfortunately, Justice Sullivan's opinion leaves litigants in the dark as to whether hybrid claims will be recognized by Indiana courts. At minimum, the debate among the justices demonstrates the need to characterize a free association claim as a separate, additional right, rather than linking it to worship or religious expression.

III. 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. Further,

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165. City Chapel Evangelical Free, Inc. v. City of South Bend, 744 N.E.2d 443, 453 (Ind. 2001) (citing Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183 (3d Cir. 1990)).

166. *Id.* at 452.

167. *Id.* at 454.

168. *Id.* at 455 (Shepard, C.J., concurring in part and dissenting in part).

169. *Id.* (Sullivan, J., dissenting).

170. *Id.*

171. *Id.*

172. *Id.* at 456.

where the government interferes with a fundamental right, the Court has demanded that the government meet a heightened scrutiny standard. Both of these aspects of substantive due process were raised by Indiana litigants this last term.

A. Regulation of Abortion and Pregnancy

In *Roe v. Wade*,[173] the Supreme Court characterized the woman's right to terminate a pregnancy as a fundamental right protected by the Due Process Clause from any legislation that fails to meet strict scrutiny analysis. In a 1992 decision, however, the Court ruled that a state may regulate the abortion decision so long as the regulation did not impose an undue burden, which the Court defined as regulation having the purpose or effect of placing a substantial obstacle in a woman's attempt to obtain an abortion.[174] Subsequently, in *Stenberg v. Carhart*,[175] the Supreme Court, in a controversial 5-4 decision, found that a Nebraska statute barring so-called partial-birth abortions imposed an undue burden because it lacked any exception for the preservation of a mother's health, and its definition of the proscribed procedure was so broad that it included the most frequently used second-trimester abortion method.[176]

Applying this analysis, the district court, in *A Woman's Choice-East Side Women's Clinic v. Newman*,[177] ruled that a provision in Indiana's abortion law that required medical personnel to provide state-mandated information about abortion and its alternatives "in the presence" of the pregnant woman at least eighteen hours before an abortion, imposed an undue burden on a woman's constitutional right to choose to end a pregnancy, and thus it violated the Due Process Clause.[178]

The court reasoned that Indiana's "in the presence" stipulation effectively required two trips to an abortion clinic, thus placing a substantial obstacle in the path of a woman seeking abortion of a non-viable fetus.[179] The Seventh Circuit earlier upheld a Wisconsin statute that forced abortion patients to make two trips to a clinic,[180] and a similar Pennsylvania statute was upheld by the U.S. Supreme Court in 1992.[181] Nonetheless, the district court noted that both the Seventh Circuit and the Supreme Court decisions left open the possibility that additional

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173. 410 U.S. 113, 164-65 (1973).

174. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 878 (1992).

175. 530 U.S. 914 (2000).

176. *Id.* at 930. *See also* Hope Clinic v. Ryan, 249 F.3d 603 (7th Cir. 2001) (holding that partial-birth abortion statutes in Illinois and Wisconsin were unconstitutional in light of the *Stenberg* opinion).

177. 132 F. Supp. 2d 1150 (S.D. Ind. 2001).

178. *Id.* at 1181.

179. *Id.* at 1151. This requirement mandated that medical personnel provide advanced information eighteen hours before an abortion in the presence of the pregnant woman. *Id.*

180. *See* Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999).

181. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).

empirical evidence establishing an undue burden could alter this result. Relying on *Casey*, the court stated that the critical inquiry was whether the abortion regulation would "operate to place a 'substantial obstacle' in the path of 'a large fraction' of the women for whom the law operates as a restriction."[182] The court then critically examined the new empirical data—a study that demonstrated that abortion rates in Mississippi declined between ten and thirteen percent after the two-trip law took effect, and data that the two-trip law caused a thirty-seven percent increase in the number of Mississippi residents who went to other states to obtain abortions. Statistics from Utah, which adopted a similar restriction, showed a 9.3% decline in the abortion rate and a thirty-three percent decrease in non-residents coming to the state to obtain abortions. Based in part on this data, which was part of a study published in the *Journal of the American Medical Association*, the court concluded that Indiana's requirement was likely to prevent abortions for approximately ten to thirteen percent of Indiana women who would otherwise chose to terminate a pregnancy.[183]

The U.S. Supreme Court has distinguished abortion regulation likely to have a "persuasive effect" on the abortion decision, which is permissible, from regulation likely to impose an undue burden.[184] The district court nonetheless concluded that there was no evidence that requiring this state-mandated information in advance actually persuaded women to choose childbirth over abortion.[185] Further, the court was skeptical of the state's proffered purpose for the provision, namely to guard against telephonic impersonation of healthcare professionals.[186] The case is currently on appeal to the Seventh Circuit. It is noteworthy that the court reached its conclusion only after a lengthy hearing where the state presented experts who challenged the credibility of the plaintiffs' statistician. Arguably, the appellate court should defer to the trial court's weighing of the credibility of the experts in the case and affirm its ruling.

In a case of first impression, the Indiana Court of Appeals considered the right to procreate in the context of a trial court ordering a woman not to become pregnant as a condition of probation. In *Trammell v. State*,[187] the defendant was charged with neglecting her infant son, who died of emaciation and malnutrition. She was found guilty but mentally ill due to her mental retardation, and she was sentenced to eighteen years in prison, eight of which would be served on

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182. *A Woman's Choice—East Side Women's Clinic*, 132 F. Supp. at 1159.

183. *Id.* Although the statistician who appeared before the district court judge was the same person whose statistical flaws were highlighted in the earlier Seventh Circuit ruling, the data was revised and the new study was published in the *Journal of the American Medical Association*. *See id.* at 1160-75. The new data convinced Judge Hamilton that women were indeed deterred by the Indiana law. *Id.* at 1175.

184. *Planned Parenthood*, 505 U.S. 833 at 886 ("[U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.").

185. *A Woman's Choice—East Side Women's Clinic*, 132 F. Supp. at 1175.

186. *Id.* at 1179.

187. 751 N.E.2d 283, 285-86 (Ind. Ct. App. 2001).

probation. She challenged the no pregnancy condition as an unconstitutional deprivation of her right to privacy.[188]

The court acknowledged that the right to beget or bear a child has been recognized as "at the very heart of this cluster of constitutionally protected choices."[189] On the other hand, those convicted of a crime do not have the same rights as others. Probation conditions that impinge on constitutionally protected rights are permitted provided they are reasonably related to the treatment of the accused and the protection of the public.[190] The court must balance "(1) the purpose to be served by probation; (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement."[191]

Here the court found that the no pregnancy condition did not serve any rehabilitative purpose since it would not improve Trammell's parenting skills.[192] Further, the state's interest in preventing injury to unborn children would be better served "by alternative restrictions less subversive of appellant's fundamental right to procreate," namely requiring Trammel to enroll in a prenatal or neonatal treatment program if she becomes pregnant.[193] It is clear that in balancing the competing interests, the court gave significant weight to the privacy right at stake. Although finding that the condition served no discernible rehabilitative purpose, the court proceeded to hold that the condition excessively impinged on the privacy right of procreation because the state's goal could be accomplished by less restrictive means—an analysis reserved for government regulation that interferes with fundamental rights.[194]

B. Substantive Due Process as a Limitation on Punitive Damages Awards

In the absence of a fundamental right, the Supreme Court has shown a great reluctance to sanction government conduct under the rather nebulous, open-ended notion of substantive due process. The one notable exception to this involves damages awarded by juries. In *BMW of North America, Inc. v. Gore*,[195] the Supreme Court held that a two million dollar punitive damages award was grossly excessive and violated substantive due process limits. The Court outlined

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188. *Id.* at 288.

189. *Id.* at 290.

190. *Id.* at 288 (citing Carswell v. State, 721 N.E.2d 1255, 1258 (Ind. Ct. App. 1999)).

191. *Id.*

192. *Id.* at 289.

193. *Id.*

194. *Id. Compare Doe v. City of Lafayette*, 160 F. Supp. 2d 996, 1001-03 (N.D. Ind. 2001), where the court upheld the city's action in permanently banning a convicted sex offender from all city parks. The court determined that the defendant did not have a fundamental liberty interest in wandering through the city parks, and it refused to acknowledge intrastate travel as a fundamental right. Applying rational basis analysis, the court ruled that the ban was rationally related to the city's interest in protecting the welfare of its children from sexual predators.

195. 517 U.S. 559, 574-75 (1996).

three criteria that should be examined in determining whether a punitive damage award should be deemed unconstitutionally excessive: the reprehensibility of the conduct, in particular, whether only economic harm is involved; the relation between compensatory and punitive damages; and the relation of the damages to other civil remedies authorized or imposed in comparable cases.[196]

Applying this standard, the Indiana Court of Appeals rejected the constitutional challenge to a $1.64 million punitive damage award in *Executive Builders, Inc. v. Trisler*.[197] The court began its analysis by declaring that when a judgment was the product of fair procedures—impartial jurors were selected, they heard all the evidence presented by both sides, the trial court properly instructed them, and it upheld the punitive award after considering its constitutionality—there was a strong presumption that the award was constitutional.[198] The court then applied the three guideposts set forth in *BMW*, and concluded that the punitive damages award did not violate substantive due process.[199]

IV. STATE CONSTITUTIONAL LAW DEVELOPMENTS

Under the tutelage of Chief Justice Randall T. Shepard, the Indiana Supreme Court has re-examined the Indiana Constitution as a potential source for the protection of civil liberties.[200] Although the Indiana Supreme Court has made it clear that it is not anxious to usurp the legislative role of the General Assembly and has repeatedly cautioned that state statutes will be presumed constitutional, it has also noted that state constitutional provisions will be interpreted independently of their federal constitutional counterpart. The court will examine the text and the history regarding the state constitutional provision as well as early decisions interpreting the state constitution under this analysis.[201] These core principles are reflected in the state constitutional cases decided this term.

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196. *Id.* at 575, 580-81, 583-84.

197. 741 N.E.2d 351, 359-61 (Ind. Ct. App. 2000).

198. *Id.* at 360.

199. *Id.* at 360-61. *See also* Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (holding that in determining whether a punitive damage award is unconstitutionally excessive, appellate courts should apply a de novo standard of review because a jury's award does not constitute a finding of fact that is entitled to deference on appeal); *In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) (the punitive damages award of $5 billion in this maritime tort suit was disproportionate to the compensatory damages award of $287 million or to the potential criminal fine of $1 billion, and thus was excessive in violation of the Due Process Clause).

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

201. *See, e.g.*, Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994) (privileges and immunities clause of the Indiana Constitution imposes duties independent of those required by the Fourteenth Amendment to the U.S. Constitution).

A. Religion Clauses

Unlike the Federal Constitution, which includes only the Establishment and Free Exercise Clauses, the Indiana Constitution guarantees religious liberty through seven distinct and separate provisions. Article I, section 2 insures that "[a]ll people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences."[202] Article I, section 3 bars any law that might "control the free exercise" of religion, and also prohibits enactments that "interfere with rights of conscience" or the "enjoyment of religious opinions."[203] Article I, section 4 reads that, "No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent."[204] In *City Chapel Evangelical Free, Inc. v. South Bend*,[205] City Chapel invoked all three of these provisions as a defense to a condemnation proceeding brought by the City of South Bend to take its building for redevelopment.

Although the Indiana Supreme Court rejected City Chapel's federal free exercise claim,[206] it ruled, 3-2, that the framers of the 1851 Indiana State Constitution did not simply paraphrase the language in the Bill of Rights and that City Chapel indeed stated a separate, viable state constitutional law claim. The majority relied heavily on an earlier Indiana Supreme Court decision, which involved the free speech provisions of the Indiana Constitution. In *Price v. State*,[207] the court held that political speech was a core value embodied in the Indiana Constitution and, as such, the state could not punish political speech even when offensive words were uttered in the context of resisting arrest. The court in *Price* reasoned that government may not impose a material burden upon a constitutionally protected core value.[208]

In this case, City Chapel contended that religious liberty was a core value, and it asserted that the taking of its property would materially burden this value because it threatened to "destroy the church."[209] It urged that South Bend be enjoined from taking the Chapel's building without a hearing where South Bend would be required to prove that the need to exercise the police power of eminent domain outweighed the restrictions imposed on Chapel's fundamental rights.[210] Relying on *Price*, the court determined that the key question was whether the condemnation proceedings would amount to a material burden upon a core

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202. IND. CONST. art. 1, § 2.

203. IND. CONST. art. 1, § 3.

204. IND. CONST. art. 1, § 4.

205. 744 N.E.2d 443 (Ind. 2001).

206. *See supra* notes 158-69.

207. 622 N.E.2d 954, 962-63 (Ind. 1993).

208. *Id.* at 960. *See also* City Chapel Evangelical Free, Inc. v. South Bend, 744 N.E.2d 443, 446-47 (Ind. 2001) (discussing the material burden analysis).

209. *City Chapel*, 744 N.E.2d at 445.

210. *Id.*

value.[211] The court explained that this analysis "looks only to the magnitude of the impairment and does not take into account the social utility of the state action at issue."[212] Using the historical approach affirmed in previous cases, Justice Dickson rejected the city's argument that the state constitution was intended to guarantee only the "personal devotional aspect of religion."[213] Instead, the court concluded that "[s]ections 2 and 3 advance core values that restrain government interference with the practice of religious worship, both in private and in community with other persons."[214] In short, because the City of South Bend sought to take property that might have materially burdened City Chapel's rights embodied in the core values of sections 2, 3, and 4 of article I, City Chapel was entitled to an opportunity to present its claim.

On the other hand, Justice Dickson emphasized that the condemnation procedure would be presumed constitutional, that City Chapel must clearly overcome that presumption, and that all doubts would be resolved against it.[215] The church would have to show that taking its building would burden its members' right to worship according to the dictates of conscience or their right to exercise religious opinions or to be free from a government preference for a particular religious society. Further, the effect of the taking must constitute a material burden, not merely a permissible qualification.[216] Chief Justice Shepard and Justice Rucker concurred with this analysis of the state constitutional claim, thus creating a three-judge majority in favor of City Chapel.

Justice Boehm, in dissent, agreed that the religion clauses in the Indiana Constitution prevent the state from imposing material burdens on the exercise of religious practice and that this protection included the public and group activities associated with religious practices.[217] However, Justice Boehm reasoned that City Chapel failed to present any evidence that South Bend's exercise of its right of eminent domain materially burdened any religious activity. There was no claim that the downtown site had "an independent religious significance."[218] Rather, City Chapel argued only the difficulty of finding another home at an affordable price. This suggests that under takings law, South Bend might be required to pay a higher price as just compensation, but this was not a basis for prohibiting the city from acting: "Given the Chapel's representation that this is a dispute over money, not religious principle, even if the Chapel proves all it claims, the solution is in dollars, not injunctive relief."[219] Justice Boehm concluded that since City Chapel presented no evidence that would bar the taking, but only evidence that might relate to establishing just compensation, it

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211. *Id.* at 446.
212. *Id.* at 447.
213. *Id.* at 448.
214. *Id.* at 450.
215. *Id.* at 450-51.
216. *Id.*
217. *Id.* at 456 (Boehm, J., dissenting).
218. *Id.* at 457.
219. *Id.* at 458.

failed to show the necessity for a hearing.[220]

Justice Sullivan agreed with Justice Boehm's conclusion that City Chapel was not entitled to a hearing; however, he did not feel there was a need to address the state religion clauses at all. He reasoned that City Chapel's entitlement to a hearing was an entirely separate issue from whether City Chapel's religious rights were violated by South Bend's exercise of its eminent domain powers.[221] City Chapel "failed to assert adequately a right to a hearing under any body of law,"[222] but instead tried to skip to the merits of the issues it would raise at a hearing. Justice Sullivan's final justification for refusing the state constitutional issues was that City Chapel failed to show the utility of an evidentiary hearing, since its brief cited only to evidence already in the record, and thus Justice Sullivan was not willing to decide the state constitutional issues.[223]

City Chapel is significant in establishing a separate role for the state religion clauses, especially in the wake of the watered-down version of the Federal Free Exercise Clause in *Employment Division, Department of Human Resources v. Smith*.[224] Many litigants in other states have turned to state constitutional provisions to secure religious liberty.[225] It remains to be seen, however, whether protection under Indiana's religion clauses will be significant, given Justice Dickson's caveat regarding the difficulty of meeting the material burden standard. Justice Boehm's dissenting opinion persuasively argues that City Chapel will not meet this standard on remand unless it comes up with new evidence as to how moving the church to a new location will materially burden its right to worship. Nonetheless, the case establishes the principle that neutral government action that has a significant negative impact on religious liberty might be prohibited by the Indiana Constitution, even if such conduct is permitted under the Federal Free Exercise Clause.

B. Due Course of Law and Equal Privileges Clauses

Article I, section 12 of the Indiana Constitution guarantees that a remedy "by due course of law" is available to a person "for injury done to him and his person, property or reputation."[226] In most cases, Indiana courts have reasoned that the analysis under section 12 parallels that under the Federal Due Process Clause.[227]

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220. *Id.*

221. *Id.* at 455 (Sullivan, J., dissenting).

222. *Id.*

223. *Id.* at 456.

224. 494 U.S. 872 (1990).

225. *See, e.g.*, Jeffery D. Williams, Humphry v. Lane*: The Ohio Constitution's David Slays the Goliath of* Employment Division v. Smith, Department of Human Resources of Oregon, 34 AKRON L. REV. 919 (2001).

226. IND. CONST. art. I, § 12.

227. *See, e.g.*, G.B. v. Dearborn County Div. of Family and Children, 754 N.E.2d 1027, 1031 (Ind. Ct. App. 2001) ("Federal and state substantive due process analysis is identical"; although the

Article I, section 23 of the state constitution 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."[228] The Indiana Supreme Court, in a 1994 decision, held that this provision should not be interpreted in the same manner as the Federal Equal Protection Clause.[229] After thoroughly investigating the text and the history of this provision, the court set forth a two-prong test, which first requires that any disparate treatment by government be reasonably related to inherent characteristics that distinguish the unequally treated classes. Further, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.[230] Most attempts to invalidate state legislative enactments under this provision have been unsuccessful because the Indiana Supreme Court requires that substantial deference be given to the legislative judgment. Only where the legislature draws lines in an arbitrary and manifestly unreasonable manner will the judiciary invalidate its laws.[231]

Despite this deferential approach, the Indiana Supreme Court, in *Martin v. Richey*,[232] held that Indiana's two-year occurrence-based medical malpractice statute of limitations[233] 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. The court left the statute intact on its face, but held that its application to Martin's situation violated both article I, section 23 and article 1, section 12.

Since the 1999 decision, however, the court has shown reluctance to expand

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right to family integrity is fundamental, Indiana statute, which prescribes exceptions to the requirement that government make reasonable effort to reunify and preserve family, satisfies substantive due process requirements because the exceptions are narrowly tailored to protect the welfare of children from parents who neglect, abuse, or abandon their children); M.G.S. v. Beke, 756 N.E.2d 990 (Ind. Ct. App. 2001) (the same analysis applies to both federal and state due process claims and, in a case of first impression, court holds that father's due process rights were not violated by the implied consent provision in Indiana's adoption law that requires father to file a paternity action within thirty days of notice if he wishes to protect his parental rights); Lake of the Woods v. Ralston, 748 N.E.2d 396 (Ind. Ct. App. 2001) (court uses federal procedural due process balancing standard and finds no violation of state or federal constitutional due process).

228. IND. CONST. art. I, § 23.

229. Collins v. Day, 644 N.E.2d 72, 73 (Ind. 1994).

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

231. *Id.* at 80. *See also* Lutz v. Fortune, 758 N.E.2d 77, 84 (Ind. Ct. App. 2001) (adoptee who sought to be declared remainder beneficiary of testamentary trust could not state viable claim under Indiana Privileges and Immunities Clause because such a claim requires state action, and here plaintiff's exclusion occurred as the result of testate succession, not a legislatively created rule of law or state action).

232. 711 N.E.2d 1273, 1279 (Ind. 1999).

233. *See* IND. CODE § 34-18-7-1(b) (1998) (statute of limitations begins to run at the time the alleged malpractice occurred, rather than when victim discovers the alleged harm).

Martin. In *Boggs v. Tri-State Radiology, Inc.*,[234] the court held that a person who discovers the malpractice within the two-year period, but files outside the limitations period, loses her claim even if the filing occurs within two years of discovery. The court reasoned that as long as the plaintiff has a meaningful opportunity to bring her claim, there is no violation of the due course of law provision.[235]

Relying on *Boggs*, the Indiana Court of Appeals, in *Hopster v. Burgeson*,[236] rejected the argument that the statute of limitations is unconstitutional as applied to persons who suffer a delayed injury. The plaintiff contended that it was not until an autopsy was performed that he realized that the defendants had misdiagnosed his wife's condition. He filed his lawsuit two years after her death, and the trial court agreed that since he could not have discovered the alleged malpractice until his wife's death, the action should proceed. On appeal, the defendants argued that the case was not controlled by the *Martin* exception because the physicians treated the plaintiff's wife within two years of her death, and nothing prevented him from filing suit within the two-year statutory period.[237] Indeed, the court in *Boggs* held that, "[a]s long as the claim can reasonably be asserted before the statute expires, the only burden imposed upon the later discovering plaintiffs is that they have less time to make up their minds to sue."[238] *Boggs* acknowledged that there may be situations where discovering and presenting the claim within the time demanded by the statute might not be reasonably possible, but it concluded that the plaintiff's eleven-month window to file did not present this situation.

The husband in *Hopster* asked the court to reevaluate *Boggs*, opining that it creates a system whereby determinations must be made on a case-by-case basis as to whether plaintiff had a reasonable amount of time remaining to file suit prior to the expiration of the statute.[239] The appellate court agreed that the current state of the law creates three different classes of medical malpractice plaintiffs. Those who discover the alleged malpractice on the date it occurs have two years to file suit; those who discover the alleged malpractice after the expiration of the statute of limitations and have no opportunity to file suit prior to the expiration will have a reasonable time to file; and those who, like this plaintiff, discover the alleged malpractice after it occurs but prior to the expiration of the two-year statute of limitations are bound by the two-year rule.[240] It means that those who suffer immediate injury due to malpractice will have a full two years to file suit, while those who suffer delayed injury will have less than two years.[241] Nonetheless, the court felt constrained by the Indiana Supreme

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234. 730 N.E.2d 692, 696-97 (Ind. 2000).

235. *Id*. at 698.

236. 750 N.E.2d 841, 849 (Ind. Ct. App. 2001).

237. *Id.* at 848.

238. *Id*. at 849 (citing *Boggs*, 730 N.E.2d at 697).

239. *Id.* at 850.

240. *Id.*

241. As to the family practitioner, for example, the husband would have had to sue within five

Court's decision in *Boggs*.[242] Ironically, in this case, the law allowed the plaintiff to maintain his claim against the physician who treated his wife almost six years prior to filing the lawsuit since he could not with due diligence have filed within the two-year period, but it prohibited him from pursuing his claims against the physicians who treated his wife more recently, because the claims arose within two years of the limitations period.[243]

Other Indiana litigants fared no better under the state constitution. In *Indiana Patient's Compensation Fund v. Wolfe*,[244] the court rejected a claim brought by parents who challenged their inability to bring suit to recover excess damages from the Indiana Patient's Compensation Fund. The statute[245] limits recovery to patients and was interpreted to exclude a parent with a derivative claim. The court ruled that this did not violate article 1, section 12, because the limitation on recovery under Indiana's Medical Malpractice Act was a rational means of achieving the legislature's goal of protecting the healthcare industry and insuring the availability of services for all citizens.[246] Further, the interpretation did not violate article I, section 23, because each patient under the Act was entitled to seek damages up to the statutory cap, and any subclassification created by the definition of patient furthered the legislature's goal of maintaining medical treatment and lowering medical costs in Indiana.[247]

Innovative attempts to use article I, section 23 by criminal defendants have been similarly unsuccessful. In *Ben-Yisrayl v. State*,[248] the court upheld the Indiana statute that excludes prospective jurors who have a conscientious opposition to the death penalty. Since differential treatment need only be reasonably related to inherent characteristics that distinguish the unequally treated class, the court had little difficulty affirming the reasonableness of excluding from a jury those "who so inherently opposed to the death penalty that they could not recommend a death sentence regardless of the facts or the law."[249] Further, the court reasoned that the law treats all jurors who express this conviction the same.

Similarly, in *Cowart v. State*,[250] the court ruled that Indiana's child molestation statute did not violate section 23, even though it provided for harsher

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months of his wife's death to preserve his claim. *See id.* at 845. The other health professionals cared for the wife within three months of her death, thus giving Mr. Hopster a much longer window within which to file his suit.

242. *Id.* at 850.

243. *Id.* at 851.

244. 735 N.E.2d 1187 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1261 (2000).

245. IND. CODE § 34-18-14-3(a) (1998).

246. 735 N.E.2d at 1193.

247. *Id.* at 1193-94. *See also* Land v. Yamaha Motor Corp., U.S.A., 272 F.3d 514, 518 (7th Cir. 2001) (Indiana has expressly held that its Statute of Repose contained in its Products Liability Act does not violate article I, section 12 or section 23 of the state constitution).

248. 753 N.E.2d 649 (Ind. 2001).

249. *Id.* at 656.

250. 756 N.E.2d 581, 586 (Ind. Ct. App. 2001).

punishment for defendants who were twenty-one years of age or older, than to offenders between eighteen and twenty years old. Applying *Collins v. Day*,[251] the court reasoned that the increased punishment for child molesters who are at least twenty-one years old is reasonably related to the inherent characteristics which distinguish the two age groups at issue, namely the different intellectual and emotional maturity and the fact that the greater age difference between the perpetrator and the victim might arguably intensify the fear of the victim and therefore justify a more severe punishment.[252] Further, because the statute applies equally to all persons who are at least twenty-one years old, there is no disparate treatment among those who fall within the classification.

Finally, in *Teer v. State*,[253] the court rejected an equal privileges challenge to the state's violent felon statute that distinguishes serious violent felons from the general class of felons by listing serious violent felonies rather than articulating a general definition. Again the court emphasized that a classification need have only a reasonable basis, and the fact that the statute omitted a few arguably violent crimes does not render the statute unconstitutional.[254] All of these cases suggest that attorneys seeking to invoke section 12 or section 23 have an uphill battle to fight in light of the significant deference the court gives to legislative enactments.

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251. 644 N.E.2d 72 (Ind. 1994).

252. *Cowart*, 756 N.E.2d at 584-86.

253. 738 N.E.2d 283 (Ind. Ct. App. 2001).

254. *Id.* at 288-89.