IV. Constitutional Law

In the two centuries of America's history, courts considering constitutional questions have intruded into social, economic, and political areas by relying on the equal protection clause, the due process clause, the contract clause, and the commerce clause or by liberally construing constitutional provisions to fit their policies. Some commentators have observed that the courts are becoming less intrusive in these areas and are deferring such matters to the legislatures.[1] According to Professor Bickel, this trend reflects the courts' limited ability to establish and implement policy in social, economic, and political areas.[2]

During the survey period, state and federal appellate courts interpreting Indiana law issued a number of controversial decisions which raised questions about the proper role of courts in determining constitutional issues affecting social, economic, and political policies. The courts continued to recognize that matters affecting religion, free expression, and the free petition of government involve fundamental rights which deserve the protection afforded by a high level of judicial review.[3] The state and federal courts generally recognized that social, political, and economic issues do not involve fundamental rights and therefore warrant low level review,[4] except when suspect classes are involved.[5]

Nevertheless, in two cases, the courts deviated from the tradi-

---

[1]*See, e.g.*, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 179 (1st ed. 1970).

[2]*Id.* at 175.

[3]*See* Citizens Energy Coalition, Inc., v. Sendak, 459 F. Supp. 248 (S.D. Ind. 1978), *aff'd*, 594 F.2d 1158 (7th Cir. 1979); International Soc'y for Krishna Consciousness v. Bowen, 456 F. Supp. 437 (S.D. Ind. 1978), *aff'd*, 602 F.2d 597 (7th Cir. 1979); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225 (Ind. 1978); Lynch v. Indiana State Univ. Bd. of Trustees, 378 N.E.2d 900 (Ind. Ct. App. 1978), *cert. denied*, 99 S. Ct. 2166 (1979). In general, courts apply high level review or strict scrutiny to matters affecting fundamental rights or suspect classes. Briefly considered, high level review or strict scrutiny requires that the challenged state action promote a compelling state interest and that the means chosen to promote that interest are narrowly tailored. Elrod v. Burns, 427 U.S. 347, 362-63 (1976) (patronage dismissals not only failed to serve compelling state interest outweighing the first amendment rights of political belief and association but also failed to provide the least restrictive alternative).

[4]*E.g.*, Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421 (N.D. Ind. 1979). Low level review requires only that the challenged state action serve a permissible state interest and that the means chosen be rationally related to that interest. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[5]*See* Trimble v. Gordon, 430 U.S. 762 (1977).

tional rule of deference and adopted solutions to social problems.[6] The criticism and resistance provoked by these decisions invite serious questions about judicial effectiveness in solving complex social issues that may be addressed more adequately by other government branches or even by private individuals.[7] Consequently, the developments within the field of constitutional law in Indiana during the survey period provide an interesting background for evaluating the role of the judiciary in today's society.

A. State Decisions

1. Constitutionality of Pari-Mutuel Betting.—The Indiana Supreme Court in *State v. Nixon*[8] decided that pari-mutuel betting constituted a lottery within the definition of the Indiana constitutional provision prohibiting lotteries[9] and thus found the Pari-Mutuel Wagering Act[10] unconstitutional.[11] The controversial decision renewed debate about the proper role of the judiciary in determining social policy vis-a-vis the other branches of government.

The majority opinion emphasized the tradition of liberal construction of constitutions. Relying on a string of decisions which reached pragmatic solutions by broadly interpreting constitutional language,[12] the court concluded that the primary aim of the constitutional prohibition against lotteries was to reduce the "harmful effects" of gambling businesses operated by purveyors.[13] Applying this interpretation of the 1852 Constitution to the pari-mutuel law, the court held: "*The pari-mutuel system is a purveying of a gaming enterprise which, because of the retainage of a percentage of all wagers, precludes the players, in sustained play, from winning while providing a reasonable assurance of a profit to the operators.*"[14] The court reasoned that pari-mutuel betting would produce the same effects that the constitutional authors sought to preclude by prohibiting lotteries and therefore construed pari-mutuel betting to be a lottery within the definition of the constitutional provision.[15] The

---

[6]United States v. Board of School Comm'rs, 573 F.2d 400 (7th Cir.), *on remand*, 456 F. Supp. 183 (S.D. Ind.), *cert. denied*, 99 S. Ct. 93 (1978); State v. Nixon, 384 N.E.2d 152 (Ind. 1979).

[7]BICKEL, *supra* note 1, at 106-07.

[8]384 N.E.2d 152 (Ind. 1979).

[9]IND. CONST. art. 15, § 8. Section 8 states: "No lottery shall be authorized nor shall the sale of lottery tickets be allowed." *Id.*

[10]IND. CODE §§ 4-25-1-1 to -6-15 (Supp. 1979).

[11]384 N.E.2d at 162.

[12]*Id.* at 156-58.

[13]*Id.* at 161 (citing State *ex rel.* Sorensen v. Ak-Sar-Ben Exposition Co., 118 Neb. 851, 226 N.W. 705 (1929)).

[14]384 N.E.2d at 161.

[15]*Id.*

court explained that lotteries were a "symbol" of the mischief that the constitution attempted to eliminate[16] and that limiting the definition[17] of lottery to a game of chance by lot would constitutionalize many forms of gambling contrary to the intent of the framers.[18]

The majority decision provoked two dissents. Justice DeBruler noted that thirteen jurisdictions with similar constitutional prohibitions against lotteries have decided that pari-mutuel betting is not a lottery.[19] He stated that history and logical analysis support the conclusion that a lottery consists of consideration, a prize, and chance.[20] Justice DeBruler found that pari-mutuel betting involves skill and does not therefore come within the definition of lottery.[21]

Concurring with DeBruler's dissent, Justice Hunter attacked the majority decision as judicial legislation. Hunter stated: "It seems quite apparent that the majority opinion has resorted to a public policy reasoning under the guise of liberal constitutional interpretation."[22] Hunter explained that the majority's liberal definition of lotteries allowed the court to establish its own views of sociological problems as public policy.[23] Hunter concluded that such judicial interpretations are an encroachment upon the legislative and executive functions.[24]

Justice Hunter's dissent suggests that the majority ignored its obligation to uphold the constitutionality of the Pari-Mutuel Wagering Act if reasonable construction of the Act would demonstrate its

---

[16]*Id.*

[17]The *Nixon* court observed that Tinder v. Music Operating, Inc., 287 Ind. 33, 40, 142 N.E.2d 610, 614 (1957), defined lottery as a game of chance consisting of consideration, a prize, and chance. 384 N.E.2d at 155-56. Thus, the *Nixon* court found that pari-mutuel betting constituted a lottery under the literal definition proposed by *Tinder*. *Id.* at 156. The court reached that conclusion by an analysis of the sport, explaining that pari-mutuel betting is a system of wagering that is based upon the outcome of a race, the combination of other wagerers, and their selection of horses as well as wager amounts. *Id.* Recognizing that players can control their bets by the exercise of judgment and skill, but not the bets of other players, the court concluded that pari-mutuel betting constitutes a lottery under a literal definition. *Id.* Although the court found such wagering to be a lottery under the principles of *Tinder*, the court eschewed the literal definition of lottery by deciding that the constitution requires a practical, common sense definition of lottery that focuses on whether the game precludes "the participants in sustained play from winning while providing a reasonable expectancy of profit for the sponsors." *Id.* at 161.

[18]384 N.E.2d at 161.

[19]*Id.* at 162 (DeBruler, J., dissenting).

[20]*Id.* at 163 (DeBruler, J., dissenting) (citing Tinder v. Music Operating, Inc., 237 Ind. 33, 40, 142 N.E.2d 610, 614 (1957)).

[21]384 N.E.2d at 164-65 (DeBruler, J., dissenting).

[22]*Id.* at 165 (Hunter, J., dissenting).

[23]*Id.* at 166 (Hunter, J., dissenting).

[24]*Id.* (Hunter, J., dissenting).

constitutional validity.[25] The court's tortured effort to expand the definition of lottery does not evidence reasonable construction but, rather, an overt imposition of judicial legislation.

2. Religion Clauses.—The Indiana[26] and United States Constitutions[27] protect the free exercise of religion and guarantee state neutrality toward religion. Two Indiana decisions examined the contours of the establishment and free exercise issues during the last term.

The Indiana Supreme Court, in *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*,[28] decided that the Indiana regulation requiring every driver's license to have a photograph of the driver[29] violated the free exercise clauses of the Indiana and United States Constitutions when applied to members of certain religions.[30] *Pentecostal House* involved a complaint filed by religious groups who argued that their religions prevented them from posing for photographs as required by the Indiana regulation. The trial court declared that the statute was unconstitutional as applied to the religious groups because the bureau could not show a compelling interest to satisfy the photograph requirement.[31]

On appeal, the Indiana Supreme Court considered the issue of whether the state's requirement of a photograph constituted coercive state action that infringed on the religious freedom of the groups. Before addressing the principal issue in the case, the court stated that the appellee religious groups had the burden of proof that the photo requirement impaired the free exercise of their religious beliefs.[32] The court stated that if the appellees could show impairment, then the bureau had the burden to show either that its actions did not violate the appellees' religious freedom or that the state had a compelling interest which allowed infringement.[33] Asserting that no first amendment issue arises when free exercise rights

---

[25]Fairchild v. Schanke, 232 Ind. 480, 113 N.E.2d 159 (1953). The court in *Fairchild* stated: "We recognize the well-established principle that it is the duty of this court to sustain the constitutionality of an act of the legislature if it can be done by a reasonable construction. Any doubt . . . must be resolved in favor of its validity." *Id.* at 483, 113 N.E.2d at 161.

[26]IND. CONST. art. 1, §§ 2, 3 (freedom of religious belief and exercise); *id.* § 4 (state neutrality toward religion).

[27]U.S. CONST. amend. I (free exercise and establishment clauses).

[28]380 N.E.2d 1225 (Ind. 1978).

[29]IND. CODE § 9-1-4-37(b) (1976). The provision states: "Every such permit or license shall bear . . . with the exception of a learner's permit, a photograph of such person for the purpose of identification . . . ." *Id.*

[30]380 N.E.2d at 1228-29.

[31]*Id.* at 1227.

[32]*Id.* at 1228.

[33]*Id.*

conflict with a mere privilege, the bureau argued that the first amendment claim was meritless because driving is a privilege.[34] The court dismissed this argument, relying on the Supreme Court decision in *Sherbet v. Verner*[35] that religious exercise is "infringed by denial of or by placing conditions upon a benefit or privilege."[36] Thus, the court concluded that the photograph requirement restricted the ability of the burdened class to drive, "regardless of whether this ability is characterized as a right or privilege."[37]

Finding the appellees' religious beliefs had been violated, the court then considered whether the bureau had demonstrated an interest so compelling as to justify infringement of the appellees' privilege. The bureau argued that its interest in insuring driver competency requires constant observation of each driver's ability and that prompt identification aids such inspections.[38] Rejecting this justification, the court observed that a number of alternative means of efficient identification, which do not violate individual religious freedom, were available to the state.[39] The court found, in addition, that a photograph on a driver's license bears no relationship to driver competency and thus concluded that the bureau had failed to demonstrate a compelling governmental interest.[40]

The Indiana Court of Appeals in *Lynch v. Indiana State University Board of Trustees*[41] treated free exercise and establishment issues arising out of a college professor's practice of reading from the Bible at the beginning of each class. The court decided that this practice violated the students' free exercise of religion even though the students had the option of leaving the classroom during the reading period.[42] Relying on United States Supreme Court opinions indicating that the option of leaving a classroom does not eliminate the pressure to conform,[43] the court concluded that the pressure to conform which resulted from the professor's control over student grades and conduct as well as from peer pressure exerted a "chilling effect" or even a "coercive effect" on the free exercise of the students' religious rights.[44]

---

[34] *Id.* at 1229.

[35] 374 U.S. 398 (1963).

[36] 380 N.E.2d at 1229 (quoting Sherbet v. Verner, 374 U.S. at 404).

[37] 380 N.E.2d at 1229.

[38] *Id.*

[39] *Id.* The court observed: "For example, the statistics which are traditionally included on a driver's license, such as license number, height, weight, eye and hair color, have long proven adequate to aid the Bureau to fulfill its important duties." *Id.*

[40] *Id.*

[41] 378 N.E.2d 900 (Ind. Ct. App. 1978), *cert. denied*, 99 S. Ct. 2166 (1979).

[42] 378 N.E.2d at 903.

[43] *Id.* (citing McCollum v. Board of Educ., 333 U.S. 203 (1948); Abington School Dist. v. Schempp, 374 U.S. 203, 289-90 (1963) (Brennan, J., concurring)).

[44] 378 N.E.2d at 903.

The professor argued that termination of his employment by Indiana State University (I.S.U.) impermissibly infringed upon the free exercise of his religious beliefs. Rejecting this argument, the court held that when one person's exercise of religion restricts another's right to believe, the "freedom to act" will be subordinated.[45] In support of this conclusion, the court observed that religious beliefs are absolutely privileged, while religious exercise is subject to narrow regulation in some instances "for the protection of society."[46] Relying on several Supreme Court decisions,[47] the court enunciated a substantive standard for reviewing claims of free exercise violations: Limitation of religious practice is permissible only upon a showing that the practice either restricts the free exercise of religious belief or interferes with a state interest which is more compelling than the interest claiming protection under the free exercise clause.[48]

In analyzing whether the Bible reading practice impinged on the free exercise of belief, the court concluded that the practice violated the students' absolute right to believe,[49] and thus became subject to limitation as a religious exercise which infringed upon another person's religious right.[50]

The court also decided that the university's interests were substantially greater than the teacher's interest under the free exercise clause, thereby justifying the university's discharge of the professor.[51] The court found that I.S.U. had a substantial interest in preserving religious neutrality as required by the establishment clause of the first amendment[52] and by the neutrality provision of the Indiana Constitution.[53] Accordingly, allowing the professor to continue reading in the classroom where he possessed "the prestige, power and influence of school authority"[54] would have violated the

---

[45]*Id.* at 905.

[46]*Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)). Such regulation is typically known as a reasonable time, place, and manner requirement.

[47]378 N.E.2d at 925. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).

[48]378 N.E.2d at 905. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). The Indiana Court of Appeals, in effect, applied a high level of review in examining the propriety of the professor's practice of reading the Bible in the classroom.

[49]378 N.E.2d at 905.

[50]*Id.*

[51]*Id.* at 908.

[52]U.S. CONST. amend. I. The first amendment states: "Congress shall make no law respecting an establishment of religion." *Id.*

[53]IND. CONST. art. 1, § 4. Section 4 provides: "No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent." *Id.*

[54]378 N.E.2d at 908. The court did not discharge Lynch because of his religious beliefs; Lynch's discharge resulted from his Bible reading activities.

principle of religious neutrality. The court also held that the professor's conduct disrupted the state's secular interest in teaching mathematics.[55]

3. State Action v. Private Action.—Due process violations under the fourteenth amendment require a finding that the challenged wrongdoing constitutes a state action.[56] In *Renforth v. Fayette Memorial Hospital Association*,[57] the Indiana Court of Appeals held that a hospital rule requiring its physicians to retain liability insurance was not a state action and therefore was not subject to the due process clause of the fourteenth amendment.[58]

The claim arose after the plaintiff Dr. Renforth was dismissed from the Fayette Memorial Hospital medical staff for failure to acquire professional liability insurance coverage as required by hospital bylaws. The doctor filed suit for legal and equitable relief against the private hospital as well as the board of trustees and executive committee of the hospital. The trial court entered judgment in favor of all the defendants.[59]

On appeal, the plaintiff presented three arguments in support of his theory that the hospital had become a public institution so that its actions necessarily constituted state action under the due process clause. First, the plaintiff noted that acceptance of government funds subjected the hospital to governmental regulation. In support, the plaintiff offered summaries of governmental grants and programs in which the hospital participated. The court of appeals denied that such funding constituted state action,[60] relying on the Seventh Circuit Court of Appeals decision in *Doe v. Bellin Memorial Hospital*,[61] which established that before state action can be found to dictate due process standards, a nexus must exist between the governmental involvement and the particular activity being challenged.[62] Dr. Renforth failed to show any relationship between the governmental funds and the position taken by the hospital regarding professional liability insurance. The court also noted the lack of any evidence of interdependence between the hospital and any governmental bodies.[63]

---

[55]*Id.* at 905-06.

[56]Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The due process clause of the fourteenth amendment provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[57]383 N.E.2d 368 (Ind. Ct. App. 1978).

[58]*Id.* at 375.

[59]*Id.* at 370.

[60]*Id.* at 375.

[61]479 F.2d 756 (7th Cir. 1973).

[62]*Id.* at 761.

[63]383 N.E.2d at 373. In Burton v. Wilmington Parking Auth. 365 U.S. 715 (1961), the Supreme Court held that state action exists when the state "has so far insinuated itself into a position of interdependence" with a private institution that the state has become "a joint participant in the challenged activity." *Id.* at 725.

Second, the plaintiff contended that the composition of the hospital board of trustees, three of whom were elected from governmental bodies, converted the private hospital into a public institution.[64] The court summarily dismissed this claim, observing that the three members elected by governmental bodies were not necessarily governmental officials and citing testimony indicating that the three members had acted independently from the governmental bodies which had elected them.[65]

Finally, the doctor argued that the hospital was a public institution because it enjoyed a monopoly position while performing a public function. The "public function" theory proposes that the acts of a private institution may be denominated state action when a private institution performs a function traditionally done by the state.[66] The court of appeals rejected the plaintiff's final argument as well, for failure to show a nexus between the purported governmental function performed by the hospital and the insurance requirement.[67]

B. Federal Decisions

1. Constitutionality of Attorney General's Refusal To Approve Contracts.—The United States District Court for the Southern District of Indiana decided in *Citizens Energy Coalition v. Sendak*[68] that the attorney general's refusal to approve contracts or subgrants for financial assistance between the state public counselor and consumer groups violated the consumer groups' first amendment right to petition as well as their fourteenth amendment right to equal protection under the laws.[69]

The principal plaintiffs in this action were the Citizens Energy Coalition, Inc., a private, nonprofit group representing residential utility ratepayers, and Indiana Public Inter-Research Group, a

---

[64]383 N.E.2d at 374. The hospital association provided the following rule for electing trustees:

> The Board of Trustees shall consist of seventeen (17) members. One (1) member shall be elected by the County Council of Fayette County; and one (1) member shall be elected by the Board of Commissions [sic] of Fayette County; one (1) member shall be elected by the Common Council of the City of Connersville, Indiana; two (2) members shall be medical doctors elected by the active medical staff of the Fayette Memorial Hospital; and twelve members shall be elected by the Council of the Association.

Id.

[65]*Id.*

[66]*Id.* (citing Barrett v. United Hosp., 376 F. Supp. 792, 799, *aff'd*, 506 F.2d 1395 (2d Cir. 1974)).

[67]383 N.E.2d at 375.

[68]459 F. Supp. 248 (S.D. Ind. 1978), *aff'd*, 594 F.2d 1158 (7th Cir. 1979).

[69]459 F. Supp. at 257-58.

private nonprofit organization promoting consumer and environmental projects. The plaintiff organizations complained that the attorney general refused to approve their contracts and subgrants because of their lobbying activities in the Indiana General Assembly. The plaintiffs sought injunctive as well as monetary relief.

Although recognizing that the attorney general had the discretion to refuse contracts that have unlawful form or content,[70] the district court rejected the attorney general's argument that the contracts involving the plaintiff organizations violated the Indiana provision prohibiting public officials from lobbying.[71] The court stated that the attorney general cannot apply an otherwise valid provision so as to deprive an individual of his liberties.[72] Finding that the attorney general's policy discriminated between groups who exercised their right to petition government by lobbying and those who do not,[73] the court held that the attorney general's action inhibited the constitutional right to petition government.[74] The court observed: "Persons in organizations such as Plaintiffs' are confronted with a dilemma: forsaking lobbying or giving up the right to seek contracts or subgrants from the State of Indiana."[75] The court thus applied a high level of judicial review,[76] requiring that the state demonstrate a compelling state interest as well as a narrowly tailored remedy to achieve that interest. The court determined that "Indiana's interest of assuring disinterested public administration and avoiding an appearance of impropriety . . . [could] be promoted by policies less

---

[70]IND. CODE § 4-13-2-14 (1976). In response to the attorney general's refusal to approve state contracts and leases, the Indiana General Assembly in 1979 passed legislation prohibiting the attorney general from delaying action on contracts. Act of Apr. 10, 1979, Pub. L. No. 23, § 1, 1979 Ind. Acts 114 (codified at IND. CODE § 4-13-2-14 (Supp. 1979)). *See* Indianapolis Star, Apr. 5, 1979, at 4, col. 3. The new legislation requires the attorney general to provide written reasons why any contract violates legal requirements. IND. CODE § 4-13-2-14 (Supp. 1979). The attorney general has the obligation under the act to submit a status report concerning a submitted contract within 45 days after submission of the contract. *Id.* In addition, the statute provides that if the attorney general fails to disapprove a contract within 90 days after submission, the contract is automatically approved. *Id.*

[71]459 F. Supp. at 258. IND. CODE § 2-4-3-7(a) (Supp. 1979) states:

> It is unlawful for any public official of this state, or of any county, township, city or town, including elective and appointive officers and employees, or any officer, member or employee of any state central committee of any party, to receive any compensation to appear before the General Assembly of the state of Indiana, or before either house or any committees of the General Assembly.

Id.

[72]459 F. Supp. at 258.

[73]*Id.*

[74]*Id.*

[75]*Id.*

[76]*Id.* (citing Elrod v. Burns, 427 U.S. 347, 362-63 (1976)).

restrictive of the right to petition government."[77] The grant by the district court of a preliminary injunction requiring the attorney general to execute the funding contracts was upheld on appeal to the court of appeals,[78] which quoted with approval the constitutional rationale of the lower court.[79]

2. Freedom of Expression and Religion.—The rights of religious sects and groups to freely express their beliefs by seeking converts, distributing literature, and soliciting donations in public places received added protection in *International Society for Krishna Consciousness v. Bowen.*[80] An action against the state by the International Society for Krishna Consciousness and one of its members challenged the constitutionality of an Indiana State Fair Board regulation limiting the plaintiffs' activities to a few booths on the fairgrounds.[81]

The court found that the plaintiffs' distribution of religious materials and flowers, as well as their solicitation of donations, constituted expression within the protection of the first amendment.[82] The court especially noted that the commercial character of solicitations does not limit their first amendment protection.[83] The court relied on a Supreme Court decision recognizing that religious groups cannot survive without financial backing and that freedom of religion, like freedom of the press and freedom of speech, belongs to everyone regardless of the ability to finance activities without donations or solicitations.[84]

Because free speech and free exercise of religion involve fundamental rights, the court applied strict scrutiny review in holding that any specific restrictions of the first amendment rights must serve a compelling governmental interest and that the least restric-

---

[77]459 F. Supp. at 258. The court reasoned that the attorney general's refusal to approve contracts was neither narrowly tailored nor rationally related to the state's interest in guaranteeing that state employees serve the public interest. *Id.* The court expressed the added reservation that this state interest did not outweigh the consumer groups' right to petition. *Id.*

[78]394 F.2d 1158 (7th Cir. 1979).

[79]*Id.* at 1162.

[80]456 F. Supp. 437 (S.D. Ind. 1978).

[81]The court stated that the plaintiffs had standing to bring the action on the grounds that the restrictive fair rules posed a danger to their first amendment freedom and that the fairgrounds constituted a public forum where first amendment protection was necessary. *Id.* at 441-43. The court also found that the State Fair Board's policy of limiting religious solicitation constituted state action under the fourteenth amendment, thereby permitting the court to examine the board's policy for first amendment violations. *Id.* at 441.

[82]*Id.* at 441.

[83]*Id.*

[84]*Id.* (citing Murdock v. Pennsylvania, 317 U.S. 105, 111 (1943)).

tive alternative must be chosen in meeting that interest.[85] The court found that the state's interest in eliminating inconvenience, discomfort, and litter produced by the religious group activities was not compelling enough to outweigh the plaintiffs' first amendment rights,[86] and that the restrictions in any case were overbroad.[87]

The court also found that the fair board's rejection of the plaintiffs' request to use the fairgrounds constituted a prior restraint because it violated procedural safeguards:

> [F]irst, the burden of instituting judicial proceedings and of proving that the material or conduct is unprotected must rest on the censor or licensor; second, any restraint prior to judicial review can be imposed only for specific brief periods and only for the purpose of preserving the status quo, and third, a prompt final judicial determination must be assured.[88]

For the foregoing reasons, the court granted summary judgment for the plaintiffs, enjoining the defendants from interfering with the plaintiffs' first amendment activity on the fairgrounds so long as the plaintiffs restricted their activities to normal hours of operation of the Indiana State Fair.[89]

3. Constitutionality of Indiana's Medical Malpractice Act.— During the 1970s, Indiana and a number of other states enacted legislation designed to limit the increase in malpractice litigation and the extent of liability in such litigation.[90] The Indiana Malpractice Act[91] requires that all medical malpractice claims against a qualified medical health care provider[92] be submitted to a medical

---

[85]456 F. Supp. at 443. The court decided that the board's policy was "unconstitutional on its face and as applied to the plaintiffs insofar as it restricts their right to free exercise of their religion." *Id.*

[86]*Id.* at 444. *But see* International Soc'y for Krishna Consciousness, Inc. v. Evans, 440 F. Supp. 414 (S.D. Ohio 1977) (similar state fair regulation limiting religious group activities to certain areas upheld in order to balance competing interests of free speech, free and orderly flow of traffic, and free access to communicated material).

[87]456 F. Supp. at 444.

[88]*Id.* at 443-44 (citing Freedman v. Maryland, 380 U.S. 51 (1965)).

[89]456 F. Supp. at 444-45.

[90]*See* Brennan, *Torts, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 340, 358 (1975); Note, *The Indiana Medical Malpractice Act: Legislative Surgery on Patients' Rights*, 10 VAL. U.L. REV. 303, 303 (1976).

[91]IND. CODE §§ 16-9.5-1-1 to -9-10 (1976 & Supp. 1979).

[92]The act defines health care provider as follows:

> [A] person, partnership, corporation, professional corporation, facility or institution licensed or legally authorized by this state to provide health care or professional services as a physician, psychiatric hospital, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist, or an officer, employee or agent thereof acting in the course and scope of his employment.

Id. § 16-9.5-1-1(a) (Supp. 1979). A health care provider is qualified under the Act when

review panel, which will offer an expert opinion concerning liability.[93] After the medical review panel renders an opinion, the parties have the option of reaching a settlement on the basis of that opinion or launching a civil action.[94]

The United States District Court for the Northern District of Indiana decided, in *Hines v. Elkhart General Hospital*,[95] that the Indiana Malpractice Act does not violate an individual's right to trial by jury, access to courts, due process, or equal protection under the law.[96] Although admitting sympathy for plaintiffs seeking compensation for malpractice, the court stated that legislative decisions involving social, economic, and political policies deserve special deference because such issues are properly the domain of the legislature and not the court.[97]

The plaintiffs in *Hines* alleged that the medical review panel established by the Act unconstitutionally requires a plaintiff to satisfy an increased burden of proof at trial[98] and infringes as well upon a plaintiff's right to have the issue of damages established solely by a jury,[99] thus violating an individual's right to trial by jury.[100] The court observed that the legislature has the authority to alter common law rights, including trial by jury,[101] and that federal and state appellate courts have found "reasonable changes in procedures surrounding the trial by jury . . . constitutionally permissible."[102] The court distinguished its case from cases in other jurisdictions which have found a medical malpractice act unconstitutional because of its elimination of the right to trial by jury.[103] Preliminary hearings such

---

he or his insurance carrier files proof of financial responsibility with the state insurance commissioner and pays a surcharge charged by the act on all health care providers. *Id.* § 16-9.5-2-1.

[93] *Id.* § 16-9.5-9-7 (1976).

[94] *Id.* § 16-9.5-9-2.

[95] 465 F. Supp. 421 (N.D. Ind. 1979).

[96] *Id.* at 426-34.

[97] *Id.* at 434.

[98] The plaintiffs alleged that admission of the medical review panel opinion would increase the plaintiffs' burden of proof because the plaintiffs might have to overcome the panel's opinion in convincing the jury of liability.

[99] 465 F. Supp. at 426.

[100] *Id.*

[101] *Id.* at 426-27.

[102] *Id.* at 427 (quoting *In re* Peterson, 253 U.S. 300, 309-11 (1920)).

[103] *Id.* at 428-30. The court dismissed Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), by noting that the Illinois malpractice statute is distinguishable in that Illinois allows the panel decision to be a final determination of the liability question whereas Indiana does not. 465 F. Supp. at 429. The court also dismissed Simon v. St. Elizabeth Med. Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976), by observing that the Ohio case was decided by a trial judge and therefore may not be Ohio law. 465 F. Supp. at 428-29 (relying on Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977)). Moreover, the court rejected Arneson v. Olson, 208 N.W.2d 125 (N.D. 1978), on the grounds that the North Dakota act is distinguishable from In-

as that provided by the Indiana Medical Malpractice Act do not eliminate the jury role in deciding facts, but merely provide prima facie evidence for jury consideration.[104] The court also recognized the current trend to treat the medical panel opinion as an expert opinion and to admit the opinion as an exception to the hearsay rule.[105]

In dismissing the argument that trial by jury includes a right to have the jury alone decide damages, the court held that the Indiana Constitution does not give the jury the sole authority to determine damages.[106] *Hines* implies that a preliminary panel[107] is unconstitutional only when it totally deprives the jury of its responsibility for determining damages.[108]

The plaintiff also argued that the Act created separate classes for health care providers who qualify for the review panel and those who do not,[109] resulting in a violation of equal protection.[110] Because the case did not involve a fundamental right or suspect class, the court applied a low level of review. Equal protection in relation to economic and social legislation only requires that the classification

---

diana's in that the North Dakota act totally abolished the jury role in malpractice cases and was therefore unconstitutional. 465 F. Supp. at 430.

[104]465 F. Supp. at 427 (citing *In re* Peterson, 253 U.S. at 309-11).

[105]465 F. Supp. at 428 (citing Comiskey v. Arlen, 55 A.2d 304, 390 N.Y.S.2d 122 (1976)).

[106]465 F. Supp. at 429-30. By way of support, the court noted that the trial court has the right to adjust the amount of damages awarded by a jury. *Id.* at 429.

[107]Although the preliminary panel procedure does not violate an individual's right to trial by jury, the Medical Malpractice Act settlement procedures may infringe upon this right. IND. CODE § 16-9.5-4-3 (Supp. 1979) outlines the procedure for determining damages after the "health care provider or its insurer has agreed to settle its liability" and the claimant seeks damages in excess of the insurance policy limits of $100,000 from the patient's compensation fund. According to the Act, the claimant must file a petition with the court and notify the other parties about the additional amount sought. *Id.* § 16-9.5-4-3(1), (2). If the health care provider or its insurer objects and files objections with the court, the court will set a hearing. *Id.* § 16-9.5-4-3(3), (4). The statute provides that if the insurance commissioner, health care provider, provider's insurer, and claimant "cannot agree" on the amount of damages to be provided by the patient's compensation fund after the health care provider or its insurer has paid $100,000, the court will decide the amount of damages exceeding the $100,000 limit after hearing any relevant evidence. *Id.* § 16-9.5-4-3(5). The procedure apparently precludes the parties from exercising their right to have a jury decide the issue of damages. The language of the act emphasizes that the matter will be decided by a court at a hearing. This procedure eliminates the role of the jury and violates the guarantee of trial by jury. U.S. CONST. amend. VII; IND. CONST. art. 1, § 20.

[108]*Id.* at 430. The court cited Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978), which held the North Dakota malpractice act to be unconstitutional because it provided for the total abolition of the jury in malpractice cases. *See* note 102 *supra* and accompanying text.

[109]465 F. Supp. at 430.

[110]*Id. See* U.S. CONST. amend. XIV, § 1; IND. CONST. art. 1, § 23.

be reasonably related to a valid governmental interest.[111] In this case, the court found that submission of malpractice claims to an administrative panel prior to a court suit reasonably achieves the legitimate state interest in reducing health care cost.[112]

A claim that the Act also violated the due process clause and the Indiana constitutional provision guaranteeing litigants the right of access to the courts,[113] on the grounds that the costs and delays created by the medical review panel and the limitations on damages deprive litigants of their access to the courts, was rejected by the court. Applying the traditional low level of review, the court held that reasonable limitations on the right of access to courts is a permissible means of serving the state interest of promoting reduced health costs and limiting medical malpractice liability.[114] The court observed in conclusion that ten other jurisdictions with similar malpractice acts have held them to be constitutional.[115]

4. Indianapolis Desegregation Case.—Within the survey period, two federal court decisions tackled many of the questions surrounding the desegregation of the Indianapolis Public Schools (I.P.S.).[116] The protracted litigation illustrates the difficulty which federal courts have had in fashioning interdistrict remedies to cure *de jure* segregation.[117]

The current litigation[118] arose from a 1976 Seventh Circuit Court

---

[111]465 F. Supp. at 430.

[112]*Id.* at 431 (citing Everett v. Goldman, 359 So. 2d 1266 (La. 1978)).

[113]*Id.* at 432. *See* U.S. CONST. amend XIV, art. I, (due process); IND. CONST. art. 1, § 12 (access to courts).

[114]465 F. Supp. at 433.

[115]*Id.* at 434.

[116]United States v. Board of School Comm'rs, 573 F.2d 400 (7th Cir.), *on remand*, 456 F. Supp. 183 (S.D. Ind. 1978).

[117]The United States Supreme Court, in Milliken v. Bradley, 418 U.S. 717 (1974), decided that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Id.* at 744. The Court stated that an interdistrict remedy is only appropriate when it is "shown that racially discriminatory acts of the state or local school district, or of a single school district, have been a substantial cause of interdistrict segregation." *Id.* at 745.

[118]The Indianapolis desegregation case has undergone several phases of litigation before the decisions issued during the survey period. The United States District Court for the Southern District of Indiana decided in *Indianapolis I* that the Indianapolis Public School District was guilty of *de jure* segregation. United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973). In affirming the district court decision, the court of appeals held that I.P.S. demonstrated purposeful discrimination in the gerrymandering of school attendance zones, in the segregation of faculty, in the use of optional attendance zones among the schools, and in school construction and placement. United States v. Board of School Comm'rs, 474 F.2d at 85-88.

On remand from the court of appeals, the district court in *Indianapolis II* began the task of fashioning a remedy. United States v. Board of School Comm'rs, 368 F.

of Appeals decision. The court decided that legislation enlarging the boundaries of the civil city of Indianapolis to include practically all of Marion County,[119] Uni-Gov, while simultaneously repealing a law providing that school and city boundaries must be coterminous,[120] had an obvious racially segregative impact.[121] The Seventh Circuit also ruled that action of the Housing Authority of Indianapolis in locating all of its public housing projects within the I.P.S. boundaries produced discriminatory effects,[122] therefore affirming a district court order transferring black students from I.P.S. to various suburban schools.[123] However, the Supreme Court of the United States vacated the Seventh Circuit decision and remanded the case[124] for further consideration in light of two Supreme Court cases requiring "proof of racially discriminatory intent or purpose" before an interdistrict remedy is enforced.[125]

On remand, the Seventh Circuit Court of Appeals during this survey period reconsidered the Indianapolis case in light of the

---

Supp. 1191 (S.D. Ind. 1973), *rev'd*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). The district court ruled that the state had the duty to design an interdistrict, multi-county remedy. 368 F. Supp. at 1205. As a temporary measure, the court also ordered I.P.S. to reassign students to ensure that each elementary school had 15% blacks. *Id.* at 1209.

The district court in *Indianapolis III*, *id.* at 1223 (a supplemental memorandum of decision in *Indianapolis II*), issued an opinion suggesting a plan for desegregation of the schools. *Id.* On appeal, the Seventh Circuit Court of Appeals affirmed the district court holding that the state had the duty to desegregate I.P.S. but reversed the lower court's ruling that an interdistrict remedy must include school districts outside Uni-Gov boundaries. United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). On remand, the district court held in *Indianapolis IV* that evidence supported an interdistrict remedy within Uni-Gov boundaries. United States v. Board of School Comm'rs, 419 F. Supp. 180 (S.D. Ind. 1975). The district court also enjoined the Indianapolis housing authority from building any more public housing within the I.P.S. boundaries. *Id.* at 186. Although the court of appeals affirmed this decision, the Supreme Court subsequently vacated the Seventh Circuit holding. United States v. Board of School Comm'rs, 541 F.2d 1211 (7th Cir. 1976), *cert. granted, vacated sub nom.* Metropolitan School Dist. v. Buckley, 429 U.S. 1068 (1977). During this survey period, the Seventh Circuit Court of Appeals and the District Court for the Southern District of Indiana have issued new opinions in light of the Supreme Court holding. The survey article focuses on the most recent Seventh Circuit and Southern District opinions.

[119]Act of Mar. 13, 1969, ch. 173, 1969 Ind. Acts 357 (codified at IND. CODE §§ 18-4-1-1 to -24-25 (1976 & Supp. 1979)).

[120]Act of Feb. 25, 1969, ch. 52, § 153, 1969 Ind. Acts 57 (codified at IND. CODE § 20-3-14-11 (1976)).

[121]United States v. Board of School Comm'rs, 541 F.2d 1211, 1221 (7th Cir. 1976).

[122]*Id.* at 1223.

[123]*Id.* at 1224.

[124]Metropolitan School Dist. v. Buckley, 429 U.S. 1068, 1068-69 (1977).

[125]Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

Supreme Court action. Addressing the question whether the district court could issue an interdistrict remedy under its equity powers,[126] the Seventh Circuit concluded that such a remedy required two prerequisite findings: that intentional action by the state had "significant segregative interdistrict effects"[127] and that a racially discriminatory purpose motivated the state action.[128]

In analyzing the first standard, the court of appeals found that the expansion of the Indianapolis civil city boundaries without a concomitant expansion of I.P.S. boundaries constituted state action which had a significant segregative interdistrict impact.[129] The court explained that before 1969 any expansion of Indianapolis automatically caused an extension of I.P.S.'s boundaries. Repeal of the law coordinating I.P.S. expansion to the city's expansion[130] constituted the requisite state action. Turning to the issue of segregative impact, the court said that legislation leaving I.P.S. boundaries unchanged while expanding city boundaries prevented I.P.S. from remedying segregation by voluntarily spreading black pupils throughout a larger area.[131]

In addition to finding discriminatory legislation, the court held that discriminatory housing practices constitute state action having a significant segregative impact.[132] The case was remanded to the district court for a determination of which state housing practices caused segregative housing patterns.[133]

Another issue to be determined on remand was whether the state action had a discriminatory purpose.[134] The court explained that discriminatory intent does not have to be a dominant purpose so long as it is a motivating factor.[135] Discriminatory purpose may be demonstrated by the disproportionate impact of the state action if the impact is severe.[136] Discriminatory purpose may also be inferred from other factors, including:

(1) the historical background of the decision, particularly

---

[126]573 F.2d at 404.

[127]*Id.* at 405 (citing Milliken v. Bradley, 418 U.S. 717, 744-45 (1974)).

[128]573 F.2d at 404. This is the requirement imposed by Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), and Washington v. Davis, 426 U.S. 229 (1976). *See* notes 134-37 *infra* and accompanying text.

[129]573 F.2d at 407.

[130]Act of Feb. 25, 1969, ch. 52, 1969 Ind. Acts 57 (codified at IND. CODE § 20-3-14-11 (1976)).

[131]573 F.2d at 407.

[132]*Id.* at 409.

[133]*Id.* at 410.

[134]*Id.*

[135]*Id.* at 411 (citing Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. at 265-66).

[136]573 F.2d at 411.

if it reveals a series of official actions taken for invidious purposes;
(2) the specific sequence of events leading up to the challenged decision;
(3) departures from the normal procedural sequence;
(4) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and
(5) the legislative or administrative history of a decision.[137]

The court concluded that the district court must apply an objective test in determining whether the state action had a discriminatory intent. Nevertheless, segregative intent may be presumed if segregation is shown to be a "natural, probable, and foreseeable result" of the state action.[138]

On remand, the district court first considered the issue of intent. Relying on the factors suggested by the court of appeals, the district court found that the historical background of the decision, the sequence of events leading to the enactment of Uni-Gov, and the significant departure from the traditional policy of keeping school districts coterminous with city boundaries demonstrated a discriminatory intent.[139]

The court also found that the public housing agency's policy of confining public housing projects to I.P.S. territory constituted state action having a segregative impact.[140] Addressing the question whether discriminatory intent motivated such housing practices, the court decided that the housing practices created a presumption of segregative intent—because the natural, probable, and foreseeable effect of limiting public housing projects within the I.P.S. boundaries is "to increase or perpetuate public school segregation within I.P.S."[141] On the basis of these findings, the district court ordered the transfer of black students from I.P.S. to various suburban schools within Marion County.[142]

---

[137]*Id.* at 412 (citing Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. at 267-68). These factors are not inclusive.

[138]573 F.2d at 413 (citing NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1046-47 (6th Cir. 1977)).

[139]456 F. Supp. at 186-88.

[140]*Id.* at 189.

[141]*Id.*

[142]Following the district court decision, the appellant Board of School Commissioners filed an appeal with the Seventh Circuit Court of Appeals. United States v. Board of School Comm'rs, Nos. 78-1800, 78-1871, 78-1996 to -2006, 78-2039, 79-1831 to -1838, 79-1874, & 79-1975 (7th Cir., filed 1979). On August 8, 1979, the Seventh Circuit granted the appellants' motion for a stay of enforcement of the district court decision. *Id.*

C. Conclusion

The constitutional decisions during the survey period offer some insight into the court's power in today's society. *Citizens Energy Coalition*, *International Society for Krishna Consciousness*, *Lynch*, and *Pentecostal House* demonstrate that courts will strictly scrutinize matters involving religion, free expression, and free petition while *Hines* illustrates that courts will defer to other branches when social, policital, and economic issues are at stake. However, *Nixon* and the Indianapolis desegregation case indicate that judicial authority is less clear when courts adopt solutions to complex social problems. *Nixon* represents a tortured effort to declare pari-mutuel betting unconstitutional by relying on authority calling for liberal construction of constitutions. The Indianapolis desegregation case is a classic example of the problems of implementing *Brown v. Board of Education*[143] "with all deliberate speed."[144] Indeed, resistance to desegregation in Indianapolis illustrates the difficulties courts face in attempting to change social attitudes and practices quickly.

CHARLES E. BARBIERI*

[143]347 U.S. 483 (1954).

[144]Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

*The author extends his appreciation to Douglas Starkey for his assistance in preparing this discussion.