V. Constitutional Law

R. Matthew Neff*

A. Introduction

Cases decided in Indiana and in the federal courts with jurisdiction in the Seventh Circuit have confronted many important constitutional issues in the last twelve months. This survey of these recent developments will consider the major cases in the field of constitutional law, with some background discussion being provided, primarily in footnotes.

B. Due Process of Law

1. Procedural Due Process.—a. Service of process and notice.—Assuming that the relative importance of the interest bears some relationship to the level of notice required, an anomalous case is *Slebodnik v. City of Indianapolis*.[1] *Slebodnik* involved the Indianapolis City-County Council's incorporation of certain properties into its sanitary district pursuant to statutory provision.[2] Those persons whose property was being incorporated into the sanitary district challenged the validity of the notice by publication. The trial court held that due process notice had been served, and the court of appeals upheld that decision. The plaintiffs challenged the annexation statute as applied, claiming that it denied them a property interest without the best notice possible. The court held that the annexation into the sanitary district involved the government's legitimate exercise of its sovereign power of *taxation*, and not its power of eminent domain.[3] The court therefore found that the taking question was not an issue and that the plaintiffs were not entitled to actual notice. The plaintiffs became liable only for their pro rata share of the cost as a proportional tax,[4] and the threat of a lien asserted against their property for failure to pay these taxes was held to be only an indirect threat, not one requiring best efforts notice pursuant to due process. No specific assessment was levied and no individualized burden or benefit was involved. Therefore, the plaintiffs were enti-

---

*B.A., DePauw University, 1977; J.D., Indiana University—Indianapolis, 1980; Attorney, Krieg DeVault Alexander & Capehart, Indianapolis, Indiana. The author wishes to acknowledge the technical support of Krieg DeVault Alexander & Capehart.

[1]412 N.E.2d 854 (Ind. Ct. App. 1980), *transfer denied*, April 20, 1981.

[2]*See* Ind. Code § 19-2-14-7 (1976) (repealed 1981).

[3]412 N.E.2d at 859.

[4]*Id.* at 860. An assessment for sewage benefits is of little legal distinction from a "pro rata share as a proportional tax."

tled only to notice by publication. *Mullane v. Central Hanover Bank & Trust Co.*[5] was held to be inapposite because that case dealt with court proceedings, and not the mere levy of a tax.[6]

b. Standing.—While standing is a well-known and highly litigated issue in federal courts due in part to the constitutional limitation of federal court jurisdiction, the issue of standing arises less frequently in state courts. The issue did, however, arise during this survey period in *City of Hammond v. Red Top Trucking Company, Inc.*[7] Red Top Trucking challenged the validity of a Hammond ordinance that required excavation sites to be at least three miles from the nearest residential district. Red Top Trucking's application to haul sand was not ratified by the common council as required by the ordinance and a permit was therefore denied. The city claimed Red Top Trucking had no standing to challenge the ordinances because it had no interest in the affected realty, the excavation site. The court held, however, that Red Top Trucking did have standing because the ordinance did not require an interest in property in order to receive a permit.[8]

Because Red Top Trucking had no other means of access to the courts than to pursue a declaratory judgment action, the court decided that it was only fair that judicial review be available under these circumstances. While it is admirable that the court considered the equities of the case in reaching the proper conclusion, its decision does not really address the issue of standing in the sense of what party will most zealously pursue its remedy and what party has been harmed.

c. The right to be heard.—In *Tucker v. Marion County Department of Public Welfare*,[9] the defendant had been denied an opportunity to speak at an ex parte hearing making her children wards of the state. The court of appeals held this to be nonreversible error because the preliminary order making the children wards of the state was merged into the final, full-blown hearing and therefore the claim of deprivation of due process was moot.[10] At first blush this

---

[5]339 U.S. 306 (1950).

[6]412 N.E.2d at 860.

[7]409 N.E.2d 655 (Ind. Ct. App. 1980).

[8]*Id.* at 657-58.

[9]408 N.E.2d 814 (Ind. Ct. App. 1980).

[10]*Id.* at 818. The court stated that: "[W]hile no later hearing can undo an arbitrary action subject to procedural safeguards, neither can the court now go back in time and restore the children to appellants for the amount of time they were wrongfully withheld." *Id.* at 817-18 n.3, (citing Town of Speedway v. Harris, 169 Ind. App. 100, 346 N.E.2d 646 (1976)). The court added that "[W]e do not imply that the final hearing rectified earlier constitutional infirmity, if any." 408 N.E.2d at 818 n.3. Finally, the court denied damages due to the absence of legislative provision therefor. *Id.* at 818.

rule seems sensible; however, it has constitutional flaws. In the first place, carrying the logic of *Tucker* to its fullest extent, as long as a person was granted oral argument in the appellate court, it could be claimed that he was given his due process right to a hearing. Secondly, the deprivation of parental rights during the period between the hearing and the actual adversarial proceeding would seem to be a sufficient deprivation of a property right to require that the right to be heard be granted at all levels of the proceeding.[11] Finally, it would seem that if any decision made at the hearing stage of the proceeding had some binding effect or substantial impact on the outcome of the case, whether direct or indirect, the defendant was in fact denied the right to fully litigate that question. When viewed in the light of these considerations, *Tucker* appears to be a questionable decision, cloaked in the logic of judicial economy.

d. The right to counsel.—The issue of the right to counsel in administrative proceedings was discussed in two recent cases, both of which reveal judicial sensitivity to the intimidating effect of an administrative hearing. In *Sandlin v. Review Board of the Indiana Employment Security Division*,[12] the court built a foundation for its conclusion that due process rights must be accorded in administrative hearings by discarding the distinction between "rights" and "privileges,"[13] and by noting that a legitimate claim to welfare benefits is a property right that may be denied only after due process of law has been afforded.[14] Procedural due process must therefore be accorded in Indiana Employment Security Division proceedings, with the appropriate degree of due process depending upon a balancing of the nature of the governmental function involved and the private interest affected by that action.[15]

Similarly, *Foster v. Review Board of Indiana Employment Security Division*[16] remanded a decision of the Employment Security Division for failure to notify the claimant of his right to be represented by counsel, stating that such was a violation of due process.[17] While the referee is not required to admonish the claimant of his right to counsel, some notice of that right must be given at

---

[11]The right to raise one's children has been held to be more precious than a property right and protected by the fourteenth amendment. *In re* Hewitt, 396 N.E.2d 938, 940 (Ind. Ct. App. 1979). Any proceeding to deprive an owner of property of his interest therein must offer the owner a meaningful opportunity to be heard. Garvin v. Daussman, 114 Ind. 429, 16 N.E. 826 (1888).

[12]406 N.E.2d 328 (Ind. Ct. App. 1980).

[13]*Id.* (citing Board of Regents v. Roth, 408 U.S. 564 (1972)).

[14]406 N.E.2d at 330 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

[15]406 N.E.2d 330 (citing Cafeteria Workers v. McElroy, 367 U.S. 886 (1961)).

[16]413 N.E.2d 618 (Ind. Ct. App. 1980).

[17]*Id.* at 620.

some time in the proceeding. The referee must make an independent inquiry when a claimant appears without counsel.[18] A claimant who fails to receive the required notice of right to counsel, however, must show the prejudicial effect of the error. Although the appellant had failed to affirmatively prove prejudice in this instance, the case was remanded for a new hearing on other grounds.[19]

e. Appellate rights.—In *Riner v. Raines*,[20] the plaintiff-appellant was an inmate appealing an order of the Conduct Adjustment Board of an Indiana prison, which had placed the appellant in segregation for fighting. The Indiana Supreme Court held that criminals in prison have been deprived of their liberty *with* due process, but are nevertheless deemed to have retained a residue of protected liberty interests.[21] Although stating that the threat of disciplinary sanction revitalized certain dormant due process requirements, the court concluded that there was no constitutionally protected right to judicial review of the decisions of fact-finding and appellate tribunals presently conducting disciplinary proceedings within the prison system.[22] The court believed that due process was satisfied by the threat of federal action if due process rights were violated,[23] and offered the rationale that the harm suffered by an inmate will have long passed before an appellate court could correct the wrong.[24] While both of these reasons may be technically correct, they are functionally inadequate. The state courts should not rely on federal courts to provide state citizens their rights under the Indiana and federal constitutions, and the fact that a remedy may be a long time coming has never deterred courts from adjudicating rights and remedies and from protecting persons against arbitrary action. While it is true that prison inmates may not have the full comple-

---

[18]This procedure is mandated by 60 IND. AD. CODE § 1-11-3 (1979).

[19]413 N.E.2d at 622.

[20]409 N.E.2d 575 (Ind. 1980).

[21]*Id.* at 577 (citing Wolff v. McDonnell, 418 U.S. 539 (1973); Baxter v. Palmigiano, 425 U.S. 308 (1976)).

[22]409 N.E.2d at 579.

[23]The court was presumably referring to 42 U.S.C. § 1983 (Supp. III 1979), which states in relevant part:

> Every person who, under color of any statute, . . . regulation, . . . or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Compare Riner with Stanley v. Illinois, 405 U.S. 645, 647 (1972), wherein the United States Supreme Court refused to embrace "the general proposition that a wrong may be done if it can be undone."

[24]409 N.E.2d at 579.

ment of constitutional rights, or at least the full degree of the rights available to ordinary citizens, it is well established[25] that they do have some rights and that appellate processes protect those rights which the inmates retain.

f. The right to due process—entitlement, liberty, and property.—Process is not "due" unless some liberty or property interest is at issue. Deciding who is entitled to due process rights created a split in the Indiana Court of Appeals in the past twelve months, and has probably caused much confusion at Fraternal Order of Police meetings. In the case of *State ex rel. Dunlap v. Cross*,[26] a police officer was suspended from the police force for a period of less than ten days. The governing statute[27] states that a police officer suspended for ten days or less has no right to appeal the administrative decision. The reason offered for this provision was that such a policy allowed more swift and effective discipline. The concept of preservation of the "esprit de corps" of the police department has been used in the past to curtail certain rights of police and firemen,[28] in tandem with the rationale that acceptance of a position as a police officer implies assent to certain conditions of continued employment.[29] The Third District Court of Appeals, relying on this logic, held that suspensions of policemen for less than ten days do not involve a property interest,[30] and therefore that there is no right to due process.[31]

An opposite result was reached in *Gerhardt v. City of Evansville*.[32] In that case, the Fourth District Court of Appeals held that allowing the suspension of policemen for up to ten days as provided by statute[33] violated due process. The court held that the right to appeal existed although not provided by statute and even in the

---

[25]"There is no iron curtain drawn between the Constitution and the prisons of this country. . . . [Prisoners] retain right of access to the courts." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (citations omitted).

[26]403 N.E.2d 885 (Ind. Ct. App. 1980).

[27]IND. CODE § 18-1-11-3(b) (Supp. 1981).

[28]*See* Kelley v. Johnson, 425 U.S. 238 (1975).

[29]This is based on Justice Rehnquist's infamous rationale that: "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974).

[30]Due process is not constitutionally mandated absent two factors: (1) state action and (2) some constitutionally protected liberty or property interest. Wilson v. Board of Ind. Emp. Sec. Div., 385 N.E.2d 438 (Ind. 1979), *cert. denied*, 444 U.S. 874 (1979).

[31]403 N.E.2d at 888.

[32]408 N.E.2d 1308 (Ind. Ct. App. 1980), *aff'd on rehearing*, 416 N.E.2d 142 (Ind. Ct. App. 1981).

[33]IND. CODE § 18-1-11-3(b) (Supp. 1981).

absence of a property interest.[34] The court remanded to the trial court to determine if any property interest was present in the case. Upon rehearing,[35] the city alleged that the holding violated the precedent of *Dortch v. Lugar*[36] and created a conflict of precedent with the *Dunlap* case. The court held that *Dortch* had not been contravened, stating that judicial review is available in order to assure that reasonable administrative procedures are followed, that disciplinary action taken is within the scope of the agency powers, and that the agency acted according to law.[37] The court agreed with the *Dunlap* court that there was no *statutory* right to judicial review of the policeman's case, but went on to disagree that there was no *constitutional* right to review. The court stated that: "We are of the opinion that the lack of a property interest does not lead to the conclusion that there is no right to judicial review."[38] The court went on to claim adherence to the precedent of *Warren v. Indiana Telephone Co.*,[39] in which the Indiana Supreme Court held that judicial review was dependent upon agency action and not upon the existence of a protected property interest, as in the case of right to notice and an opportunity to be heard.[40]

Clearly, the *Gerhardt* court is correct in its analysis that due process is owed to members of the police force, whether suspended for ten days or for more. The *Dunlap* court has reverted to the archaic analysis of rights versus privileges, a standard that has fallen into disrepute in the modern era of constitutional law.[41]

However, due process is constitutionally mandated to be based upon a protected property or liberty interest, and the *Gerhardt* court may have gone too far in its pronouncements. The better anal-

---

[34]408 N.E.2d at 1310 (citing Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399 (1940)).

[35]416 N.E.2d 142 (Ind. Ct. App. 1981).

[36]255 Ind. 545, 266 N.E.2d 25 (1971). In *Dortch*, the Indiana Supreme Court held that: "We are unable to discover any provision in our constitution *requiring* the guarantee of tenure or rank to employees of a municipal government unit." *Id.* at 578, 266 N.E.2d at 45 (emphasis in original).

[37]416 N.E.2d at 143.

[38]*Id.* at 143 (citing as an example Murphy v. Indiana Parole Bd., 397 N.E.2d 259 (Ind. 1979)).

[39]217 Ind. 93, 26 N.E.2d 399 (1939).

[40]Due process rights to a hearing, after notice, along with a right to be heard were held to be required only where liberty or property interests were implicated. In the case of agency action *absent* a liberty or property interest, only judicial review is required by due process. 416 N.E.2d at 143.

[41]*See* McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). This rationale was pronounced valueless in Graham v. Richardson, 403 U.S. 365, 374 (1971). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

lysis is that a policeman does have a protected property interest in his job in that he has a legal basis to believe that his job will continue for an indefinite period. The policeman therefore has a legitimate expectation of continued employment. Once there is a legitimate expectation of continued employment, due process must be accorded the officer/employee. That principle distinguishes this case from *Board of Regents v. Roth*,[42] in which a professor who was hired for a determinate period was held not to have a protected property interest. In that case, however, the professor had no legitimate expectation of continued employment, unlike the policeman in *Gerhardt*.

The due process rights of public employees was also considered in a context outside of the police force. In *Indiana Alcoholic Beverage Commission v. Gault*,[43] the court held that if one's employment is at the will of a government agency, that person has no property interest in employment at a particiular rank. An employee at will is therefore not entitled to the procedural protections linked to a property interest, thus, the court of appeals reversed the trial court's reinstatement of an excise policeman's rank.[44] Again, it would seem that the plaintiff had a legitimate expectation in continued employment. The issue in this case was the right to a due process hearing, not the right to continued employment.[45]

---

[42]408 U.S. 564 (1972). The court phrased the absence of a protected liberty or property interest in this way:

> [T]he terms of respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

Id. at 578 (emphasis in original).

[43]405 N.E.2d 585 (Ind. Ct. App. 1980). The court, construing IND. CODE § 7.1-2-2-12 (1976), held that Mr. Gault was an employee at will in spite of his twenty years of service. The terms of his service lend support to his legitimate expectation of continued employment, which would have arisen if by no other means than custom. To adhere to the letter of the statute, however, would force the conclusion that Mr. Gault was labelled an employee at will, and therefore could acquire no legitimate expectation of continued employment.

[44]405 N.E.2d at 590.

[45]For a general discussion of the procedural due process rights of "at will" employees, *see* Note, *At-Will Public Employee Entitled to Procedural Due Process Hearing Prior to Termination*, 9 SETON HALL L. REV 810 (1978), discussing a New Jersey court's holding to that effect in Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 390 A.2d 90 (1978).

An argument against this theory would be that if an employee at will may be

In *Holbrook v. Pitt*,[46] the question of whether a lessee was entitled to Housing and Urban Development (HUD) rent subsidies was submitted to the Seventh Circuit Court of Appeals. As a result of the relative values at stake, the court held that all tenants should get notice of their right to retroactive subsidy benefits, a written statement telling why such benefits have been denied (if in fact they have), and an opportunity to challenge the sufficiency of the reasons.[47] A hearing was required prior to a final denial of retroactive benefits. For these reasons, the case was remanded to the district court to decide what process was in fact due in this particular instance.[48]

g. Procedural due process and considerations of fairness—challenges to statutes and actions.—In *Mother Goose Nursery Schools v. Sendak*,[49] the defendant Indiana Attorney General refused to approve a contract with the plaintiff to provide nursery school services to children of welfare recipients because the president of the plaintiff corporation had been convicted for filing false income tax returns. The plaintiff alleged that the defendant's action was arbitrary, charging a violation of constitutional rights protected by federal statutory law.[50] The attorney general admitted that the contract was in proper form under the applicable provisions of the Indiana Code[51] and that his denial of approval of the contract was based solely on the president's conviction. Vaulting defenses of qualified immunity, the court held that the attorney general had a duty to approve all contracts lawful in form and content, and that he had no discretion to reject other contracts, for the reason that he is not a party to such contract.[52] In denying the plaintiff's right to contract,

---

fired for any reason, there is no reason to hold a hearing to determine the cause of termination. If, for example, an employee were being fired for reporting violations of health standards or for exercising his constitutional rights, logic would support the employee's argument. This, however, is not the law of Indiana. Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. Ct. App. 1980). *But see* Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (retaliatory discharge as a result of claim for workman's compensation held wrongful and actionable).

[46]643 F.2d 1261 (7th Cir. 1981).

[47]*Id.* at 1280-81.

[48]*Id.* at 1281.

[49]502 F. Supp. 1319 (N.D. Ind. 1980).

[50]The plaintiff brought suit under 42 U.S.C. § 1983 (Supp. III 1979).

[51]IND. CODE § 4-13-2-14 (Supp. 1981) states in part: "All contracts and leases shall be approved as to form and legality by the attorney general." This section has been construed to mean that the attorney general may *only* consider contract form and legality in the exercise of his quasi-judicial professional discretion. Citizens Energy Coalition v. Sendak, 594 F.2d 1158 (7th Cir.), *cert. denied*, 444 U.S. 842 (1979).

[52]502 F. Supp. at 1325.

Sendak had denied a right protected by the fourteenth amendment,[53] as well as plaintiff's property interest in its reputation. As a result, Attorney General Sendak was held liable for a violation of the plaintiff's constitutional rights,[54] and monetary damages were awarded, a result which the court had refused in *Citizens Energy Coalition v. Sendak*.[55]

Indiana's mineral lapse statute was challenged in *Short v. Texaco, Inc.*[56] The trial court had declared the Mineral Lapse Act[57] ("Act") unconstitutional, holding that the Act was contrary to due process, equal protection, and the guarantee of just compensation for property taken for public use. The Indiana Supreme Court classified the interest in mineral estates as an interest in real estate and therefore accorded it the "firmest protection of the Constitution from irrational state action."[58] The court found, however, that the standards of notice required by *Mullane v. Central Hanover Bank*[59] were inapplicable with regard to the Act because the Act was self-executing and did not contemplate an ajudication before a tribunal prior to the lapse of the property interest.

2. Void for Vagueness Challenges.—Several statutes were challenged within the last twelve months on the basis of failing the vagueness test. In *Bailey v. State*,[60] the defendant challenged the Indiana robbery statute[61] as vague and overbroad and therefore unconstitutional. In disposing of this challenge, the Indiana Supreme Court quoted *Stotts v. State*[62] which enunciated the test for vagueness. The statute challenged in this case was reviewed on its face. The defendant claimed that the statute allowed for a chain of causation to go on *ad infinitum*.[63] The court, relying on the case of *Colton v. Commonwealth of Kentucky*,[64] equated the vagueness doc-

---

[53]The court found contractual interests to be property within the terms of the fourteenth amendment, and that "[t]he plaintiff in this case had a sufficient interest in the contract to at least be afforded some kind of explanation for its disapproval and also thereafter to be afforded at least a minimal opportunity to confront and refute the charges." *Id.* at 1324-25.

[54]*Id.* at 1326.

[55]594 F.2d 1158 (7th Cir.), *cert. denied*, 444 U.S. 842 (1979).

[56]406 N.E.2d 625 (Ind. 1980).

[57]IND. CODE §§ 32-4-11-1 to -8 (1976).

[58]406 N.E.2d at 627.

[59]339 U.S. 306 (1950).

[60]412 N.E.2d 56 (Ind. 1980).

[61]IND. CODE § 35-42-5-1 (Supp. 1981).

[62]257 Ind. 8, 271 N.E.2d 722 (1971).

[63]412 N.E.2d at 58. The defendant alleged that the absence of a time limitation on the operation of the phrase "results in" made the statute unconstitutionally vague.

[64]407 U.S. 104 (1972) wherein the United States Supreme Court stated that: "The root of the vagueness doctrine is a rough idea of fairness." 407 U.S. at 110, *quoted in* 412 N.E.2d at 58.

trine with fundamental notions of fairness, and decided that the causative terms of the statute denote natural consequences and responses to conduct, and there was therefore no legal uncertainty.

In the case of *F.J. v. State*,[65] F.J. contended that the extension portion of the temporary commitment statute[66] was unconstitutional due to vagueness and overbreadth. The court held that the definitions of "mentally ill" and "gravely disabled"[67] make the statute sufficiently precise to comport with due process. The statute also requires that as a result of the mental illness, the person must present a *substantial risk* that he will harm himself or others or is in danger of harm due to his disability. The court held that this adequately restrained the discretion accorded to courts and put such persons on notice of the statute's criteria.[68]

A school transfer regulation was tested on vagueness principles in *Commission on General Education v. Union Township School of Fulton County*.[69] The school challenged particular applications of the school transfer rules to students alleging that several different factors had to be considered. The court held that in order to provide due process, an administrative decision must be in accordance with previously stated, ascertainable standards.[70] These ascertainable standards were necessary in order to provide a fair warning of the criteria that the administrative body would use, and to provide the courts with guidelines for judicial review.[71] The court stated that it would be unable to review the administrative decision to decide whether it was arbitrary and capricious without these standards.[72]

In *Nova Records, Inc. v. Sendak*,[73] the new Indiana Code sections governing drug paraphernalia,[74] fashioned after the Model Drug Paraphernalia Act as drafted by the Drug Enforcement Administration of the United States Department of Justice, were tested for vague-

---

[65]411 N.E.2d 372 (Ind. Ct. App. 1980).

[66]IND. CODE § 16-14-9.1-9(i) (Supp. 1981) allows a temporary commitment to be extended for not more than 90 days if the attending physician files with the court a report stating that the defendant (1) continues to be mentally ill and (2) is either "dangerous" or "gravely disabled and in need of continuing custody, care or treatment in the facility for an additional period not to exceed ninety (90) days." *Id.*

[67]These terms are defined at IND. CODE § 16-14-9.1-1 (Supp. 1981).

[68]411 N.E.2d at 381.

[69]410 N.E.2d 1358 (Ind. Ct. App. 1980). The principles that were to be used in deciding whether to allow a student to transfer from one school to another were dictated by IND. CODE § 20-8.1-6.1-2 (1976). The court held that the four criteria dictated by this section were the sole standards to be relied upon. 410 N.E.2d at 1362.

[70]410 N.E.2d at 1361 (quoting Podgor v. Indiana Univ., 381 N.E.2d 1274, 1281 (Ind. Ct. App. 1978)).

[71]410 N.E.2d at 1361.

[72]*Id.* at 1362.

[73]504 F. Supp. 938 (S.D. Ind. 1980).

[74]IND. CODE § 16-6-8.5-5 & §§ 35-48-4-8.1 to -8.3 (Supp. 1981).

ness, overbreadth, and certain other constitutional infirmities. The court held that the Indiana version of the Model Drug Paraphernalia Act was constitutional. The court found that the intent requirement of the challenged statute would serve to prevent the levy of criminal penalties upon innocent shippers of legitimate goods, and that any effects on interstate commerce would be incidental and justified.[75]

In the case of *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*,[76] the statute challenged as unconstitutionally vague was not a criminal statute, but one which required any person within the Village of Hoffman Estates who sold any "item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs"[77] to obtain a $150 license and file affidavits representing that the owner and every employee authorized to sell such items had never been convicted of drug related offenses. Additionally, the licensee was required to keep records, open to police inspection, for every specified item sold, along with the name and address of the purchaser. Sales to minors were flatly forbidden. After prudently removing the susceptible items from its shelves,[78] Flipside sued the Village in federal court.

The court found that the Village Board of Trustees was attempting to use the licensing procedure to do that which it could not do with a criminal statute. The court held that using a licensing procedure in this manner violated due process even though not linked to criminal penalties. The court found that the standards for enforcing the ordinance were left on an *ad hoc* and subjective basis, which is prohibited under the terms of *Grayned v. Rockford*.[79]

In *Johnson v. St. Vincent Hospital, Inc.*,[80] there were additional challenges to the Indiana Medical Malpractice Act[81] on the basis of unconstitutional vagueness. In the unanimous decision of the Indiana Supreme Court, the statute was found to be constitutionally sufficient on its face. The appellant alleged that the Act should be declared void as vague under article I, section 12 of the Indiana Constitution[82] guaranteeing due course of law for its failure to specify

---

[75]504 F. Supp. at 943.

[76]639 F.2d 373 (7th Cir. 1981).

[77]*Id.* at 374 (quoting Village of Hoffman Estates Ordinance 969-1978 (Feb. 20, 1978)).

[78]*Id.* at 374-75. By avoiding a violation of the ordinance and a subsequent arrest which might require federal court abstention under Younger v. Harris, 401 U.S. 37 (1971), Flipside was able to assure federal court review.

[79]408 U.S. 104 (1972).

[80]404 N.E.2d 585 (Ind. 1980). For a thorough treatment of a number of issues raised in *Johnson*, *see* Harrigan, *Torts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 425, 425 (1981).

[81]IND. CODE §§ 16-9.5-1-1 to -10-5 (1976 & Supp. 1981).

[82]IND. CONST. art. 1, § 12.

detailed procedures and practices to be followed by the medical review panel. The appellant's inability to cite any authority to support that claim allowed the supreme court to quickly dispose of the argument. The court went on to elaborate and advised, however, that the panel was to function in an informal and reasonable manner, "guided by a trained lawyer who presumptively will not deny to each party a reasonable opportunity to present its evidence and authorities."[83] The function of the medical panel was noted to be only one of recommendation and its finding of fact were held to be merely advisory, and therefore there was no reason to mandate specific procedures.[84]

A confusing case in the vagueness area is *Atkinson v. City of Marion*.[85] In this case, the appellant Atkinson appealed his dismissal from the Marion Police Department for "conduct unbecoming an officer." The appellant challenged this ordinance (based on an Indiana Code section)[86] as unconstitutionally vague, claiming that the ordinance gave insufficient notice of what conduct was prohibited, and failed to offer any guidance to administrative tribunals.[87] The appellant also alleged, and the court acknowledged, that more precision was required in drafting laws that touch upon first amendment issues.[88] In a rather spongy opinion, the court seemed persuaded that the phrase was vague, but then said that the acts at issue here, which included lying and forgery, were so clearly within the phrase that it was constitutional.[89] This is an indication that the court judged the constitutionality of the ordinance as applied, in spite of the fact that the appellant had challenged the ordinance on its face.[90]

C. Equal Protection of the Law

1. Generally.—a. Fundamentals of equal protection.—Equal protection[91] has become one of the most effective vehicles for challenging the validity of official action, in part because the standards of equal protection are easily identifiable and allow for reasonable interplay of public policy and official discretion. In the case of

---

[83]404 N.E.2d at 596.

[84]*Id.*

[85]411 N.E.2d 622 (Ind. Ct. App. 1980).

[86]*See* IND. CODE § 18-1-11-3(a)(3) (Supp. 1981).

[87]411 N.E.2d at 625.

[88]*Id.* at 626 n.3 (citing Parker v. Levy, 417 U.S. 733 (1974)).

[89]411 N.E.2d at 627 (quoting *Parker* to the effect that " '[O]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness . . . .' " 417 U.S. at 756).

[90]The court went on to find that the administrative action taken was not " 'arbitrary, capricious and illegal.' " 411 N.E.2d at 628.

[91]U.S. CONST., amend. XIV.

Clark v. Lee,[92] the Indiana Occupational Income Tax Act[93] was declared unconstitutional because it effectively taxed only nonresidents of the state. The Act was drafted in order to retain some of the income taken out of Indiana by employees living across the state border. Residents of Indiana were to receive a credit on the occupational income tax in the amount of income tax paid, and the combined effect of the tax and the credit made the tax fall only on the shoulders of non-residents. The Indiana Supreme Court held that this was a violation of equal protection of the laws under both the Indiana and federal constitutions.[94]

b. Legislation involving suspect classes.[95]—In the case of *Steup v. Indiana Housing Finance Authority*,[96] the plaintiff-appellant sued to have the Indiana Housing Finance Act[97] declared unconstitutional. The court held that providing aid to those families with incomes of up to 125% of the median income of that locale did not violate state and federal equal protection principles.[98] The court noted that legislative distinctions need not be mathematically precise and that no suspect class was involved in this case because distinctions were made on the basis of wealth. The court, after noting that low level scrutiny was to be applied,[99] which requires that the statute bear a rational relationship to permissible governmental purposes, apparently applied a "fair and substantial relationship" test, which has characteristically been applied in intermediate standard equal protection cases such as sex discrimination.[100]

Chief Justice Givan, concurring and dissenting in part, argued that a preferential class had been created by the Act,[101] a class of low income businesses and persons. He agreed that the statute

---

[92]406 N.E.2d 646 (Ind. 1980).

[93]IND. CODE §§ 6-3.5-3-1 to -14 (1976). A decision on this tax had been deferred to the state courts. *See* Blaske v. Bowen, 437 F. Supp. 1056 (S.D. Ind. 1976), *aff'd*, 559 F.2d 1224 (7th Cir. 1977).

[94]406 N.E.2d at 652.

[95]Courts are to give strict scrutiny to those laws and official actions that touch upon fundamental rights or primarily affect suspect classes. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) and its progeny. *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, 515-687 (1978).

[96]402 N.E.2d 1215 (Ind. 1980).

[97]IND. CODE §§ 5-20-1-1 to -26 (Supp. 1981).

[98]402 N.E.2d at 1223.

[99]*Id. See also* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[100]In the case of Reed v. Reed, 404 U.S. 71 (1971), the U.S. Supreme Court established a third-tier of equal protection scrutiny for a small class of cases, frequently classifications based on gender: "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to that object of the legislation . . . .'" 404 U.S. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). *See also* Craig v. Boren, 429 U.S. 190 (1976).

[101]Specifically, *see* IND. CODE § 5-20-1-5 (Supp. 1981).

should be reviewed with low level scrutiny, but found there to be no rational relationship between the means and the end. The purpose of the statute was to provide housing, not increase the financial or employment status of the poor. For these reasons, he found that there was no rational relationship between the statute and the goals which the statute attempted to achieve.[102]

An equal protection challenge was also one of the many challenges made to the Indiana Medical Malpractice Act.[103] In *Rohrabaugh v. Wagoner*,[104] the appellant challenged the statute of limitations section of the Medical Malpractice Act,[105] arguing that the two year statute of limitations on malpractice actions denied minors equal protection of the law required by the fourteenth amendment to the United States Constitution, by the Indiana Constitution, article I, section 23, and by the due process of law guarantee contained in the Indiana Constitution, article I, section 12. Under the statute, children ages 6 to 21 must commence their action within the same two year period as adults.[106] The court recognized that the equal protection clauses require strict scrutiny only when classifications impinge upon the exercise of a fundamental right or operate to the particular disadvantage of a suspect class.[107] Defining a class by age, however, does not call for strict scrutiny,[108] and so the legislature is not required to provide special time periods for minors between the ages of six and eighteen. Rationality is therefore the required standard, and drawing a line at six year old minors is a rational standard because children of that age can presumably communicate medical complaints to their parents or guardian, who can then commence the action on their behalf.[109]

In *Johnson v. St. Vincent Hospital, Inc.*,[110] the appellants challenged the Medical Malpractice Act[111] on the basis that it subjected malpractice claimants to burdens not borne by other tort claimants and granted corresponding benefits to health care providers in violation of the privileges and immunities clause of article I, section 23 of the Indiana Constitution and the equal protection clause of the fourteenth amendment to the United States Constitu-

---

[102]402 N.E.2d at 1231.

[103]IND. CODE §§ 16-9.5-1-1 to -10-5 (Supp. 1981).

[104]413 N.E.2d 891 (Ind. 1980).

[105]IND. CODE §§ 16-9.5-3-1 to -2 (Supp. 1981).

[106]*Id.* § 16-9.5-3-2.

[107]413 N.E.2d at 893.

[108]*See* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[109]The court recognized that it might be overruling, *sub silentio*, portions of Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974).

[110]404 N.E.2d 585 (Ind. 1980).

[111]IND. CODE §§ 16-9.5-1-1 to -10-5 (Supp. 1981).

tion. The court held that neither classification as a tort claimant nor as a health care provider involved a suspect class[112] and that the statute impinged upon no fundamental right such as voting, procreation or interstate travel.[113] Having therefore dug a grave of low level scrutiny, the court applied the wrong standard.[114] The *ratio decidendi* was the weighing of individual rights against public policy.

As a separate challenge, the appellants alleged that the limitation on damages recoverable by medical malpractice claimants was a violation of equal protection. In rejecting this challenge, the supreme court again completely overlooked the rational relationship standard that is normally applied in low level scrutiny cases and applied a fair and substantial relationship test, citing *Sidle v. Majors*.[115] *Sidle* in turn relied upon *Reed v. Reed*[116] and *Johnson v. Robinson*.[117] *Reed*, however, applied an intermediate level of scrutiny, and *Johnson*, a low level scrutiny. The court also relied upon *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[118] as authority that the "fair and substantial relationship" test applied.

2. Desegregation.—a. United States v. Board of School Commissioners.[119]—During the survey period, another chapter in the voluminous story of the Indianapolis desegregation case was written. The case, which was filed in 1968, is now in its thirteenth year. The current litigation involves the implementation of the interdistrict remedy which the district court had ordered as a result of its findings that the Housing Authority of the City of Indianapolis, as approved by the Metropolitan Development Commission of Marion County, located all of its public housing projects within the territory of Indianapolis Public Schools (IPS) with a racially discriminatory intent or purpose. The district court in 1978 had found that housing location and certain actions of the Indiana General Assembly were motivated by a racially discriminatory intent and therefore ordered

---

[112]"Neither classification involves a suspect classification such as race, wealth, lineage, alienage or illegitimacy." 404 N.E.2d at 597. Prior to this reference, however, wealth was not a suspect class.

[113]*Id.*

[114]"The fair and substantial relation standard is to be applied here." 404 N.E.2d at 597 (citing Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974)).

[115]264 Ind. 206, 341 N.E.2d 763 (1976).

[116]404 U.S. 71 (1971).

[117]415 U.S. 361 (1974).

[118]438 U.S. 59 (1978). In *Duke Power*, the validity of the Price-Anderson Act limiting liability for nuclear accidents was challenged. The United States Supreme Court, however, applied the rational relationship test to uphold the damage limitation. *Id.* at 93.

[119]637 F.2d 1101 (7th Cir.), *cert. denied*, 101 S. Ct. 114 (1980). For a thorough discussion of the Indianapolis desegregation cases see Note, 14 IND. L. REV. 777 (1981).

an interdistrict remedy.[120] Several plans were submitted to the district court in the instant action, with the court deciding on one-way busing of students from the inner city to the outlying school districts.[121] The court rejected the two-way busing plan suggested by IPS because it felt that it lacked the power to order that a suburban child be transported from his school corporation as long as the suburban school corporations retained their identity as distinct legal entities. The court found that there was no evidence that any suburban school corporation had operated anything other than a unitary school system. The busing of inner city school children to the adjoining school districts was held not to be a violation of the equal protection, because students of both races would be bused from the inner city, and within IPS itself.[122] In accomplishing the further revisions of the remedy that the court had ordered, IPS was directed to ignore and abolish its present high school area lines. This order was made on the basis of the belief that the lines were in fact drawn with the discriminatory purpose that the court had found.[123]

In addition, the district court ordered the establishment of certain training programs in order to ease the transition for students and teachers, with the State to bear the expense. Finally, as a matter of fundamental fairness, the court ordered that surplus teachers in the IPS system receive first consideration for hiring by the suburban schools.[124]

b. United States v. Board of School Commissioners,[125] *on appeal.*—On appeal of the district court decision, the Seventh Circuit Court of Appeals reviewed the evidence which the lower court detailed in reaching its finding that the UniGov legislation which had created the new city boundaries and the decision to place public housing within the IPS district was done with a discriminatory intent. In support of this conclusion, the court of appeals noted that "Indiana has for generations pursued a legislative policy that school district lines should grow as the corporate lines of the cities grow."[126] This historical fact was added to the evidence adduced at trial to infer that when UniGov was formed and the school corporations involved were exempted from the provisions of the government merger, the government acted with the intent to permit continued discrimination and aggregation of minority students in the IPS boundaries while preserving the existing characteristics of the

---

[120]Judge Dillin held that such action was taken with a racially discriminatory purpose. 456 F. Supp. 183 (S.D. Ind. 1978).

[121]506 F. Supp. at 663.

[122]*Id.* at 663.

[123]*Id.* at 671.

[124]*Id.* at 674-75.

[125]637 F.2d 1101 (7th Cir. 1980).

[126]*Id.* at 1106.

outlying school corporations. In addition, a 1961 Act of the Indiana legislature[127] had been repealed a few days prior to the enactment of the UniGov legislation. The appellate court took this action to mean that there was discriminatory intent or at least complicity in the formation of UniGov and a desire to keep IPS predominantly black. For these reasons the appellate court affirmed the district court's determination that the 1969 repeal of the 1961 School Annexation Statute was done with a discriminatory purpose.

In reviewing the decision of the district court regarding housing, the court of appeals found that the lower court had failed to determine how much of the current housing segregation within the UniGov boundaries was the result of intentional state action rather than non-discriminatory actions or private acts of discrimination. The appellate court therefore narrowed its review to one issue, the location of public housing in Marion County. In reviewing the evidence, the appellate court agreed with the district court's finding that the decision in the 1960's to locate public housing in Marion County within IPS boundaries was motivated by a segregative intent on the part of state agencies. The sole remaining factor to be considered was whether this intent had substantial interdistrict effects;[128] the Seventh Circuit deferred to the district court's findings and affirmed the decision that the effects of school segregation within IPS were not sufficient to support the two-way busing plan.[129] While upholding the district court's decision to order one-way busing, the appellate court disagreed with the court's reasoning stating that the court *does* have the power to implement a plan which would reassign students from non-IPS to IPS schools, based upon the finding that discriminatory actions by the *state* had significant segregative impact across district lines.[130]

In a strong dissent, Judge Tone extensively reviewed the record, concluding that the real effect of the court's decision was to impose the responsibility on the state to force integration, rather than to *remedy* prior *de facto* segregation:

> If I am right in my belief that the record does not support the findings of discriminatory purpose, the real issue raised by this case is whether otherwise permissible state

---

[127]1961 Ind. Acts, Ch. 186 (School Annexation Statute), *cited in* 637 F.2d at 1106 n.13.

[128]Milliken v. Bradley, 418 U.S. 717 (1974) is the landmark decision on the interdistrict remedy issue. In expressing the opinion of the Court, Chief Justice Burger stated that "[b]efore the boundaries of separate and autonomous school districts may be set aside . . . it must first be shown that there has been a constitutional violation within one district that produces a *significant segregative effect* in another district." *Id.* at 745 (emphasis added).

[129]637 F.2d at 1114.

[130]*Id.* at 1114-15.

> action that does not attempt to remedy the effect of *de facto* segregation is for that reason alone an act of *de jure* segregation. The lesson to be derived from today's decision seems to be that the answer is yes . . . .
>
> Thus a state may not restructure civil government or build public housing in an area in which *de facto* school segregation exists without assuming also the affirmative duty to remedy that segregation.[131]

D. Specific Constitutional Rights and Duties Classified According to Amendment

1. The First Amendment, Including Freedom of Religion.—a. Judicial reluctance to become involved in ecclesiastical matters.—In the case of *Marich v. Kragulac*,[132] the plaintiffs and defendants were battling over who had the right to Serbian Orthodox Church property in East Chicago, Indiana. The trial court dismissed the plaintiff's cause of action for lack of subject matter jurisdiction due to the constitutional prohibition[133] of interference in church matters. Plaintiffs were loyal to the mother church in Yugoslavia, while the defendants sided with a defrocked bishop who headed the local church. The Indiana Court of Appeals held that the relevant inquiry prior to a decision concerning subject matter jurisdiction must be whether the court can resolve the property dispute on the basis of neutral principles of law which do not involve the resolution by the court of ecclesiastical issues, relying on *Presbyterian Church v. Hall Church*.[134] If the court must decide doctrinal propriety, then it has no subject matter jurisdiction.[135] The courts must defer to the resolution of issues of religious doctrine or "polity" by the highest court of a hierarchical church organization.[136]

---

[131]*Id.* at 1129. For an interesting discussion of the essential demise of the *de jure/de facto* distinction and the negative effect of such a demise, *see* Note, *Equal Protection and the Neighborhood School Concept: The Demise of the De Jure-De Facto Distinction*, 55 WASH. L. REV. 735 (1980); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L. J. 317 (1976).

[132]415 N.E.2d 91 (Ind. Ct. App. 1981).

[133]U.S. CONST. amend. I.

[134]393 U.S. 440 (1969). Resolutions of disputes regarding church property have been the object of several court cases. The neutral principles approach to establishing the identity of the church by relying upon non-doctrinal indices such as charters, constitutions, and by-laws and in the absence thereof, a presumption of majority rule, relates back to Bouldin v. Alexander, 82 U.S. 131 (1872).

[135]Draskovich v. Pasalich, 151 Ind. App. 397, 280 N.E.2d 69 (1972).

[136]415 N.E.2d at 98. "Hierarchical church" has been defined as "(1) those organized as a body with other churches [and] (2) have a similar faith and doctrine (3) with a common ruling convocation or ecclesiastical head . . . ." Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 110 (1952).

"A hierarchical church is generally one in which authority is exercised by laymen

If the church is of a congregational structure, however, the court has the power to decide the issue.[137] The general rule in local schism cases is that the principle of presumptive majority rule applies to the right to control the actions of the title holder of property.[138] While the state has a legitimate interest in the peaceful resolution of disputes over property and in providing a peaceful forum for resolution of such disputes, if the controversy is motivated by disputes over doctrinal practices within the church, the court is barred from resolving the property dispute on the basis of constitutional principle: "If the court must resolve questions of doctrinal propriety in order to determine who has legal control of the property, then it has no jurisdiction of the purported cause of action."[139]

The polity approach to the resolution of church disputes has been accepted in Indiana.[140] *Marich* was consequently remanded to the trial court to determine whether, on the basis of neutral principles of law, the relationship between the local church and the mother church was based on a hierarchical structure. If the trial court determined that the relationship was based on such a structure, the judgment of the hierarchy must be enforced. If, however, the church was found to be congregational in its structure, the court must go on to find which faction represents the local congregation, applying the presumptive majority rule. That presumption may be rebutted if, upon applying neutral principles of law, sources such as statutes, corporate charters, deeds and organizational constitutions of the church disclose the true identity of the local church.[141]

b. The right to attend criminal proceedings.—In *State ex rel. The Post-Tribune Publishing Co. v. Porter Superior Court*,[142] the plaintiff newspaper petitioned for an original writ of mandate or prohibition to overrule the trial court's order of closure of a bail hearing. The Supreme Court of Indiana, assuming *arguendo* that the

---

and ministers organized in an ascending succession of judicatories, while a congregational church is one in which each local church is self-governing." Serbian Orth. Church Cong. of St. Demetrius v. Kelemen, 21 Ohio St. 2d 154, 256 N.E.2d 212, 214 (1970).

Neutral principles methodology has been held to comport with the first amendment. Jones v. Wolf, 443 U.S. 595 (1979).

[137]*See* Serbian Eastern Orth. Diocese for the United States and Canada v. Milivojevich, 426 U.S. 696 (1976).

[138]415 N.E.2d at 101. *See also* Jones v. Wolf, 443 U.S. 595 (1979).

[139]414 N.E.2d at 96.

[140]Smart v. Indiana Yearly Conf. of Wesleyan Methodist Church, 257 Ind. 17, 271 N.E.2d 713 (1971); Price v. Merryman, 147 Ind. App. 295, 259 N.E.2d 883, *cert. denied*, 404 U.S. 852 (1971).

[141]415 N.E.2d at 103. *See generally* Annot., 52 A.L.R.3d 324 (1973).

[142]412 N.E.2d 748 (Ind. 1980).

public and press have a right to attend judicial proceedings,[143] stated that open judicial proceedings are standard and are to be favored.[144] The right to a public trial is guaranteed by the sixth amendment and Indiana Constitution Article I, Section 13,[145] but that right is extended only to the criminal defendant, and the public and news media do not participate in that right.[146] The defendant had concurred in the closure order, and the constitutional rights at issue had therefore been waived. The newspapers claimed that the closure order was invalid here because it was not preceded by a hearing, affording them an opportunity to appear by counsel and offer their arguments against closure. The Indiana Supreme Court, noting that in the recent United States Supreme Court case of *Gannett Co. v. DePasquale*[147] it had been assumed for purposes of argument that there was a first amendment right of the public and the press to have access to pretrial hearings, held that *Gannett* did not require discrete hearings affording the press an opportunity to appear by counsel to contest the closure.[148] However, the court noted that a voiced objection to closure should be considered as a circumstance strongly supporting the necessity of a prior hearing.[149]

Considering the particular facts of this case, the delay caused by

---

[143]The court noted that the same assumption was made by the United States Supreme Court in Gannett Co. v. DePasquale, 443 U.S. 368 (1979). The court found considerable support for this assumption in U.S. CONST. amends. I and XIV, IND. CONST. art. 1, §§ 9 & 12, and IND. CODE § 35-1.1-2-1 (Supp. 1981), which provides in part: "(a) Criminal actions shall be tried publicly in the county where the offense was committed, except as otherwise provided by law."

[144]412 N.E.2d at 750. The court qualified this by noting that the right to a public trial is based upon the rights of the defendant. It has therefore been held that it is not unconstitutional to exclude the press from a trial during the testimony of one witness. *Id.* at 751 (citing Hackett v. State, 266 Ind. 103, 360 N.E.2d 1000 (1977)).

[145]U.S. CONST. amend. VI and IND. CONST. art. 1, § 13.

[146]412 N.E.2d at 750.

[147]443 U.S. 368 (1979).

[148]In discussing the issue, the United States Supreme Court stated:

> Despite this failure to make a contemporaneous objection [by the Gannett reporter], counsel for the petitioner was given an opportunity to be heard at a proceeding where he was allowed to voice the petitioner's objections to closure of the pretrial hearing. At this proceeding, which took place after the filing of briefs, the trial court balanced the "constitutional rights of the press and the public" against the "defendant's right to a fair trial." . . . In short, the closure decision was based "on an assessment of the competing societal interests involved . . . rather than any determination that First Amendment freedoms were not implicated."

443 U.S. at 392-93 (citing Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (Powell, J. dissenting)). The conclusion of the Indiana Supreme Court was that while the facts of the case were not the same, the legal requirement of explicit weighing had been fulfilled.

[149]412 N.E.2d at 751.

a closure hearing would have denied several fundamental rights to the defendant. The court's procedure provided all the safeguards that a hearing would have offered.[150] The judge had announced the outcome of the suppression hearing, and prior to closure he had publicly enunciated the reasons for the closure. The judge's order explicitly enumerated the factors considered regarding the closure and revealed that the hearing would have neither offered more protection nor affected the outcome.[151] For these reasons, the Indiana Supreme Court denied the writ of mandate/prohibition.[152]

2. The Fourth Amendment—Search and Seizure.—a. Administrative searches.—During the survey period, administrative searches were scrutinized by courts in at least two notable cases. In *Andrus v. P-Burg Coal Co.*,[153] the plaintiff Secretary of the Interior sought to force the defendants to allow an inspection of their facilities to check for compliance with the Surface Mining Control and Reclamation Act of 1977 (SMCRA).[154] The defendant had refused to allow the inspectors on his premises without a search warrant. After a preliminary consideration of the constitutionality of the SMCRA, the court held that as a general rule, insofar as administrative searches are concerned, search warrants were required.[155] An exception to this requirement exists if the industry has a history of pervasive regulation so that no genuine expectation of privacy can exist.[156] Coal mine health and safety cases have historically found coal mines to be within this exception.

Judge Dillin of the federal district court found that there was minimal likelihood of an abuse of discretion in this case because the SMCRA regulations specified the frequency and breadth of the search that was to take place.[157] The court was swayed by the argument that surprise searches were necessary to effectuate the purposes of the statute. The SMCRA provides that upon refusal to permit an inspection, the government may seek an injunction.[158] This procedure curtails the harassment that search warrants are designed to prevent. Therefore, the permanent injunction was granted.[159]

---

[150] *Id.* at 751-53.

[151] *Id.* at 753-55.

[152] *Id.* at 755-56.

[153] 495 F. Supp. 82 (S.D. Ind. 1980).

[154] 30 U.S.C. §§ 1201-1328 (Supp. III 1979). Section 1267 deals specifically with inspections, reports and review of inspections, and their procedures.

[155] 495 F. Supp. at 85-86 (citing Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)).

[156] 495 F. Supp. at 86 (citing United States v. Biswell, 406 U.S. 311 (1970) and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)).

[157] 495 F. Supp. 88 (citing 30 C.F.R. §§ 721.11 & 721.12 (1980)).

[158] 30 U.S.C. § 1271(c) (Supp. III 1979).

[159] 495 F. Supp. at 88. The court stated:

Given the long history of federal regulation of the mining industry, along

In *Wilson v. Health and Hospital Corp.*,[160] the appellant alleged that the defendant Health and Hospital Corporation's warrantless and consentless searches of Wilson's properties violated the fourth amendment.[161] The trial court had held, in granting the summary judgment motion against the plaintiff, that neither the searches nor the notices violated the constitutional rights of the plaintiff.[162]

This case involved a fire which had destroyed one-half of a duplex and the occupant of the other side of the duplex requested that the defendant inspect his residence. After inspecting the occupant's side, the officer entered and inspected the interior of the side that had burned. The second inspection was made without the benefit of a warrant, notice, or consent of the owner.[163] The defense of the Health and Hospital Corporation was that the side that suffered the fire was open and completely unsecured, and that therefore any fourth amendment protection had been waived. The inspector, during the course of his search, found several violations and notified the plaintiff that he must correct them.[164]

In a second separate incident, a health officer employed by the Health and Hospital Corporation visited one of the plaintiff's buildings to perform an inspection. A resident of the building offered to show the inspector around the premises and took the inspector to the basement area. The officer testified that a visual inspection of the basement was possible without moving the basement door because it was standing partially open. Also, some of the apartments in the building were unoccupied and were inspected without obtaining consent or a warrant due to the clear view available to the interior of the apartments.[165]

The condition of these premises formed the basis for the trial court's decision that the dwellings were open to the public view and were therefore not within the plaintiff's reasonable expectation of privacy. The trial court found that since the premises were in an

---

with the guidelines for inspection and the provision requiring the government to seek injunctive relief upon refusal to allow inspection, the government is not required to obtain a search warrant before being able to inspect the defendant's mining operation.

Id.

[160]620 F.2d 1201 (7th Cir. 1980).

[161]U.S. CONST. amend IV. The appellant based his claim on 42 U.S.C. § 1983 (Supp. 1980), seeking damages, an injunction barring similar future searches, and a declaratory judgment that the ordinance pursuant to which the searches were made was unconstitutional.

[162]620 F.2d at 1206.

[163]*Id.*

[164]*Id.*

[165]*Id.* at 1207

open condition the plaintiff's expectation of privacy was not objectively reasonable.[166]

The appellate court, refusing to accept this rationale, first denied that the facts of this case fell within the "plain view" exception. "The most obvious problem is that it is not even clear in this case what, if any, violations were in plain view of the officer *while he was located where he had a right to be*."[167] The fact that the officer took in some of the information while making routine inspections might allow him to use the information as a basis to form probable cause, but it did not provide a sufficient basis for conducting a warrantless search.[168] For these same reasons, the appellate court denied the use of the "open fields" exception. The open fields exception is inapplicable in a case where there was an actual entry made, because that exception does not permit the warrantless search of open areas within the "curtilage" of a dwelling.[169] Also, the open fields exception is subject to the same limitation that the plain view exception is, that the exceptions allow warrantless *seizures* of evidence visible to the official or to the public in general, but they do not justify warrantless *searches*, or entries into the area in the first place.[170]

The sole evidence offered by the plaintiff in opposition to defendant's motion for summary judgment was that he was the owner of the property at issue in this case. The appellate court held that this was a sufficient impediment to the grant of summary judgment and therefore reversed and remanded the case to the trial court.[171] In this case, the common law and statutory right of private ownership of property and protection against trespass was a sufficient defense to defendant's motion for summary judgment.[172]

Judge Tone dissented to the decision, stating that Mr. Wilson's affidavit made no reference to other matters establishing his reasonable expectation of privacy, which imposed upon the appellate court

---

[166]*Id.* (citing Katz v. United States, 620 F.2d 347 (1967)).

[167]620 F.2d at 1209 (emphasis added). Insofar as the duplex was involved, there was nothing proved to have been in plain view. As to the apartment building, the court was unable to ascertain what was in the inspector's plain view. Regardless, his presence in the basement of the apartment building was not authorized, and the resultant "plain view" should have been excluded from consideration. The court held that the inspector was not where he had a right to be, and that the view was not "inadvertent and unexpected," as required by Coolidge v. New Hampshire, 403 U.S. 433 (1971). 620 F.2d at 1209.

[168]620 F.2d at 1209.

[169]*Id.* (citing Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968)).

[170]*Id.* at 1209-10 (citing United States v. Bensinger, 489 F.2d 865 (7th Cir. 1973), *cert. denied sub nom.* Felton v. Saiken, 417 U.S. 910 (1974)).

[171]620 F.2d at 1213-14, 1217.

[172]*Id.* at 1212-13 (quoting Rakas v. Illinois, 439 U.S. 128 (1978)).

the duty to decide the case on the basis of the record and not to remand it. Additionally, Judge Tone noted that:

> Given the *Katz* principle that the Fourth Amendment protects people and not places, ownership unaccompanied by either occupancy or any exhibition of an expectation of privacy or an intention to assert a privacy interest should not be sufficient for Fourth Amendment protection. Here the plaintiff displayed an utter indifference to privacy.[173]

b. The right to consent and waive fourth amendment protection.—In *Brames v. State*,[174] the Indiana Supreme Court held that a defendant may not object to the violation of a third party's constitutional rights, unless the violation involved an area in which the defendant had a reasonable expectation of privacy.[175] The court held that the defendant, although not the owner of the property, had a reasonable expectation of privacy at his parent's cottage. However, the consent of a person who has common authority over premises or effects is valid against the absent person with whom the authority is shared.[176] In this case, the defendant's parents had granted the police permission to search the premises, they had consented to the search of property shared with the defendant, and the police search was therefore constitutional.[177]

c. High school searches.—In the Seventh Circuit case of *Doe v. Renfrow*,[178] the plaintiff Doe, a junior high school student filed civil rights complaints on the basis of strip searches and the sniffing of her person by police dogs searching for drugs at her school. In a textbook case of abuse of police power, 2,780 students of the school were subjected to canine sniffing. Judge Sharp of the Northern District of Indiana granted the defendant school officials summary judgment on the issue of monetary damages for the body search of the plaintiff Doe on the basis of qualified immunity.[179] The officials were held not liable for damages because of an absence of proof of malice and their subjective and objective good faith had not been challenged by the complaint.[180] Judge Sharp did hold the plaintiff entitled to declaratory relief that the nude body search was made without

---

[173]620 F.2d at 1219.

[174]406 N.E.2d 252 (Ind. 1980).

[175]*Id.* at 254 (citing Katz v. United States, 389 U.S. 347 (1967)).

[176]United States v. Matlock, 415 U.S. 164 (1974).

[177]406 N.E.2d at 255.

[178]631 F.2d 91 (7th Cir. 1980), with additional dissents printed at 635 F.2d 582 (7th Cir. 1980).

[179]475 F. Supp. 1012 (N.D. Ind. 1979).

[180]631 F.2d at 92 n.3.

a finding of reasonable cause and in violation of the fourth amendment.

It is difficult to conceive how the judge could have found subjective and objective good faith in the strip search of a junior high school student. It is well settled that students entering school premises do not leave their constitutional rights at the door.[181]

The court of appeals adopted Judge Sharp's opinion as their own, with the exception that the court held that the defendant school officals were not immune from liability arising out of the nude search based on the good faith defense articulated in *Wood v. Strickland*.[182] *Wood* stated that school officials who act "in good-faith fulfillment of their responsibilities and within the bounds of reason under all circumstances [but] not in ignorance or disregard of settled indisputable principles of law would be protected from liability actions."[183] The Seventh Circuit Court of Appeals is to be commended on its reaffirmance of Judge Sharp's use of the principles of law and its disagreement on their application in this case.

3. The Fifth Amendment; Condemnation; Taking, and Self Incrimination.—a. What constitutes a taking under the fifth amendment.—In the case of *Jaymar-Ruby, Inc. v. FTC*[184] the federal district court ruled that the mere risk of disclosure to the public or to competitors of trade secrets given to the FTC, which in turn gives the information to state attorneys general under a promise of confidentiality, did not fall within the "taking" terms of the fifth amendment.[185] The court presumed that governments will honor their commitments to keep confidential information secret, relying on the authority of *Exxon Corporation v. FTC*.[186] If an improper disclosure did occur, resulting in competitive injury, it would be, at worst, a collateral consequence of FTC cooperation with state inquiries and no fifth amendment guarantee would be violated.[187] Even

---

[181]Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969). The large number of students searched would seem to make the facts all the more clear.

[182]420 U.S. 308 (1975). "A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U.S. at 322.

[183]631 F.2d at 92 (quoting Wood v. Strickland, 420 U.S. 308, 321 (1975)).

[184]496 F. Supp. 838 (N.D. Ind. 1980).

[185]U.S. CONST. amend. V.

[186]589 F.2d 582, 590-91 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). The D.C. Circuit indulged in the presumption that information revealed to Congress would be held confidential, and that if disclosure were made, the plaintiff would have a remedy against the particular individual.

[187]496 F. Supp. at 846.

presuming that some disclosure would occur, there could not be a taking until the disclosure was made, and only at that time would a cause of action for damages be instituted. The mere threat of some future disclosure may not form the basis to elude the jurisdiction of the FTC.[188]

b. Self incrimination and the right to assert fifth amendment protection.—In *Martincich v. City of Hammond*,[189] the plaintiff appealed the trial court's affirmance of the Department of Public Works' action dismissing him from the Hammond Police Department. The court held that the availability of the fifth amendment privilege against self incrimination is not dependent upon whether the proceeding is civil, criminal or administrative, but rather whether a statement is or may be inculpatory.[190] The court stated that the purpose of the fifth amendment is to prevent *forced* self incrimination, not to protect information desired to be kept private. The court noted, however, that no inculpatory statements were made by Martincich and that since this was a disciplinary action, and therefore no threat of criminal prosecution existed, the plaintiff had no fifth amendment right protection. Martincich was told that he could refuse to testify at the administrative hearing but that if he exercised the right of refusal he would be precluded from testifying later.[191] The holding in this case violates the well known principles that have developed concerning the fifth amendment and the constitutional protection against self incrimination.[192]

---

[188]*Id.* at 846-47.

[189]419 N.E.2d 240 (Ind. Ct. App. 1981).

[190]*Id.* at 243 (citing Haskett v. State, 255 Ind. 206, 263 N.E.2d 259 (1970)).

[191]The court stated that this had the effect of forcing a decision at the beginning of the hearing as to whether he would testify or not. 419 N.E.2d at 243-44.

Martincich was not, in the eyes of the court, under duress to testify, in spite of the fact that it was possible he would lose his job if he did not offer a rebuttal to the charges. Logically, Martincich was forced to testify, but the absence of a threat of criminal prosecution undercut his fifth amendment right. Martincich was dismissed, however, for alleged fencing activities. Evidence admitted at the administrative hearing would have been admissible at a criminal trial.

[192]*See* Green v. State *ex rel.* Dept. of State Revenue, 390 N.E.2d 1087 (Ind. Ct. App. 1981). In *Green*, the court stated

> It is basic that the fifth amendment protection against self-incrimination exists only in criminal actions. The protection is generally not available in civil proceedings unless there are criminal overtones. . . . [T]he legislature has created a law enforcement system in which criminal and civil elements are inherently intertwined. Thus, the line between civil and criminal proceedings is difficult to draw. *Donaldson v. U.S.*, (1971) 400 U.S. 517, 91 S. Ct. 434, 27 L.Ed.2d 580, drew the line in the federal system at the recommendation to the Department of Justice for prosecution. In Indiana, we cannot draw such a "bright-line" between the civil and criminal. The Department, unlike the IRS, cannot represent itself in court in enforcement proceedings,

4. The Eighth Amendment Prohibition Against Cruel and Unusual Punishment.—In *Chavis v. Rowe*,[193] a six month confinement in a five by seven foot cell with four other prisoners was held to violate the plaintiff's eighth amendment rights,[194] the conditions being found to transgress modern standards of dignity, humanity and decency.[195] The test for the plaintiff's constitutional action based on the eighth amendment is a showing that prison officials intentionally inflicted excessive or grossly severe punishment on a prisoner or that the officials knowingly maintained conditions so harsh as to shock the conscience.[196] The court held that the plaintiff's placement in a five by seven foot cell with four other men did constitute an eighth amendment violation because it violated the court's perception of standards of civilized incarceration.[197] The degeneration of the prisoners under these conditions was probable and self-improvement was unlikely.[198] For these reasons, the judgment for defendant was reversed and remanded to the trial court.[199]

The U.S. Supreme Court has recently taken up consideration of cell space and the eighth amendment in the case of *Rhodes v.*

---

but rather must make use of the offices of the Attorney General for this purpose. The Attorney General, under IC 6-3-6-11, also has concurrent jurisdiction with the local prosecutor to prosecute criminal tax cases. Thus, unlike the federal system, the Attorney General's office is active in the original subpoena enforcement and consequently its first involvement cannot be the determinative factor. We, however, feel that a recommendation to the Attorney General for prosecution (or the initiation of such an action) can serve as notice that the process has become criminal.

Id. at 1090.

[193]643 F.2d 1281 (7th Cir. 1981).

[194]U.S. CONST. amend. VIII. The proscription of cruel and unusual punishment applies to state correctional facilities. *See* Lock v. Jenkins, 464 F. Supp. 541 (N.D. Ind. 1978).

[195]643 F.2d at 1291 (citing Hutto v. Finney, 437 U.S. 678, 685 (1978)).

This court recently described the test for a § 1983 action charging prison officials with violating the Eighth Amendment as requiring plaintiff to show that prison officials intentionally inflicted excessive or grossly severe punishment on him or that the officials knowingly maintained conditions so harsh as to shock the general conscience. *Stringer v. Rowe*, 616 F.2d 993, 998 (7th Cir. 1980).

643 F.2d at 1291.

[196]643 F.2d at 1291.

[197]*Id.* (citing Battle v. Anderson, 564 F.2d 383, 393 (10th Cir. 1977)).

[198]*Id.* The Tenth Circuit has ordered the Oklahoma Department of Corrections to provide each prisoner with a minimum of sixty square feet. Battle v. Anderson, 564 F.2d 388, 393 (10th Cir. 1977). "Punitive isolation" was held to violate the eighth amendment in Hutto v. Finney, 437 U.S. at 688. The Seventh Circuit also noted that overcrowding may state a due process claim, citing Bell v. Wolfish, 441 U.S. 520, 542 (1979).

[199]643 F.2d at 1292.

Chapman.[200] While eighth amendment cases are characteristically fact-sensitive, this most recent case serves to reveal the current attitude of the Court regarding prison conditions:

> The five considerations on which the District Court relied also are insufficient to support its constitutional conclusion. The court relied on the long terms of imprisonment served by inmates at SOCF; the fact that SOCF housed 38% more inmates than its "design capacity"; the recommendation of several studies that each inmate have at least 50-55 square feet of living quarters; the suggestion that double celled inmates spend most of their time in their cells with their cellmates; and the fact that double celling at SOCF was not a temporary condition. . . . These general considerations fall short in themselves of proving cruel and unusual punishment, for there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment.[201]

After a review of the District Court's findings of fact, Justice Powell and the majority reversed the trial and appellate courts' conclusion that double-celling violated the eighth amendment. The facts in *Rhodes*, however, were not nearly as egregious as those in *Chavis*. *Chavis* appears to retain its vitality.

5. The Relationship Between State and Federal Governments and the Tenth Amendment.—In *State v. Andrus*[202] the Surface Mining Control and Reclamation Act of 1977[203] ("SMCRA") was held by the federal district court to be unconstitutional. The constitutionality was challenged by the plaintiffs on several bases, notably that the provisions exceeded the regulatory authority of the federal government based on the commerce clause, that the provisions were in violation of the tenth amendment,[204] and that the statute provided for a taking of property without just compensation in violation of due process and the taking clause requirements of the fifth amendment.[205]

---

[200]101 S. Ct. 2392 (1981).

[201]*Id.* at 2399.

[202]501 F. Supp. 452 (S.D. Ind. 1980), *rev'd sub nom* Hodel v. Indiana, 101 S. Ct. 2376 (1981).

[203]30 U.S.C. §§ 1201-1328 (Supp. 1980).

[204]U.S. CONST. amend. X.

[205]*Id.* This claim was based on the contention that the regulation was not reasonably related to the legitimate federal goals of controlling interstate commerce and the effect of environmental problems on commerce. 501 F. Supp. at 455.

Addressing the commerce clause challenge, the court stated that its inquiry into commerce clause issues must be a two-fold inquiry:

> First, this Court must "determine whether the particular activity [facet of surface mining operations] regulated or prohibited is within the reach of the federal power," *United States v. Darby*, 312 U.S. 100, 120-21 . . . (1941), that is whether there is a rational basis for Congress to conclude that the particular facet of surface mining operations regulated or prohibited has a substantial and adverse effect on interstate commerce. . . . Second, "the means chosen," . . . must be "reasonably adapted" or "plainly adapted" to the legitimate end of removing the substantial and adverse effect on interstate commerce.[206]

The court held that strip mining in Indiana has a negligible effect on interstate commerce and cited extensive authority to this effect.[207]

Additionally, the provisions of the SMCRA requiring that the original contour of the land be restored were so marginally based on interstate commerce that the court held that they were not within the commerce power of the federal government and were therefore struck down.[208] The provisions requiring strip miners to undertake certain post-mining land uses as a precondition to the grant of a permit to mine were held to be unrelated to removing the substantial adverse effects on interstate commerce and therefore exceeded the federal government's authority.[209]

Arguing also on tenth amendment[210] grounds, the plaintiffs contended that the provisions which required a state to submit a program in full conformity with the SMCRA and imposing the Secretary's regulations in default thereof violated the sovereignty of the states. Plaintiffs additionally contended that the provisions challenged were actually land use controls, traditionally a responsibility of state government and that the SMCRA therefore offended the spirit of the tenth amendment as enacted. Citing *National League of Cities v. Usery*,[211] the district court held that the tenth amendment formed a limitation upon the interstate commerce power of the federal government, that such limitation had been violated, and that the provisions im-

---

[206]501 F. Supp. at 458.

[207]*See* the detailed discussion of the evidence to this effect at 501 F. Supp. at 460-61.

[208]501 F. Supp. at 461.

[209]*Id.*

[210]U.S. CONST. amend. X.

[211]426 U.S. 833 (1976).

pinging upon the powers of the state government were therefore unconstitutional.[212]

Concerning the provisions that the federal government, in the absence of the state's affirmative action, could promulgate regulations that would be administered in Indiana, the court stated that:

> This Court must view the portions of the Act challenged by plaintiffs as if the Federal Government were going to administer the Act under a Federal program in Indiana, for if sovereign functions of a State are dictated and confined by the Act under threat of a federal program, it is not relevant that a State may ultimately "choose" under threat of federal usurpation of a sovereign function to have a State program, make such decisions, and structure its government accordingly.[213]

In discussing the plaintiffs' allegation that the federal legislation was irrational and essentially a violation of substantive due process, the court concluded that:

> There is no rational basis to support that the discriminatory treatment toward plaintiffs and the States in the Midwest, or that the failure to grant plaintiffs equal variances, furthers a legitimate "national interest." For selective or discriminatory Federal legislation to be valid under the Fifth Amendment, there must be an overriding national interest justifying such difference in treatment, and there must be "a legitimate basis for presuming that the rule was actually intended to serve that interest."[214]

Finding these overriding national interests to be absent, the court held that the act was irrational, arbitrary, and capricious, and therefore unconstitutional.[215]

Addressing the plaintiffs' argument that the SMCRA took their property without just compensation as required by the fifth amendment, the court found that it was technologically impossible to restore prime farmland to prior levels of yield, that consequently, the value of the mineral interest was destroyed, and that the Act therefore constituted an unconstitutional taking.[216]

Finally, certain provisions that addressed procedural aspects of the Act were found to be unconstitutional. One requirement, that in

---

[212]501 F. Supp. at 462-68.

[213]*Id.* at 464.

[214]*Id.* at 469 (quoting Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)).

[215]501 F. Supp. at 469.

[216]*Id.* at 471.

order to gain a hearing on violations the defendant must pay the proposed penalty into an escrow account, was held to violate procedural due process guarantees.[217]

The district court, unfortunately, was reversed by the U.S. Supreme Court in the case of *Hodel v. Indiana*.[218] Justice Marshall, delivering the opinion of a unanimous Court, rebutted almost all of Judge Noland's decision. The Court refused to assess the quantum of strip mining impact on interstate commerce, deferring to Congress' decision and noting that under a long line of cases only incremental effect is required.[219]

The Court also nullified the decision as premised on the tenth amendment:

> The District Court also held that the 21 substantive statutory provisions discussed above violate the Tenth Amendment because they constitute "displacement or regulation of the management structure and operation of the traditional governmental function of the States in the area of land use control and planning . . . ."
>
> . . .
>
> Like the provisions challenged in *Virginia Surface Mining*, the sections of the Act under attack in this case regulate only the activities of surface mine operators who are private individuals and businesses, and the District Court's conclusion that the Act directly regulates the States as States is untenable. This Court's decision in *National League of Cities* simply is not applicable to this case.[220]

The glaring error of this decision is that the Supreme Court failed to consider the provisions of the SMCRA which required the state to promulgate regulations regarding strip mining, or in the absence

---

[217]*Id.* (citing Fuentes v. Shevin, 407 U.S. 67 (1972)).

[218]101 S. Ct. 2376 (1981). For a detailed discussion of arguments for and against the Surface Mining Control and Reclamation Act, *see* Note, *The Constitutionality of the Federal Surface Mining Control and Reclamation Act of 1977*, 13 IND. L. REV. 923 (1980).

[219]*Id.* at 2386.

[220]*Id.* at 2385-86. The court quoted Stafford v. Wallace, 258 U.S. 495, 521 (1922), which stated:

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of danger and meet it. This court will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

Id. at 2384.

of such regulations required the State to enforce federal regulations imposed by fiat. This is the encroachment on state government that *National League of Cities v. Usery*[221] sought to prevent.

Finally, the Court decided that the District Court had erred in searching for an overriding national interest as a justification for violating equal protection.[222] Justice Marshall held that since no fundamental right or suspect class was involved, only low level scrutiny was due and the Court should defer to Congressional judgment. The fifth amendment challenge was sidestepped by the Court's conclusion that no particular piece of property had been taken under the Act, and that the plaintiffs claimed a taking by the mere force of statutory enactment, which it deemed insufficient.[223]

6. Personal Rights Based on the Aura of Combined Constitutional Amendments.—In a 1980 case decided by the District Court of the Northern District of Indiana, *Gary-Northwest Indiana Women's Sevices v. Bowen*,[224] the Indiana criminal statute regulating abortions was challenged. The plaintiffs were not presently being prosecuted because the criminal action against the plaintiffs had been dismissed before the evidentiary hearing and as a result, the defendants' abstention argument failed. The plaintiffs claimed that the Indiana requirement that a mother who is having an abortion in the second trimester be hospitalized is not "reasonably related to maternal health" and therefore in violation of the *Roe v. Wade*[225] standard for the second trimester.[226]

The plaintiffs argued that certain early second trimester dilation and evacuation (D & E) abortions are so safe that applying Indiana's hospitalization provisions to them does not reasonably relate to maternal health. The court stated that it was bound to the *Roe* division at the end of the first trimester, when the risk of having an abortion is less than the risk of having a child and the court therefore cannot affect the line of demarcation.[227] This is an unfortunate by-product of *Roe v. Wade*, because it binds the precedent to a specific time, unaffected by advances in medical technology. While the court notes that two cases[228] have followed the plaintiffs' argu-

---

[221]426 U.S. 833 (1976).

[222]101 S. Ct. at 2386.

[223]*Id.* at 2387.

[224]496 F. Supp. 894 (N.D. Ind. 1980) (construing IND. CODE §§ 35-1-58.5-1 to -7 (1976)).

[225]410 U.S. 113 (1973).

[226]496 F. Supp. at 898-99.

[227]The district court premised this standard on Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

[228]Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980), and Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 483 F. Supp. 679 (W.D. Mo. 1980), *cited at* 496 F. Supp. at 899.

ment by stating that the dividing line is not the first and second trimester, but the point where abortions become more dangerous than childbirth, the Northern District of Indiana refused to follow this precedent.

The second tack taken by the plaintiffs was that the hospitalization requirement did not further the real standards of *Roe*. The unavailability to some indigent mothers of hospital care during abortion proved that the regulation did not relate to maternal health. The court easily sidestepped this argument by noting that Indiana is not required to guarantee the practical availability of abortions to all indigent women.[229] The court held that the obstacle in this case was not the required hospitalization, but the indigency. Ultimately, the court held that the hospitalization was reasonably related to the promotion of maternal health, and therefore was in accord with *Roe v. Wade*.[230]

E. Conclusion

The cases reviewed in this Survey Article reflect a continued disuse of state constitutional law. Whether recent changes in the relationship of federal and state government will affect this situation is unclear. There remains a strong argument in favor of the disuse of state constitutional law in the desire to provide consistency of privilege and immunity, even in the face of disparate application of law to fact.

A second thread running through recent Indiana constitutional cases is spun more by default—the preoccupation of the Indiana Supreme Court with criminal appeals. It is hoped that this survey period reveals a new trend of Indiana Supreme Court guidance in non-criminal areas.

---

[229]496 F. Supp. at 900 (citing Williams v. Zbaraz, 448 U.S. 358 (1980) and Harris v. McRoe, 448 U.S. 297 (1980) (upholding the constitutionality of the Hyde Amendment)).

[230]*Id.* at 902.