STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

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INTRODUCTION

Because of the movement in recent years to explore state constitutions as a largely untapped source for the protection of individual liberty, the first part of this survey explores Indiana's rather slow, but steady, movement in this direction. The remaining materials focus on state and federal court cases that raise significant federal constitutional issues implicating Indiana law and Indiana litigants.

I. DEVELOPMENTS UNDER THE STATE CONSTITUTION

Although a few years ago the Chief Justice of the Indiana Supreme Court, Randall T. Shepard, urged Indiana attorneys to reexamine Indiana's Bill of Rights as a potentially significant source for the protection of personal liberty, commentators have lamented that, with a few exceptions, there has been much more "rhetorical commitment" than substance.[1] By and large, Indiana courts continue to hold that Indiana's constitutional provisions should be interpreted the same as their federal constitutional counterparts. Thus, in *Babcock v. Lafayette Home Hospital*,[2] the Court of Appeals of Indiana applied the same constitutional standard in responding to state and federal challenges to Indiana's two-year statute of limitations for bringing medical malpractice claims. The court reasoned that the statute does not violate the equal protection guarantees of either the United States or the Indiana Constitutions because the limitations period was a "rational" legislative response to fiscal uncertainties in the health care industry.[3] In *Hudgins v. McAtee*,[4] the court stated that the "due course of law requirement" in Article I, Section 12 is "analogous to the due process clause of the fourteenth amendment to the United States Constitution."[5]

Similarly, with regard to most criminal procedural safeguards, Indiana courts have followed United States Supreme Court precedent interpreting parallel federal constitutional guarantees. For example, in *Lahr v. State*,[6] the court noted that "Indiana has applied the federal analysis to speedy trial claims made under

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1. *See* Patrick Baude, *Recent Constitutional Decisions in Indiana*, 26 IND. L. REV. 853 (1993).

2. 587 N.E.2d 1320 (Ind. Ct. App. 1992).

3. *Id.* at 1375 (citing Douglas v. Hugh A. Stallings, M.D., Inc., 870 F.2d 1242, 1248 (7th Cir. 1989)).

4. 596 N.E.2d 286 (Ind. Ct. App. 1992).

5. *Id.* at 289.

6. 615 N.E.2d 150, 151 n.2 (Ind. Ct. App. 1993).

our state constitution," and in *Scrougham v. State*,[7] the court reasoned that double jeopardy claims brought under Article I, Section 14, should be analyzed in the same fashion as similar claims brought under the United States Constitution.[8]

In addition to its reluctance to stray from federal constitutional principles, the Indiana Supreme Court's unwillingness to issue innovative, substantive decisions under the state constitution is due to the court's narrow approach to state constitutional interpretation. The justices appear to have embraced Supreme Court Justice Antonin Scalia's jurisprudence, which emphasizes an originalist interpretation of the Constitution, rather than the theory of an evolving, developing Constitution.[9] Thus, in *Bayh v. Sonnenburg*,[10] the Indiana Supreme Court stated that its task in interpreting the Indiana Constitution was to "search for the common understanding of both those who framed it and those who ratified it"; courts should look "to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted."[11]

Decisions from last term clearly reflect this historical approach. In *Price v. State*,[12] the plaintiff challenged the constitutionality of her conviction under Indiana's disorderly conduct statute, which prohibits particular categories of speech as "unreasonable noise." Although Article I, Section 9 bars restrictions on the right to speak "on any subject whatever," it also states that "for abuse of that right, every person shall be responsible."[13] The Indiana Court of Appeals affirmed Price's conviction, noting that pre-existing common law proscribed such kinds of speech, and that it "does not appear that the framers and ratifiers of the Constitution intended to put speech akin to 'fighting words' beyond the power

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7. 564 N.E.2d 542, 545-46 (Ind. Ct. App. 1991).

8. *See also* Dolliver v. State, 598 N.E.2d 525 (Ind. 1992) (search and seizure conducted pursuant to a warrant based on a telephone call from an anonymous source violates both Fourth Amendment and Article I, Section 11). However, *Moran v. State*, 625 N.E.2d 1231 (Ind. Ct. App. 1993), held that warrantless search of curbside trash violated state constitutional rights against unreasonable search even though it did not violate the Fourth Amendment. *Id.* at 1240, and *Brady v. State*, 575 N.E.2d 981 (Ind. 1991), held that the specific requirement in Article I, Section 13 of face-to-face confrontation prohibits children from testifying via videotape in a molestation case even though the more general language in the confrontation clause of the Fourteenth Amendment might not. *Id.* at 989. Further, in *Best v. State*, 566 N.E.2d 1027 (Ind. 1991), the court held that the state constitutional principle of proportionality (Art. I, § 16) required reduction of defendant's sentence from twenty to ten years even though any alleged proportionality requirement implied by the Eighth Amendment prohibition against cruel and unusual treatment might not. *Id.* at 1032.

9. *See* Justice Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849 (1989), in which the Justice attacks modern constitutional scholars who have strayed from "the original meaning." *Id.* at 853-54.

10. 573 N.E.2d 398 (Ind. 1991), *cert. denied*, 112 S. Ct. 1170 (1992).

11. *Id.* at 412.

12. 622 N.E.2d 954 (Ind. 1993).

13. IND. CONST. art. IX, § 9.

of the Legislature to proscribe."[14] The Indiana Supreme Court disagreed with this analysis and overturned Price's conviction.[15] Thoroughly reviewing the history of the state constitution, the court explained that in Indiana "the police power is limited by the existence of certain preserves of human endeavor," and that "[a] right is impermissibly alienated when the State materially burdens one of the core values which it embodies."[16] Reasoning that political speech is such a "core value" embodied in Section 9, and that the state punished Price for political speech protesting the legality and appropriateness of police conduct, the court held that her conviction for unreasonably noisy political "expression" could not stand unless the expression inflicted harm upon others "analogous to that which would sustain tort liability against the speaker."[17] Although Price was shouting profanities at police officers at the time of her arrest, because her speech was political speech that did not rise above the level of "a fleeting annoyance" to the residents who were the victims of her tirade, the state could not punish Price for her words.[18] In short, the profanities she yelled at the police included protected political speech, to which Indiana's constitution affords a high level of protection under Section 9.

On the other hand, in *State v. Rendleman*,[19] the court used an historical argument to reject a claim that the law enforcement immunity section of the Indiana Tort Claims Act violates the "open courts" provision of the Indiana Constitution. Article I, Section 12 provides that "every person for injury done to him in his person, property, or reputation, shall have remedy by due course of law."[20] However, in 1851 Indiana adhered to sovereign immunity, a remnant of English common law.[21] Although subsequent judicial decisions eroded this

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14. 600 N.E.2d 103, 114 (Ind. Ct. App. 1992). Note that one year earlier in *Fordyce v. State*, 569 N.E.2d 357 (Ind. Ct. App. 1991), the court similarly relied upon obscenity proscriptions existing at the time of the constitutional convention to conclude that the framers would have assumed obscenity to be beyond the protection of the state constitutional provision. Although the Oregon Supreme Court has interpreted the Oregon Constitution, which was copied from Indiana's, to protect both fighting words and obscenity, the *Fordyce* court rejected its approach. *Id.* at 361-62.

15. *Price*, 622 N.E.2d at 964-65. The court, however, rejected an "overbreadth" challenge, finding that federal overbreadth analysis was never part of the history and structure of the Indiana Constitution. *See also* Helton v. State, 624 N.E.2d 499, 507 (Ind. Ct. App. 1993), relying on *Price* to reject an overbreadth challenge to Indiana's Gang Statute.

16. *Id.* at 960.

17. *Id.* at 964. The public nuisance doctrine would not be a constitutional application of the legislature's duty to protect. *Id.*

18. *Id. See also* Radford v. State, 627 N.E.2d 1331 (Ind. Ct. App. 1994) (because Radford's speech protested the legality and appropriateness of police conduct and that speech at most comprised a public nusance, conviction for disorderly conduct must be reversed). *Cf.* Stites v. State, 627 N.E.2d 1343 (Ind. Ct. App. 1994) (because defendant was not protesting appropriateness of police conduct, but was merely uttering obscenities, disorderly conduct conviction must stand; mere presence of police officer does not convert defendant's speech into political expression).

19. 603 N.E.2d 1333 (Ind. 1992).

20. *See* IND. CONST. art I, § 9.

21. *Id.* at 1335.

common law sovereign immunity, the Indiana Supreme Court nonetheless found no historical justification for invalidating the immunity provision: "Article I, Section 12 does not prevent the legislature from modifying or restricting common law rights and remedies, [because] no one has a vested [constitutional] interest in any rule of the common law . . . ."[22] The court continued, noting that "Indiana's Constitution does not forbid abolition of old rights recognized by the common law in order to attain permissible legislative objectives."[23] In short, although some have urged Indiana courts to take a more vigorous, innovative approach in interpreting the Indiana Constitution,[24] absent a well-founded historical justification, it does not appear that Indiana courts currently are inclined to do so.

In addition to *Price*, there were a few other noteworthy decisions suggesting the unique importance of the Indiana Constitution. Two cases focused on Article I, Section 12 (the same provision at issue in *Rendleman*). In *Bals v. Verduzco*,[25] the Indiana Supreme Court found in Section 12 a state constitutional right of access to the courts for employees injured as a result of intra-company defamatory falsehoods. Because, unlike the federal constitution, the Indiana Constitution specifically guarantees a remedy for injury to reputation, the court refused to adopt the position prevailing in many jurisdictions that defamatory material must be communicated to third parties in order to be actionable.[26] The legal fiction that intra-company communication of defamatory information is not "publication" was found to interfere with "values embodied in our state constitution."[27]

In a second case, *Campbell v. Criterion Group*,[28] the Indiana Court of Appeals relied upon Article I, Section 12's requirement that courts be open and available "without purchase" when it determined that courts must provide indigent civil appellants with a record of proceedings prepared without cost. On transfer, the Indiana Supreme Court, while agreeing that civil appellants are entitled to appeal *in forma pauperis*, rejected the notion that appellants are necessarily entitled to a transcript at public expense.[29] Relying upon Indiana's Rules of Appellate Procedure, the court reasoned that an appellant must first demonstrate that his appeal cannot be perfected through preparation of a "statement of evidence," which is used when a transcript is physically unavailable. Because Campbell failed to demonstrate that his appeal could not be perfected by preparing such a statement of evidence, it affirmed the trial court's refusal to order the transcription at public expense.[30]

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22. *Id.*
23. *Id.* at 1336.
24. *See, e.g.*, Baude, *supra* note 1, at 864.
25. 600 N.E.2d 1353, 1355-56 (Ind. 1992).
26. *Id.* at 1355.
27. *Id.*
28. 588 N.E.2d 511, 516 (Ind. Ct. App. 1992).
29. Campbell v. Criterion Group, 605 N.E.2d 150 (Ind. 1992).
30. *Id.* at 160-61.

One final area involving state constitutional law deserves mention. Although the language in Article I, Section 23 of the Indiana Constitution ("the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens"), is significantly different from the text of the Fourteenth Amendment (no state shall "deny to any person within its jurisdiction the equal protection of the laws"), Indiana decisions have held that the federal and state equal protection guarantees are coextensive and protect identical rights.[31] Thus, in the absence of a fundamental right or a suspect classification, Indiana courts have used a highly deferential approach and have sustained statutes and ordinances supported by any rational basis. For example, in *Pazzaglia v. Review Board of Indiana Department of Employment and Training Services*,[32] the Indiana Court of Appeals sustained an unemployment compensation rule that denies benefits to an employee who leaves a job voluntarily and then is terminated from a second job in less than ten weeks. The court held that the rule is rationally related to the state's legitimate interest in stabilizing employment and in protecting the first employer's interests.[33] In *Thomas v. Greencastle Community School Corp.*,[34] the same court held that a high school athletic association rule that prevents students over age nineteen from competing in inter-school athletic competition bears a rational relationship to the legitimate interests of promoting safety and fair competition.[35]

Indiana High School Athletic Ass'n v. Schafer[36] represents a marked departure from this deferential approach. The Indiana Court of Appeals in *Schafer* recognized the rationality of an Indiana High School Athletic Association (IHSAA) rule whereby students enrolled in school beyond the ordinary eight semesters of high school are ineligible to participate in interscholastic athletics.[37] Because, however, Schafer was repeating the academic year due to an illness and not due to academic deficiency, the court held that the rule swept too broadly and could not constitutionally be applied to Schafer's circumstances.[38] In reaching its conclusion, the court cited as authority an earlier Indiana Supreme

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31. United Farm Bureau Mut. Ins. Co. v. Lowe, 583 N.E.2d 164 (Ind. Ct. App. 1991).

32. 608 N.E.2d 1375 (Ind. Ct. App. 1993).

33. *Id.* at 1378.

34. 603 N.E.2d 190 (Ind. Ct. App. 1992).

35. 603 N.E.2d at 194. *See also* Kleiman v. State, 590 N.E.2d 660 (Ind. Ct. App. 1992) (state statute providing for expungement of arrest records of persons wrongfully arrested due to mistaken identity or lack of probable cause, but denying expungement to those acquitted after trial, is a reasonable classification which does not violate Section 23); Babcock v. Lafayette Home Hosp., 587 N.E.2d 1320, 1325-26 (Ind. Ct. App. 1992) (although the shorter statute of limitations applied to medical malpractice claims may provide "harsh results in some instances," the distinction is sustained as bearing "a rational relationship to legitimate state interest").

36. 598 N.E.2d 540 (Ind. Ct. App. 1992).

37. *Id.* at 551 (it establishes the "primacy of classroom education over athletics").

38. *Id.* at 554.

Court decision, *Sturrup v. Mahan*,[39] in which another provision of IHSAA bylaws was invalidated because "they sweep too broadly in their proscription and, hence, violate the Equal Protection Clause of the 14th Amendment."[40] Because the concept of overbroad rule-making is not a part of a traditional federal equal protection analysis, one may explain *Sturrup* and *Schafer* only as state constitutional decisions. In *Jordan v. Indiana High School Athletic Ass'n*,[41] the federal district court for the Northern District of Indiana remarked that Indiana had adopted a "modified rational basis test" that requires not only a rational relationship to a legitimate government interest, but also that the means be narrowly tailored to the asserted government purpose.[42]

Because at this point Indiana courts have yet to explain the source of such an overbreadth rule,[43] it is probably premature to suggest that courts will give Section 23 of the Indiana Constitution greater teeth than its federal constitutional counterpart. Indeed, an Indiana appellate court, commenting on *Schaefer*, stated that this "modified rational basis test," is "out of the mainstream of equal protection case law."[44] Because the Indiana Supreme Court in *Sturrup* "gave no reason for its departure from traditional equal protection analysis and did not provide any guidance as to its future implications," the court cautioned that one should read the decisions narrowly, and that courts should limit their application to the examination of similar rules.[45]

II. Federal Constitutional Law Developments

A. Procedural Due Process

In deciding whether a law violates procedural due process rights, the United States Supreme Court applies a two-prong analysis, requiring that a plaintiff initially identify a property or a liberty interest, and, assuming the plaintiff meets

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39. 305 N.E.2d 877 (Ind. 1974).

40. *Id.* at 881.

41. 813 F. Supp. 1372 (N.D. Ind. 1993).

42. *Id.* at 1378. The Seventh Circuit has ruled that the appeal of this suit was rendered moot by the player's graduation, and thus it did not reach the merits of the equal protection challenge. 16 F.3d 785 (7th Cir. 1994).

43. If anything, the Indiana Supreme Court in *Sturrup* suggests it is applying federal constitutional law (albeit incorrectly): "said bylaws are *unreasonable* in that they sweep too broadly in their proscription, and hence, violate the Equal Protection Clause of the 14th Amendment." 305 N.E.2d at 881.

44. Thomas v. Greencastle Community Sch. Corp., 603 N.E.2d 190, 193 (1992).

45. *Id.* In *Thomas*, the court sustained the age eligibility requirements of the IHSAA, rejecting the "under-inclusive" challenge brought by the plaintiffs, but suggesting that the rule could have withstood an over-inclusive challenge even under intermediate scrutiny. *See also* Crane v. Indiana High Sch. Athletic Ass'n, 975 F.2d 1315 n.6 (7th Cir. 1992) (relying on a pendent state law claim in order to avoid a constitutional challenge to another IHSAA eligibility rule).

this burden, the Court then balances the competing interests to determine whether the state has afforded sufficient procedural safeguards.

1. Identification of Protected Interest.—Turning to the first part of the analysis, state or local law or custom often dictates whether a property or liberty interest has been created. In *Colburn v. Trustees of Indiana University*,[46] the Seventh Circuit held that faculty members had no property interest either in tenure or reappointment.[47] Although a university handbook and appointment documents set forth criteria and procedures to be used regarding employment decisions, the court reasoned that a property interest is created only "when an employer's discretion is clearly limited so that the employee cannot be denied employment unless specific conditions are met."[48] The assertions in the handbook that faculty members would be judged by certain criteria were insufficient to create a property interest. Further, because there was no formal reappointment system that included annual reviews, it was unlikely that faculty members could have reasonably relied on any assurances they received from individual faculty members as guarantees of their continued future employment.[49] Similarly, in *Swartz v. Scruton*,[50] the Seventh Circuit held that a state university professor did not enjoy, by virtue of contract, rule, or understanding, a legitimate claim of entitlement to a merit pay increase.[51] Although the professor might expect a merit pay increase, he had no property right to a specific amount of merit pay because such was based on multiple layers of contingency. Further, even if the contract set forth procedures for assessing merit, this contractual right was not the equivalent of a constitutionally protected property right.[52]

On the other hand, in *McCammon v. Indiana Department of Financial Institutions*,[53] the court held that because the state civil service statute provided that employees could be removed only for certain enumerated acts of misconduct, the plaintiffs had a constitutionally protected property interest.[54] Although Indiana law was subsequently amended explicitly to require a showing of cause

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46. 973 F.2d 581 (7th Cir. 1992).
47. *Id.* at 589-92.
48. *Id.* at 589.
49. *Id.* at 592.
50. 964 F.2d 607 (7th Cir. 1992).
51. *Id.* at 610-11.
52. *Id.* at 610. *See also* Burns Harbor Fish Co. v. Ralston, 800 F. Supp. 722 (S.D. Ind. 1992) (although fishermen had a protected property interest in their fishing licenses, they did not have a due process property interest in using gill nets within the confines of Indiana waters of Lake Michigan since the statutory ban limited merely the means by which fishermen could catch fish, not the licenses themselves).
53. 973 F.2d 1348 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1282 (1993).
54. *Id.* at 1351-52.

for dismissal,[55] the amendment was intended to clarify, rather than alter, existing law.

Indiana employees who cannot establish a vested property interest, i.e., who serve "at will," may nonetheless seek federal procedural safeguards where, at the time of their termination, the employer defames them to such an extent as to foreclose future job opportunities, thus interfering with a federally-recognized liberty interest.[56] In order to trigger the right to a so-called "name-clearing hearing," the employee must establish that the comments were made incident to the loss of employment, and that they were so maligning as to foreclose future job opportunities. Thus, in *Wroblewski v. City of Washburn*,[57] the Seventh Circuit rejected due process claims brought by the city's ex-mayor because the comments that the mayor was judgment-proof were not "morally stigmatizing," nor were they made incident to the loss of employment. Moreover, Wroblewski could not show that he was excluded from his profession on a permanent or protracted basis.[58] Similarly, in *Vukadinovich v. Board of School Trustees*,[59] the Seventh Circuit held that derogatory comments made by school board trustees *after* the board fired the teacher did not trigger due process because at that point, the teacher faced no threat of lost employment, and because he presented no evidence that his prospects for future employment were diminished.[60]

2. *What Process Is Due*?—Once a protected property or liberty interest is identified, the necessary procedural safeguards are determined by balancing (a) the private interest affected; (b) the risk of erroneous deprivation and the value of additional procedural safeguards; and (c) the government's interests.[61] The United States Supreme Court applied this three-pronged test last term in *Heller v. Doe*[62] to assess the validity of Kentucky's involuntary mental retardation

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55. *See* IND. CODE § 28-11-2-5 (1993).

56. Note that the Supreme Court in *Paul v. Davis*, 424 U.S. 693 (1976), held that damage to reputation alone does not constitute a liberty interest. Further, it has clarified that unless the alleged stigma occurs incident to loss of government employment or some other tangible benefit, there is no federal claim. Siegert v. Gilley, 500 U.S. 226 (1991). Compare the earlier discussion of Indiana's constitutional guarantee of a remedy for injury to reputation. *See supra*, notes 26-27 and accompanying text.

57. 965 F.2d 452 (7th Cir. 1992).

58. *Id.* at 456-57. The city had actually adopted a policy of refusing to contract with any private marina operator that hired the ex-mayor, who claimed this exclusionary policy deprived him of occupational liberty.

59. 978 F.2d 403 (7th Cir. 1992).

60. *Id.* at 413. *See also* McMath v. City of Gary, 976 F.2d 1026 (7th Cir. 1992) (although plaintiff demonstrated violation of his occupational liberty interest by showing he was stigmatized by publicly disclosed information and that he suffered a tangible loss of employment opportunities as a result of public disclosure, the evidence failed to establish that it was the defendants who disseminated the stigmatizing information beyond the appropriate chain of command within the city of Gary, thus requiring reversal of the jury verdict on this issue).

61. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

62. 113 S. Ct. 2637 (1993).

commitment procedures that allowed guardians and immediate family members to participate in the proceedings. Plaintiffs argued that participation by such persons whose interests may be adverse to that of the individual facing possible involuntary commitment "skews the balance" against retarded individuals.[63] Applying the *Mathews* test, the Court concluded that participation by close relatives and legal guardians did not increase the risk of erroneous deprivation. Even if the participation might increase the chances that the proceeding will result in commitment, the Court determined that this does not suggest a due process violation because due process is intended to enhance accurate, not pro-plaintiff, decision-making.[64]

In the employment context, minimal procedural due process requires only adequate notice of charges and an opportunity to present one's side. In *Vukadinovich v. Board of School Trustees*,[65] because the plaintiff was given notice, specific reasons for his termination, and the right to present evidence and cross-examine witnesses, the Seventh Circuit held that he was not denied due process.[66] Similarly, in *Payne v. Housing Authority*,[67] the district court sustained the procedure used to dismiss a city employee, noting that the "root requirement" of due process demands only that an individual be given an opportunity for a hearing before being deprived of a significant property interest, and that this need not include legal representation nor the procedural rules of a court trial.[68]

On the other hand, in *City of Mitchell v. Graves*,[69] the court held that notice provided eight days before a hearing did not give the attorney adequate time to prepare a defense or to test the validity of charges leveled against a police officer. Therefore, the denial of the police officer's motion for continuance of the disciplinary hearing violated due process, even though proceedings before administrative bodies are not required to be conducted with all the procedural safeguards afforded to judicial proceedings.[70]

The *Mathews* balance has also been important outside the context of employment decisions. In *Holmes v. Randolph*,[71] the Indiana Supreme Court applied *Mathews* to assess the validity of Indiana's law governing the towing and disposal of abandoned vehicles. The court held that the Indiana statute, which provides for attaching notice to vehicles for at least seventy-two hours and then providing notice by first-class mail, satisfied minimal due process.[72] Due

63. *Id.* at 2648.
64. *Id.* at 2649.
65. 978 F.2d 403 (7th Cir. 1992).
66. *Id.* at 413.
67. 821 F. Supp. 561 (S.D. Ind. 1993).
68. *Id.* at 562.
69. 612 N.E.2d 149 (Ind. Ct. App. 1993).
70. *Id.* at 152.
71. 610 N.E.2d 839 (Ind. 1993).
72. *Id.* at 846.

process was not violated by the mere possibility that mail notice might not reach persons on vacation or removed from their homes, nor would added procedures, such as certified mail, significantly reduce the chance of error. As the court noted, "[P]rocedural due process rules are shaped by the risk of error inherent in the process as applied to the generality of cases, not the rare exceptions."[73]

Indiana prisoners again brought several procedural due process challenges. In *Forbes v. Trigg*,[74] the court held that due process was violated by an Indiana Department of Correction rule allowing inmates and staff members to refuse to testify at disciplinary hearings without explanation.[75] While urging the Department to enact a new rule, the court concluded that, as applied in this case, there was no due process violation because the testimony sought from prison officials who disciplined the inmate was repetitive and unnecessary.[76] In *Rasheed-Bey v. Duckworth*,[77] the court held that due process entitles inmates to disclosure of exculpatory evidence in disciplinary proceedings, unless disclosure would unduly threaten institutional concerns.[78] However, the court found that in this case the information sought was not exculpatory and was more likely to hurt the inmate's case than to help it, and, thus, the process used to impose disciplinary segregation against Rasheed-Bey satisfied constitutional requirements.[79]

B. Substantive Due Process

1. Protection Against Arbitrary Government Action.—In *Zinermon v. Burch*,[80] the Supreme Court articulated the well-established rule that the due process clause contains a substantive component that bars certain arbitrary, wrongful government conduct regardless of the fairness of the procedures provided. Although federal courts have been generally reluctant to invalidate government action on substantive due process grounds, this limitation was successfully invoked in *Smith v. School City of Hobart*.[81] The district court held that a school's reduction of grades for alcohol-related misconduct (four percent grade reduction for each day the student was suspended for alcohol use) violated a student's substantive due process rights because there was no reasonable relationship between the misconduct and the student's academic performance.[82] Further, although a plaintiff arguably must identify an underly-

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73. *Id.* at 845 (quoting *Mathews*).
74. 976 F.2d 308 (7th Cir. 1992).
75. *Id.* at 317.
76. *Id.* at 318.
77. 969 F.2d 357 (7th Cir. 1992).
78. *Id.* at 362.
79. *Id.*
80. 494 U.S. 113 (1990).
81. 811 F. Supp. 391 (N.D. Ind. 1993).
82. *Id.* at 399.

ing liberty or property interest in order to prevail under a substantive due process theory, several courts, including the Seventh Circuit, have reasoned that the term "liberty" should be given a broader interpretation in the substantive due process context.[83] For example, in *Wroblewski v. City of Washburn*,[84] the Seventh Circuit reasoned that although the plaintiff could not establish occupational liberty in the procedural due process sense, this did not foreclose him from alleging a substantive due process violation of liberty that includes "a freedom from all substantial arbitrary impositions and purposeless restraints."[85]

Although substantive due process theoretically remains a viable tool for challenging government abuse of power, unless fundamental constitutional rights are implicated, a highly deferential standard is used.[86] Thus, in *Wroblewski* the Seventh Circuit proceeded to hold that even if the city acted out of animosity in effectively excluding the plaintiff from working at its marina, the action did not rise to the level of offensiveness or repugnance needed to find a substantive due process violation.[87] The city's conduct did not "shock the conscience" or "fly in the face of our society's standards of decency."[88]

Similarly, in *TXO Production Corp. v. Alliance Resources Corp.*,[89] the United States Supreme Court failed to find a substantive due process violation when a jury awarded ten million dollars in punitive damages in a case in which actual damages were only $19,000. In a plurality opinion, three Justices concluded that the jury could have "reasonably" imposed this punitive damage award.[90] It was not so "grossly excessive" as to violate due process, because millions of dollars were potentially at stake, TXO acted in bad faith, its conduct was part of a broader, larger pattern of fraud and deceit, and TXO was a very wealthy defendant.[91] Although Justice Kennedy rejected the plurality's "reasonable" formulation, he concurred in the judgment on grounds that the jury's verdict reflected a rational concern for deterrence and retribution, rather than bias, passion, or prejudice.[92] The fifth and sixth votes in the majority came from Justices Scalia and Thomas, who totally rejected the substantive due process analysis, arguing that federal courts have no business whatsoever in this area except to ensure that procedural due process has been observed.[93] Because the majority opinion was so divided on the rationale for rejecting the substantive

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83. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 710 n.5 (1976).
84. 965 F.2d 452 (7th Cir. 1992).
85. *Id.* at 457 (citing Poe v. Ullman, 367 U.S. 497, 542-43 (1961)).
86. *See* Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?*, 16 U. DAYTON L. REV. 313 (1991).
87. *Wroblewski*, 965 F.2d at 458.
88. *Id.*
89. 113 S. Ct. 2711 (1993).
90. *Id.* at 2722.
91. *Id.* at 2722-23.
92. *Id.* at 2725-26.
93. *Id.* at 2727.

due process claim, the decision leaves this area in a continuing state of uncertainty. As the plurality noted, there is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[94] On the other hand, as Justice Scalia pointed out, the decision may as a practical matter eliminate most substantive due process challenges to punitive damages awards: ". . . the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that 'this is no worse than *TXO*'"[95]

Collins v. City of Harker Heights[96] reflects a further, significant limitation on substantive due process claims. *Collins* held that a city's failure to train a sanitation department employee or to warn him about known risks of harm could not be characterized as arbitrary or conscience-shocking in a constitutional sense.[97] Therefore, the United States Supreme Court denied claims brought by the widow of an employee who died of asphyxia after entering a manhole to unstop a sewerline without wearing safety gear. More fundamentally, the Court ruled that the due process clause simply does not impose any affirmative duty on government entities to provide its employees with minimal levels of safety in the workplace.[98]

Similarly, the United States Supreme Court has ruled that absent a custodial relationship, such as exists with regard to prisoners or the mentally ill who have been institutionalized by the state,[99] there is no affirmative duty on the part of government to provide protective services.[100] Thus, in *DeShaney v. Winnebago County Department of Social Services*,[101] the Supreme Court held that nothing in the due process clause requires the state to protect life, liberty and property against invasion by private actors or to provide substantive services for those

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94. *Id.* at 2720 (citing Pacific Mut. Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)).

95. *Id.* at 2727. Of course, Justice Scalia asserted that he would "shut the door" that the majority left slightly ajar. In a second case, *Concrete Pipe & Prod. v. Construction Laborers Trust*, 113 S. Ct. 2264 (1993), the Supreme Court rejected a substantive due process challenge to the imposition under federal law of withdrawal liability from pension programs. The Court reasoned that the penalty was rationally related to the terms of Concrete Pipe's participation in the plan it joined, and that this sufficed for substantive due process scrutiny regarding economic legislation. 113 S. Ct. at 2289.

96. 112 S. Ct. 1061 (1992).

97. *Id.* at 1070.

98. *Id.* at 1069-70. *See also* Reilly v. Waukesha County, 993 F.2d 1284, 1287 (7th Cir. 1993) (due process clause does not create an entitlement to "low-risk" employment).

99. *See* Swofford v. Mandrell, 969 F.2d 547 (7th Cir. 1992) (due process protects pretrial detainees from deliberate exposure to violence and from failure to protect when prison officials learn of a strong likelihood that a prisoner will be assaulted; detainee's allegations that his cell was not inspected for over eight hours despite his screams, that a make-shift weapon was accessible in the cell, and that he was placed in a dangerous population satisfy the requirement that plaintiff plead a level of intent at least as high as deliberate indifference or reckless disregard).

100. *See* Wells & Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J.L. REF. 1, 15 (1982).

101. 489 U.S. 189 (1989).

within its borders.[102] Similarly, in *Culver-Union Township Ambulance Service v. Steindler*,[103] the Indiana Supreme Court ruled that a township policy of limiting lifesaving services while affirmatively undertaking to render ambulance services could not be challenged under the due process clause. The court reasoned that the Fourteenth Amendment does not require government to provide rescue services, and thus an "inept rescue is not a cognizable theory for due process liability."[104]

2. *Protection of Fundamental Rights.*—The United States Supreme Court has held that certain individual rights, although not enumerated in the Constitution, are protected by the concept of liberty from government interference unless the state can prove a compelling justification for its action. Beginning with the 1965 decision in *Griswold v. Connecticut*,[105] which struck down a statute forbidding the distribution or use of contraceptive devices, the Court has identified the existence of fundamental rights protecting privacy and personal autonomy in matters of procreation,[106] marriage,[107] and the family.[108] In recent years, however, the Court has narrowed the doctrine of fundamental rights by limiting it to interests rooted in the traditions and collective conscience of the people. For example, in *Bowers v. Hardwick*,[109] the Court held that because sodomy statutes have a lengthy history, sexual preference cannot be regarded as a fundamental right.[110]

This analysis was used to reject claims made by detained alien juveniles to an Immigration and Naturalization Service (INS) regulation that allowed their release only to parents, close relatives, or legal guardians. In *Reno v. Flores*,[111] Justice Scalia found that a child who has no available parent, close relative, or legal guardian has no fundamental right to be placed in the custody of a "willing-and-able" private custodian instead of a government-operated or selected child-care institution.[112] Justice Scalia reasoned that no such right is "rooted in the tradi-

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102. *Id.* at 196. *See* Levinson, *supra* note 86, at 338-42.

103. 629 N.E.2d 1231 (Ind. 1994).

104. *Id.* at 1234-35. *See also* Mullin v. Municipal City of South Bend, 618 N.E.2d 42 (Ind. Ct. App. 1993) (negligence action against city to recover for delay in dispatching paramedic unit to house fire was properly dismissed because the city owed no special duty of care to the plaintiffs; the fact that the dispatcher was informed of the address at which the fire was located, and the names of the residents therein, does not establish a special, individualized relationship entitling the plaintiffs to recover).

105. 381 U.S. 479 (1965).

106. Roe v. Wade, 410 U.S. 113 (1973) (woman's right to decide whether to terminate pregnancy).

107. Loving v. Virginia, 388 U.S. 1 (1967) (freedom to marry person of another race).

108. Moore v. City of East Cleveland, 431 U.S. 494 (1977) (right of grandmother to reside with her grandsons).

109. 478 U.S. 186 (1986), *reh'g den.*, 478 U.S. 1039 (1986).

110. *Id.* at 196.

111. 113 S. Ct. 1439 (1993).

112. *Id.* at 1447.

tions and conscience of our people as to be ranked as fundamental," and thus there was no need to subject the INS regulation to heightened scrutiny.[113] Although Justices O'Connor and Souter concurred in the judgment, they rejected Justice Scalia's characterization of the right in question. They found the right at issue to be "freedom from institutional confinement," which triggers heightened, substantive due process scrutiny.[114] They found, however, that the INS program survived heightened scrutiny where governmental custody is decent and humane and not punitive.[115]

C. Equal Protection

1. Rational Basis Analysis.—Although the core concern of the Equal Protection Clause of the Fourteenth Amendment is that persons similarly situated must be treated the same, the United States Supreme Court has made clear that where the classification does not single out a suspect class or affect a fundamental right, statutes will be given a strong presumption of constitutional validity. Thus, in *FCC v. Beach Communications, Inc.*,[116] the Court sustained the 1984 U.S. Cable Communications Policy Act, which requires television systems to obtain franchises from local government while exempting Satellite Master Antenna Television (SMATV) that serves commonly owned or managed buildings that do not use a public right-of-way. Plaintiffs contended that there was no basis to treat systems that do not use public right-of-way differently merely because some of the systems serve commonly owned buildings while others serve separately owned buildings. The lower court held that the justifications were without foundation.[117] The Court reversed, unanimously finding that the common ownership distinction was constitutional.[118]

The Court emphasized that in areas of social and economic policy, a statutory classification is valid if any reasonably conceivable state of facts provides a rational basis for the classification; moreover, the statute bears a strong presumption of validity and those attacking the rationality carry the burden of negating every conceivable basis that might support the law.[119] Further, because the legislature need not articulate its reasons for enacting a statute, it was irrelevant whether the FCC actually was motivated by the conceived reason for the challenged distinction.[120] The Court emphasized that legislative choice should not be subject to courtroom factfinding, and that adherence to these restraints was necessary to preserve the rightful place and independence of the

113. *Id.*
114. *Id.* at 1454.
115. *Id.* at 1454-56.
116. 113 S. Ct. 2096 (1993).
117. *Id.* at 2100.
118. *Id.* at 2104.
119. *Id.* at 2101-02.
120. *Id.* at 2102.

legislative branch.[121] Thus, despite the lower court's finding that the FCC had submitted nothing more than a "naked intuition, unsupported by conceivable facts or policies,"[122] the Court refused to enter the thicket of more carefully probing administrative justifications for economic regulation.

Outside the area of economic regulation, the United States Supreme Court has been equally reluctant to apply heightened scrutiny. Although the deferential approach is abandoned where the classification affects a suspect class or a fundamental right, the Court in recent years has refused to recognize groups as suspect or rights as fundamental.[123] This past term, in *Heller v. Doe By Doe*,[124] the Court was asked to decide whether differences between the mentally retarded and the mentally ill justify different involuntary commitment procedures. Kentucky allowed mentally retarded persons to be committed on the basis of clear and convincing evidence, while proof beyond a reasonable doubt was needed to commit mentally ill persons. In addition, it allowed close relatives and guardians to participate as parties in proceedings for the mentally retarded, but not for the mentally ill.[125] The Court, in a five to four ruling, held that there was a rational basis for such differential treatment and consequently no equal protection violation.[126] The Court declined to discuss the question of whether heightened scrutiny was needed because it was not properly raised below,[127] but it cited as authority its earlier holding in *Cleburne v. Cleburne Living Center, Inc.*, in which the Court refused to categorize the mentally retarded as a super-protected suspect class.[128] The Court reasoned that "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."[129] Further, it emphasized that the legislature need not articulate a purpose or rationale supporting its classification, but rather the law must be sustained provided any "reasonably conceivable state of facts" can provide a justification.[130] It noted that "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."[131]

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121. *Id.*

122. *Id.* at 2100.

123. *See, e.g.*, Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) (age is not a suspect classification); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (mental retardation is not a trait, like race or gender, that triggers higher levels of equal protection scrutiny).

124. 113 S. Ct. 2637 (1993).

125. *Id.* at 2640-41.

126. *Id.* at 2650.

127. *Id.* at 2642.

128. *Id.* at 2643.

129. *Id.* at 2642.

130. *Id.*

131. *Id.* at 2643.

As to the different standards of proof, Justice Kennedy reasoned that because mental illness is more difficult to diagnose than mental retardation, Kentucky's decision to assign a lower level of proof in commitment proceedings involving the mentally retarded was justified. Both in determining whether the person suffers from mental illness or mental retardation and in assessing whether the person presents a danger or a threat of danger to self, family, or others, the difference in diagnosis alone provides a rational basis for the disparate treatment of the two groups.[132] In addition, Justice Kennedy reasoned that because the prevailing methods of treatment for the mentally ill are much more invasive than those given the mentally retarded, the higher burden of proof at the commitment stage was rational.[133]

Addressing the disparate rule regarding involvement of close relatives and guardians, six Justices agreed that their participation in proceedings for the mentally retarded was permitted because they would more likely have valuable insights that could be considered during the involuntary commitment process.[134] Mental illness, by contrast, often manifests itself with suddenness and usually after minority. Thus family members would be less likely to provide necessary information. Also, individuals previously of sound mental health may have a need for privacy that justifies the state in confining a commitment proceeding to the "smallest group compatible with due process."[135] Although arguably Kentucky could have required relatives and guardians to participate without being parties to proceedings for the mentally retarded, the majority emphasized that traditional equal protection analysis does not require a state to choose the least-restrictive means of achieving its legislative end.[136]

The dissenting Justices argued that the Kentucky scheme could not survive rational-basis scrutiny, and that the majority had failed to follow *Cleburne*, which, despite its purported rejection of heightened scrutiny, required some inquiry into the record to support the state's proffered justifications.[137] The dissenters contended that the majority's emphasis on the diagnostic differences was too narrow and ignored the fact that the respective interest of the public and the subjects of the commitment proceeding were identical: "Both the ill and the retarded may be dangerous, each may require care, and the State's interest is seemingly of equal strength in each category of cases."[138] As to the purported difference in treatment, the dissent presented statistical data suggesting that seventy-six percent of the institutionalized retarded also receive some type of psychoactive drug, and that fully fifty-four percent receive psychotropic

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132. *Id.* at 2644.
133. *Id.* at 2645.
134. *Id.* at 2647-48.
135. *Id.*
136. *Id.* at 2648.
137. *Id.* at 2651-52.
138. *Id.* at 2653.

drugs.[139] Thus, there was no plausible basis for the majority's assumption that the institutional response to mental retardation is less intrusive than treatment of mental illness. By applying the highly deferential approach used for traditional equal protection analysis, the majority ignored this data and refused to more closely scrutinize the state's proffered justifications for its enactment.

2. *Heightened Scrutiny.*—When a law intentionally discriminates against a suspect class—race, national or ethnic origin, or to a certain degree alienage—or if it interferes with a fundamental right, the Court applies strict scrutiny, requiring the government to show a compelling interest and no less drastic means for its legislation.[140] Further, in the areas of gender and illegitimacy, the Court has applied a so-called intermediate approach requiring the government to show that the classification bears a fair and substantial relationship to an important government interest.[141]

As to heightened scrutiny based upon suspect classification, the United States Supreme Court in recent years has invoked the equal protection guarantee to invalidate the use of peremptory challenges on the basis of race. Although initially limited to prosecutors, the Supreme Court last year in *Georgia v. McCollum*[142] held that the equal protection clause prohibits criminal defendants from exercising peremptory challenges on the basis of race.[143] The Supreme Court this term addressed the question of whether excluding potential jurors because of their sex is just as unlawful as disqualifying them on the basis of their race.[144] The plaintiff in the case, a man facing an Alabama paternity lawsuit, argued his rights were violated when an all-female jury decided he was the child's father and he had to pay child support. The Court ruled that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[145] Because the practice serves to perpetuate archaic stereotypes about the relative abilities of men and women, and because the state has no "exceedingly persuasive" justification for allowing the discrimination, the state fails to meet the heightened scrutiny standard.[146]

As to the second vehicle for triggering strict scrutiny, namely fundamental rights, the Court has long recognized the constitutional right of citizens to create and develop political parties, and to exercise their right to vote. The right is derived from the First Amendment and has also been held to be protected as a

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139. *Id.* at 2654.

140. The reference to a racial classification as "suspect" apparently originated with Korematsu v. United States, 323 U.S. 214 (1944).

141. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (gender discrimination); Mills v. Habluetzel, 456 U.S. 91 (1982) (illegitimacy).

142. 112 S. Ct. 2348 (1992).

143. *Id.* at 2359.

144. J.E.B. v. *Alabama ex rel.* T.B., 114 S. Ct. 1419 (1994).

145. *Id.* at 1421.

146. *Id.* at 1426-27.

fundamental right under the Equal Protection Clause.[147] Thus, in *Norman v. Reed*,[148] the Court held that restrictions limiting the access of new parties to the ballot must be narrowly drawn to advance a state interest of compelling importance.[149] The Illinois statute required new parties, such as the Harold Washington Party, to obtain 25,000 signatures from each of the county's two districts in order to appear on the county ballot. Because this was more rigorous than the rule governing access to the state ballot, the law was held to be unconstitutional.[150]

In *Gallagher v. Election Board*,[151] the Indiana Supreme Court considered the validity of an Indiana statute limiting the voting rights of those who move from one precinct to another within thirty days of an election. The law requires voters who move to a new precinct to have their registration transferred to that new precinct no later than the twenty-ninth day prior to the election, which effectively disenfranchises newcomers. The statute provides that voters who stay within the same county and complete an affidavit at the county election office requesting a transfer of registration may, however, vote in their former precinct.[152] The Indiana Court of Appeals reasoned that because the statute adversely affected the fundamental right to vote, the state had to demonstrate a compelling interest for its distinctions, which it failed to do.[153] The Indiana Supreme Court reversed, finding that the lower court erred in applying strict scrutiny and in ignoring United States Supreme Court decisions that have recognized the validity of reasonable residency requirements.[154] Although accepting the notion that the right to vote is fundamental, it found that citizens do not enjoy a fundamental right to vote in a precinct in which they do not reside. Thus, the Indiana statute needed only to survive rational basis analysis.[155] Because an individual who changes counties has a "more attenuated" interest in local elections than an individual who locates within the same county where the legislative district is likely to remain the same, Indiana has a rational

147. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

148. 112 S. Ct. 698 (1992).

149. *Id.*

150. *Id.* at 708. *Cf.* Burdick v. Takushi, 112 S. Ct. 2059 (1992), holding that Hawaii's blanket prohibition on write-in voting does not unreasonably infringe upon its citizens' rights under the First Amendment. Since the state's ballot access laws imposed only reasonable burdens on First Amendment rights, any prohibition against write-in voting was presumptively valid and was counterbalanced by the state's interest in maintaining the integrity of the democratic system. A few years ago, in *Paul v. Indiana Election Bd.*, 743 F. Supp. 616 (S.D. Ind. 1990), a similar provision in the Indiana Code was struck as unconstitutional. Assuming Indiana law is similar to ballot access provisions in Hawaii, arguably a prohibition on write-in voting would be presumptively valid.

151. 598 N.E.2d 510 (Ind. 1992), *cert. denied*, 113 S. Ct. 1051 (1993).

152. *Id.* at 512.

153. *Id.* at 514, referring to *Gallagher*, 579 N.E.2d at 652-53.

154. 598 N.E.2d at 514.

155. *Id.* at 514-15.

basis in making this classification.[156] Further, the requirement that the intra-county voter execute the required transfer affidavit in order to exercise one's franchise in the former precinct rationally serves the state's interest in keeping accurate records.[157] Thus, the court sustained the Indiana statute in its entirety.

D. Free Speech and Association

A significant number of United States Supreme Court, as well as lower court, decisions addressed important First Amendment issues. The Court, for the second time in two years, tackled the difficult question of whether the First Amendment should protect harmful speech, especially hate speech. In addition, it decided three cases exploring the extent to which commercial speech deserves constitutional protection. In other cases, lower courts heard First Amendment speech and association claims brought by government employees.

1. First Amendment Protection for Harmful Speech.—The Court has long recognized that certain types of speech are of such slight social value and so injurious to the public good that they should not be entitled to First Amendment protection. Thus, obscenity, child pornography, libelous speech,[158] speech that incites imminent lawless action, and fighting words have been deemed to fall outside the protection of the First Amendment.[159] Nonetheless, in *R.A.V. v. City of St. Paul*,[160] the Court held that even if the city's bias-motivated ordinance was construed to prohibit only arguably unprotected fighting words, because the statute banned only a certain category of fighting words, *i.e.*, those that would arouse resentment on the basis of race, color, creed, religion, or gender, this was an impermissible content-based restriction on speech.[161] The ordinance prohibited speakers who expressed views on the disfavored subjects

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156. *Id.* at 515.

157. *Id.* at 516.

158. Even libelous speech receives some protection. The Supreme Court has held that where a public figure or public official is the object of libelous statements, the public official must prove, by clear and convincing evidence, that the material was published with actual malice, i.e., knowledge that it was false, or reckless disregard for whether it was false or not, in order to recover any damages. *See* Heeb v. Smith, 613 N.E.2d 416 (Ind. Ct. App. 1993) (defamation action by former superior court judge against attorney and president of county bar association was precluded because statements made were substantially true and there was thus no actual malice as required for a public figure to recover). *Cf.* Henrichs v. Pivarnik, 588 N.E.2d 537 (Ind. Ct. App. 1992) (the element of actual malice was established with convincing clarity as a matter of law, thus supporting the trial court's summary judgment order on behalf of the former Indiana Supreme Court Justice).

159. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8 at 837-38 (2d ed. 1988).

160. 112 S. Ct. 2538 (1992).

161. *Id.* at 2547. The concern with content neutrality also led to the invalidation of an Indiana statute that exempted newspapers from sales tax. In *Emmis Publishing Co. v. Department of State Revenue*, 612 N.E.2d 614 (Ind. Tax Ct. 1993), the court held that the statutory definition of newspaper as limited to publications "published for the dissemination of news of importance and of current interest to the public" discriminated on the basis of the content of speech and thus was incompatible with the purposes of the First Amendment.

of race, color, creed, religion, or gender, while permitting expression containing abusive invectives addressing other topics. Although the protection of the human rights of members of groups who have been subject historically to discrimination is a compelling government interest, the strict scrutiny standard could not be met because there are content-neutral ways to advance that interest.[162]

By focusing on the content neutrality problem, Justice Scalia, joined by four Justices, failed to resolve the core question raised in the certiorari petition, namely whether words that merely inflict injury to sensibilities are unprotected or whether the Court should retain the more traditional, narrow definition of fighting words as limited to one-on-one incitements to violence. Four Justices, concurring separately, reasoned that the Minnesota Supreme Court had misconstrued earlier case precedent to include as fighting words "expressive activity caus[ing] [merely] hurt feelings, offense, or resentment," and concluded that the statute was constitutionally overbroad.[163] Thus far, Indiana courts have applied the more narrow definition of fighting words and therefore have not addressed this issue.[164]

Less than twenty-four hours after the *R.A.V.* decision was handed down, the Wisconsin Supreme Court invalidated its "hate enhancement" statute, which increased the penalty for offenses in which the victim was intentionally selected on the basis of race, color, religion, disability, sexual orientation, national origin, or ancestry. The Wisconsin court found that the enhancement provision threatened to chill free speech and that it stepped into the realm of "subjective mental thought."[165] Disagreeing, the United States Supreme Court in *Wisconsin v. Mitchell*[166] unanimously held that enhancing Mitchell's conviction for aggravated battery from two to four years did not violate his First Amendment rights.[167] Justice Rehnquist emphasized that the statute punished the act of selection rather than thought, and that assaultive behavior was not the type of

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162. 112 S. Ct. at 2550. The Court stated that laws which selectively proscribe fighting words are presumptively invalid. *Id.* at 2542. The city argued that content-neutral means would not accomplish its purpose, which was to register its strong disapproval of this type of speech and to clarify that such speech would not be tolerated in that community. Justice Scalia reasoned that it was precisely this message which the government could not convey unless it met strict scrutiny. *Id.* at 2550.

163. 112 S. Ct. at 2559-60.

164. *See* Price v. State, 600 N.E.2d 103, 108 n. 6 (Ind. Ct. App. 1992), *rev'd on other grounds* 622 N.E.2d 954 (Ind. 1993) (adopting the narrow definition of fighting words in construing the state's prohibition of "unreasonable noise" in its disorderly conduct statute). The court's treatment of the state constitutional challenge to this statute is discussed *supra* notes 12-18 and accompanying text. *See also* Robinson v. State, 588 N.E.2d 533 (Ind. Ct. App. 1992) (even if such words as "get the fuck away," "bullshit," and "mother-fucker" may be tolerated or in common usage by a certain segment of society, they still constitute fighting words which "tend to incite an immediate breach of peace").

165. 486 N.W.2d 807, 811 (Wis. 1992).

166. 113 S. Ct. 2194 (1993).

167. *Id.* at 2202.

expressive conduct that could be considered as protected speech. He noted that sentencing judges traditionally have had discretion to consider a wide variety of factors, including bad motive for committing a crime, provided they do not consider a defendant's abstract beliefs.[168] *R.A.V.* was distinguished as a case where the ordinance was explicitly directed at expression, while the Wisconsin statute "is aimed at conduct unprotected by the First Amendment."[169] The Court found that the "State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[170]

Further, Justice Rehnquist rejected plaintiff's argument that the statute was constitutionally overbroad because of its chilling effect on free speech. This argument presupposes that persons would suppress unpopular, bigoted opinions for fear that if they later committed offenses covered by the statute, such opinions would be offered at trial to establish motive. Justice Rehnquist concluded that such a hypothesis was too speculative to support an overbreadth claim, and that, in any event, the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[171] A "hate enhancement" bill was enacted by the Indiana legislature during the 1994 session.

2. *Commercial Speech.*—Although the Court previously deemed this category to be unprotected, it held that consumers have a right to receive truthful communication, and thus commercial speech should be entitled to some, albeit less, protection than non-commercial speech.[172] Deceptive or misleading commercial speech or that which counsels illegal action may be prohibited, and other types of commercial speech may be regulated provided the government demonstrates a substantial interest that is directly promoted by its regulation.[173] The question of how much government regulation of commercial speech should be allowed in light of its less protected status has proved to be troublesome. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[174] the Supreme Court held that even a content-based statute singling out advertising of gambling parlors is valid because it serves a substantial state interest in reducing the demand for casino gambling by Puerto Rican residents and because it is no more extensive than necessary.[175]

This past term, in *United States v. Edge Broadcasting Co.*,[176] the Supreme Court sustained a federal statute that criminalized television and radio broadcast-

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168. *Id.* at 2199-2200.
169. *Id.* at 2201.
170. *Id.*
171. *Id.*
172. Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc., 425 U.S. 748, 773 (1976).
173. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).
174. 478 U.S. 328 (1986).
175. *Id.* at 348.
176. 113 S. Ct. 2696 (1993).

ing of lottery advertisements by licensees who operate in a state that prohibits lotteries.[177] Edge Broadcasting is a Virginia corporation licensed by North Carolina, and it broadcasts from a small town three miles south of the Virginia border. Virginians comprise more than ninety-two percent of its audience, but because North Carolina does not sponsor a lottery, the federal statute compels Edge to refrain from contracting with Virginia for broadcast of advertisements promoting Virginia's lottery.[178] Edge argued that the federal restriction did not advance the asserted government interest because North Carolinians already experienced pervasive exposure to Virginia lottery advertising through television, broadcast, and print media based in Virginia. The Court nonetheless sustained the federal statute. The Court found that the federal government had a substantial interest in supporting the policy of non-lottery states, while at the same time not interfering with the policy of states that permit lotteries.[179] In commercial speech cases, the Court has held that the means must merely be reasonably related to promoting the government interest, and here the government advanced its purpose by reducing lottery advertising, even when such advertising was "not wholly eradicated."[180]

Although the analysis in *Edge Broadcasting* suggests that the Supreme Court does not provide much protection for commercial speech, in two other cases this term the Court invalidated commercial speech restrictions. In *Cincinnati v. Discovery Network, Inc.*,[181] the Court struck a city ordinance that prohibited the distribution of commercial handbills on public property, while allowing non-commercial newsracks. Applying the same standard used in *Edge*, the Court held that the city failed to establish a "reasonable fit" between its legitimate interest in safety and aesthetics and the discriminatory means it had chosen.[182] While the city argued that its selective ban was justified because of the "less protected" status of commercial speech, Justice Stevens postulated that the city had attached more importance to the distinction between commercial and non-commercial speech than was warranted, and it had "seriously underestimate[d] the value of commercial speech."[183]

Justice Stevens reasoned that because newsracks filled with commercial or non-commercial publications are equally responsible for safety concerns and visual blight, "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted."[184] Thus, a bare assertion of the "low value" of commercial speech will be an insufficient justification for laws that

177. *Id.*
178. 113 S. Ct. at 2702.
179. *Id.* at 2703.
180. *Id.* at 2707.
181. 113 S. Ct. 1505 (1993).
182. *Id.* at 1510.
183. *Id.* at 1511.
184. *Id.* at 1514.

discriminate against this form of speech. The case seems difficult to reconcile with *Edge Broadcasting*. One may contend that by eliminating sixty-two of Cincinnati's 2,000 newsracks that were used for purely commercial purposes, the problem of sidewalk congestion and aesthetics would be at least partially ameliorated. Although both cases arguably used a "reasonable fit" standard, the opinions by various Justices reflect continued disagreement about government's power to regulate commercial speech.

In a third commercial speech case, *Edenfield v. Fane*,[185] the Court invalidated a Florida statute that prohibited direct, in-person solicitation of potential clients by certified public accountants (CPAs). It found that the law failed to meet the standard that government regulation of commercial speech "be tailored in a reasonable manner to serve a substantial state interest."[186] The Court had little difficulty in accepting the substantiality of the state's asserted interest in protecting consumers from fraud or overreaching. It found, however, that the flat ban did not advance the state's interest; there was no study suggesting that personal solicitation of prospective business clients by CPAs created the danger of fraud or overreaching nor was there anecdotal evidence to justify this restriction.[187]

Although the Court in 1978 sustained a similar prohibition on in-person solicitation by attorneys,[188] in *Edenfield* the Court reasoned that solicitation by CPAs does not pose the "same dangers" (*i.e.*, a CPA is not a professional trained in the art of persuasion) and the typical client of a CPA is far less susceptible to manipulation than young accident victims whom the state was trying to protect from attorney solicitation.[189] The Court emphasized that "[e]ven under the First Amendment's somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial government interest."[190] Here the Court concluded that the ends sought by the state were simply not being advanced by the speech restriction and thus Fane's right to speak was infringed.[191]

3. Free Speech and Association Rights of Government Employees.—The United States Supreme Court has held that government cannot condition employment on relinquishing First Amendment rights. In *Elrod v. Burns*,[192] it held that political patronage systems wherein employees are fired simply because they are members of the wrong political party violate the Constitution.[193] In *Rutan v. Republican Party*,[194] the Court in 1990 extended this

185. 113 S. Ct. 1792 (1993).
186. *Id.* at 1798.
187. *Id.* at 1800.
188. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).
189. *Edenfield*, 113 S. Ct. at 1802-03.
190. *Id.* at 1804.
191. *Id.*
192. 427 U.S. 347 (1976).
193. *Id.* at 374.

protection to include patronage-based decisions regarding hiring, promotion, transfer, and recall decisions. Only when the employer can demonstrate that party affiliation is an appropriate requirement for the performance of the specific job in question may an employer escape liability.[195] Thus, in *Matlock v. Barnes*,[196] the Seventh Circuit held that an investigator in the city law department was not a policy-making or a confidential employee because he had little authority, did not supervise anyone, and there was no area regarding his duties where political affiliation would affect job performance.[197] He could not, therefore, be terminated for political reasons.[198] On the other hand, in *Selch v. Letts*[199] the Seventh Circuit held that a Republican could be discharged from his position as a state highway subdistrict superintendent on the basis of his political affiliation.[200] The court examined the amount and nature of the plaintiff's responsibilities, focusing attention upon whether an opposition party loyalist could threaten the policy goals of the party in power.[201] Although conceding that upper levels of management provided guidelines for the execution of plaintiff's tasks, because he could decide where and when work was to be completed, his implementation of policy would have a "substantial effect on the public's perception of the Democratic administration."[202] Thus, the new Democratic governor was entitled to fill the position with individuals politically loyal to him.

Although the defendant carries the burden of proving that political affiliation is a necessary prerequisite to effective job performance, the plaintiff has the initial burden of establishing that political affiliation was a motivating factor in the adverse employment decision. This proved to be a major obstacle for several Indiana litigants. In *Vukadinovich v. Board of School Trustees*,[203] the Seventh Circuit held that the district court properly granted summary judgment for the defendants because no reasonable jury could conclude that a teacher's comments made two years prior to a school board's decision to terminate his employment contract were a substantial or motivating factor in the school board's decision.[204] In *Garrett v. Barnes*,[205] although there was sufficient evidence to

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194. 497 U.S. 62 (1990).

195. *Id.* at 64 (citing *Elrod* and Branti v. Finkel, 445 U.S. 507 (1980)).

196. 932 F.2d 658 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 304 (1991).

197. *Id.* at 664.

198. *Compare* Dimmig v. Wahl, 983 F.2d 86 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 176 (1993) (Illinois deputy sheriff who was discharged due to his refusal to campaign for the sheriff has no First Amendment claim because deputies operate with sufficient autonomy and discretionary authority to justify the sheriff's use of political considerations).

199. 5 F.3d 1040 (7th Cir. 1993).

200. *Id.* at 1045-47.

201. *Id.* at 1043.

202. *Id.* at 1046.

203. 978 F.2d 403 (7th Cir. 1992).

204. *Id.* at 408-09.

205. 961 F.2d 629 (7th Cir. 1992).

conclude that a mayor was aware of an employee's endorsement of his political opponent, there was no direct or circumstantial evidence to support the employee's contention that the termination was politically motivated. The Seventh Circuit observed that mere "public perception of political machinations, innuendo, and speculation cannot be the basis of a jury verdict."[206]

When an employee's speech rather than association triggers the adverse employment action, the Supreme Court applies a balancing test to determine whether the speech rights outweigh the government's interests. In *Connick v. Myers*,[207] the Court stated that the critical, initial question is whether the government employee's speech is a matter of public concern.[208] The *Connick* Court characterized the plaintiff's speech as largely an internal personnel dispute—the plaintiff was angry over her transfer to another department. Consequently, the Court determined that the speech was entitled to little protection, and the defendant could justify the dismissal by merely articulating a belief in the disruptive potential of the plaintiff's conduct.[209]

Applying *Connick*, the Seventh Circuit in *Colburn v. Trustees of Indiana University*[210] found that the plaintiff's speech, which consisted of letters expressing concern about a feud within the sociology department and requesting external review of the department's peer review committee, was not a matter of public concern and was not protected by the First Amendment.[211] Although the court noted that speech is not unprotected simply because it raises complaints or other issues personal to the speaker, it found that speech is not protected where the overriding reason for the speech is the concern of only a few individuals whose careers may be on the line.[212] Similarly, in *Norris v. Board of Education*,[213] the district court emphasized that an employee's speech must present a matter of public concern and not merely a private dispute between parties in order to implicate the First Amendment.[214]

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206. 961 F.2d at 634. *See also* Caldwell v. City of Elwood, 959 F.2d 670 (7th Cir. 1992) (because government employee who claimed he was retaliated against for speaking out on matters of public concern failed to sufficiently allege that any defendant retaliated against him because of his conversation with the mayor, his complaint was properly dismissed); Cusson-Cobb v. O'Lessker, 953 F.2d 1079 (7th Cir. 1992) (employee's conclusory assertion that her political affiliation was well known was insufficient to overcome employer's unequivocal denial of any knowledge of employee's political affiliation prior to the discharge).

207. 461 U.S. 138 (1983).

208. *Id.* at 146.

209. *Id.* at 154.

210. 973 F.2d 581 (7th Cir. 1992).

211. *Id.* at 585-86.

212. *Id.* at 588.

213. 797 F. Supp. 1452 (S.D. Ind. 1992).

214. *See also* Hartman v. Board of Trustees of Community College Dist. 508, 4 F.3d 465 (7th Cir. 1993) (when the overriding reason for the speech, determined by its content, form and context, appears to be related to the speaker's personal interests as an employee, the speech will not be afforded protection). *Cf.* Glass v. Dachel, 2 F.3d 733 (7th Cir. 1993) (speech which discloses

Even when the speech is deemed to be a matter of public concern, the court must still balance the free speech interest of the employee against the state's interest as an employer in running an efficient operation. In *Lach v. Lake County*,[215] the Indiana Court of Appeals reversed a trial court's application of this standard. The sheriff's department contended, and the trial court found, that Lach could be disciplined for writing letters to the newspaper regarding candidates for office during a campaign because of the need to maintain discipline and morale in the sheriff's department. Although the department argued that the published comments would have a tendency to inhibit the proper performance of Lach's duties and would make it difficult for him to supervise other officers under his command, the defendant produced no evidence that Lach's comments undermined morale or discipline.[216] The trial court's unsubstantiated "inferences" were unwarranted, and thus the disciplinary action against Lach was improper.[217]

In addition to the right of government employees to speak and associate freely, the Supreme Court also has recognized a right not to associate. In *Abood v. Detroit Board of Education*,[218] the Court held that the state could not force public school teachers to join a union.[219] Although it has allowed states to require payment of a service fee for collective bargaining purposes, the Court in subsequent cases has emphasized that any funds must be germane to collective bargaining and must be justified by the government's vital policy in labor peace and avoiding "free riders."[220]

Applying this case precedent, an Indiana appellate court in *Albro v. Indianapolis Education Ass'n*[221] held that the union was required to affirmatively prove chargeable expenses to establish a non-union member's fair share fee.[222] It held that lobbying expenses, political and charitable expenses (even if *de minimis*, public relations expenses), and organizing expenses were not chargeable.[223] The *Albro* court further held that state and national affiliation

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wrongdoing and a breach of the public trust is protected even if it may have been motivated in part by a personal vendetta against a superior); Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993) (plaintiff's speech, in support of co-workers involved in a lawsuit alleging gender discrimination by employer, an Illinois public agency, involved a matter of public concern); Churchill v. Waters, 977 F.2d 1114 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 2991 (1993) (plaintiff's speech regarding hospital's failure to properly educate and train nurses in highly specialized areas is clearly a matter of public concern; hospital may be liable even if, due to inadequate investigation, it had at the time of discharge insufficient knowledge of the content of the speech to realize its protected status).

215. 621 N.E.2d 357 (Ind. Ct. App. 1993).
216. *Id.* at 359.
217. *Id.* at 359-60.
218. 431 U.S. 209 (1977).
219. *Id.* at 242.
220. Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991).
221. 585 N.E.2d 666 (Ind. App. 1992).
222. *Id.* at 669.
223. *Id.* at 672.

expenses were chargeable only to the extent that the benefit inured to members of the local union.[224] The Indiana Supreme Court adopted this opinion in its entirety in *Fort Wayne Education Ass'n, Inc. v. Aldrich*,[225] reversing a lower court decision that sustained the union's proposed method of calculating fair share fees.

E. Freedom of Religion

1. The Establishment Clause.—Proceeding on the premise that the proper role of government is to maintain a position of neutrality vis-a-vis religion, the Supreme Court in *Lemon v. Kurtzman*[226] recognized that the Establishment Clause required government programs to share three characteristics: (1) the program must have a secular purpose; (2) the primary effect must neither advance nor inhibit religion; and (3) the program cannot create excessive entanglement between church and state.[227]

In recent years, several Justices have vociferously argued that the *Lemon* test is too restrictive and that it should be replaced by a more "accommodationist" approach to church-state questions, but, thus far, a majority has refused to overturn the decision.[228] In *Lee v. Weisman*,[229] the Court, in a five to four decision, rejected the Solicitor General's invitation to give government greater freedom to inject religion into its activities and policies. While not specifically addressing the *Lemon* factors, the majority held that the Establishment Clause outlaws the practice of public schools' inviting clergy to deliver non-sectarian prayers at graduation ceremonies.[230] Justice Kennedy found that graduation prayers "bore the imprint of the State and thus put school-age children who objected in an untenable position."[231] He emphasized the heightened concern with protecting freedom of conscience from subtle, coercive pressure in the elementary and secondary school setting.[232]

Citing *Lee*, the Seventh Circuit in *Berger v. Rensselaer Central School Corp.*[233] held that an Indiana public school district violated the Establishment Clause by permitting representatives of Gideon International to distribute Bibles

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224. *Id.* at 671-74.
225. 594 N.E.2d 781 (Ind. 1992).
226. 403 U.S. 602 (1971).
227. *Id.* at 612-13.
228. *See infra* notes 242-43 and accompanying text.
229. 112 S. Ct. 2649 (1992).
230. *Id.* at 2661.
231. *Id.* at 2657.
232. Despite *Lee*, in Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993), the Fifth Circuit sustained a public school district's resolution permitting high school seniors to deliver non-sectarian, non-proselytizing invocations at graduation ceremonies. The court reasoned that its conduct did not coerce students' participation in religion, and therefore did not violate the Establishment Clause.
233. 982 F.2d 1160 (7th Cir. 1993), *cert. denied*, 113 S. Ct. 2344 (1993).

to elementary school children during instructional time, notwithstanding the school district's policy of equal access for all speakers.[234] Although the district court had sustained the practice, saying it was no more offensive than allowing other groups, such as the Little League, into classrooms,[235] the appellate court found that this practice bore the *imprimatur* of state involvement in religion.[236] Further, a public school could not sanctify such an endorsement of religion by simultaneously sponsoring non-religious speech. In short, the Establishment Clause trumps the free speech clause "in the coercive context of public schools."[237]

The Seventh Circuit's holding in *Berger* should be compared to this term's Supreme Court decision in *Lamb's Chapel v. Center Moriches School District.*[238] In *Lamb's Chapel*, the school board relied upon the Establishment Clause to refuse requests by plaintiffs to use school facilities *after hours* for a religious-oriented film series on Christian family values. The school corporation allowed social, civic, and recreational use of its facilities after school hours, but denied any use for religious purposes.[239] The Court unanimously found that this discrimination violated free speech rights and that the asserted Establishment Clause defense was faulty.[240] Applying the *Lemon* analysis, the Court found no realistic danger that the community would believe the district was endorsing religion or any particular creed by merely allowing after-hours use of its facility.[241] Further, any benefit to religion or to the church would have been incidental.[242]

Three Justices, concurring in the judgment, wrote separately to challenge the majority's citation to *Lemon.* Justice Scalia described *Lemon* as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[243] He noted that five of the current sitting Justices have already personally "driven pencils through the creature's heart," and yet the *Lemon* opinion continues to "stalk" Establishment Clause jurisprudence.[244] Justice Scalia argued that the Establishment Clause should not be read to forbid nondiscriminatory access to school facilities provided the practice "does not signify state or local embrace of a particular religious sect."[245]

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234. *Id.* at 1171.
235. *Id.*
236. *Id.* at 1166.
237. *Id.*
238. 113 S. Ct. 2141 (1993).
239. *Id.* at 2144.
240. *Id.* at 2148.
241. *Id.*
242. *Id.*
243. *Id.* at 2149 (Scalia, J., concurring).
244. *Id.* at 2149-50.
245. *Id.* at 2151.

The significance of the Court's refusal to bury *Lemon* is reflected in the recent Seventh Circuit decision of *Gonzales v. North Township of Lake County*.[246] In *Gonzales*, plaintiffs challenged a local township's display of a crucifix in its public park. The defendants argued that the crucifix was a war memorial, and its presence on public property did not violate the Establishment Clause. The Seventh Circuit began by noting that, "[a]lthough the test is much maligned, the Supreme Court recently reminded us that *Lemon* is controlling precedent and should be the framework used by courts when reviewing Establishment Clause challenges."[247] Applying the first prong of *Lemon*, the court rejected the township's claim that the crucifix was intended to act as a war memorial. Because the township failed to offer any evidence showing that the crucifix ever had been used for memorial purposes, and the history suggests that the goal was to spread the Christian message throughout Lake County, the court held that the primary purpose was religious.[248] Further, even if the township displayed a sign dedicating the symbol to "our honored dead," it still could not free itself from the constitutional requirement that a secular purpose be demonstrated.[249]

Concerning *Lemon*'s second requirement, the court held that "the crucifix's presence in the Park convey[ed] the primary message of the Township's endorsement of Christianity."[250] The Seventh Circuit distinguished previously sustained government displays of religious messages by pointing out that the crucifix did not "bear secular trappings sufficient to neutralize its religious message."[251] Further, unlike seasonal displays or displays having historical significance, the township had a permanent symbol displayed in a prominent public area that endorsed religion and thus violated the Establishment Clause.[252]

Despite the Supreme Court's apparent refusal to bury *Lemon*, the accommodationist proponents won a victory in the high court last term. In *Zobrest v. Catalina Foothills School District*,[253] the Court held five to four that the Establishment Clause does not bar a public agency from providing a sign-language interpreter to a deaf child in a private, sectarian high school.[254] Using the *Lemon* analysis, most forms of "parochiaid" since the 1970s have been

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246. 4 F.3d 1412 (7th Cir. 1993).
247. *Id.* at 1417-18.
248. *Id.* at 1421.
249. *Id.*
250. *Id.* at 1422.
251. *Id.* at 1423.
252. *Id.* The court goes on to note that, as to the third prong, the record did not show any contact between the township and the Knights of Columbus who originally donated the crucifix, and thus it could not find excessive entanglement in religion by virtue of the crucifix merely standing in Wicker Park.
253. 113 S. Ct. 2462 (1993).
254. *Id.* at 2469.

disallowed as either impermissibly advancing religion or creating excessive entanglement between Church and State.[255] Nonetheless, in *Zobrest*, five Justices held that government programs that neutrally provide benefits to a broad class of citizens (here, students with disabilities) should not be invalidated just because sectarian institutions also may receive an attenuated financial benefit.[256] Without invoking the *Lemon* test, the majority reasoned that the public subsidy created no financial incentive for parents to choose a sectarian school, and because the aid was not skewed towards religion, the service did not offend the Establishment Clause.[257] Deaf children, not sectarian schools, were the primary beneficiaries. In addition, because the parents chose of their own free will to place their child in a pervasively sectarian environment and because the interpreter they requested would neither add to or subtract from that environment, the Establishment Clause did not bar the assistance.[258] Although the interpreter clearly was the conduit for the religious message, the Court took great care in emphasizing all the special features that insulated this form of assistance from the fate of earlier "parochiaid" programs.[259] Further, the Court did not overrule the much-maligned *Lemon* decision. Thus, *Zobrest*'s precedential effect may be quite narrow, and the state of Establishment Clause jurisprudence remains uncertain.

2. *Free Exercise Clause.*—Free exercise claims usually arise when one is seeking an exemption from a neutral, generally applicable law, the aim of which is non-religious, but which conflicts with the tenets of a religion, either preventing a religious practice or compelling forbidden conduct. The Supreme Court has held that where the government practice significantly interferes with free exercise rights, the government has to show an overriding interest. Additionally, the government must show that granting a religious exemption would frustrate that interest.[260] In recent years, however, the Court strayed from applying heightened scrutiny to free exercise claims. In *Employment*

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255. The Court's holdings in this area, however, are not entirely consistent. While the Court has sustained the use of public funds for secular textbooks, it has invalidated aid for slide projectors, tape recorders or record players. It has allowed parochial schools to receive the benefit of speech and hearing therapists on school premises, but not remedial teachers or counselors. *See* Rosalie Berger Levinson, *Separation of Church and State*, 18 VAL. U. L. REV. 707, 713-14 (1984).

256. *Zobrest*, 113 S. Ct. at 2467-68.

257. 113 S. Ct. at 2467. Although the Court does not cite *Lemon*, it relies on two earlier Supreme Court cases where the decisions were reached using the *Lemon* framework.

258. *Id.* at 2468.

259. *Id.* at 2466-69.

260. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (A Seventh Day Adventist was impermissibly denied unemployment compensation benefits because of her refusal to take a job requiring Saturday work; plaintiff must be granted an exemption from the normal requirement that employees seeking unemployment be "available" for work); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish must be granted exemption from state compulsory school attendance law because the state cannot show that granting an exemption to the Amish would impair its compelling interest in an informed citizenry).

Division, Department of Human Resources of Oregon v. Smith,[261] the Court determined that when generally applicable statutes are not specifically directed to religious practices, they need not be subject to strict scrutiny review.[262] Applying a "reasonableness" standard, the Court in *Smith* held that Native American Indians could be criminally prosecuted under generally applicable drug laws for the sacramental use of peyote.[263]

The *Smith* opinion triggered significant alarm regarding the fate of religious liberty. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,[264] three Justices (Souter, Blackmun, and O'Connor) argued in a concurring opinion that *Smith* was wrongly decided and should be overturned.[265] The majority opinion, however, specifically cited *Smith* as good law,[266] although it struck the municipal ordinance in question as not facially neutral.[267] In *Church of Lukumi*, the city claimed it had enacted neutral ordinances prohibiting the sacrificial killing of animals, and that *Smith* was controlling. The record, however, did not support its argument.

Some 60,000 members of the Church of Lukumi Babalu Aye live in southern Florida where they practice a religion that calls for animal sacrifices at birth, marriage, and death rites. The church also sacrifices animals in curing the sick and for the initiation of new members and priests. When the group sought a permit from the city to build a church, the city responded by enacting ordinances banning this practice. Although the majority maintained that neutral laws of general applicability need not be justified by a compelling government interest even if they incidentally burden religious practices, they found in this case that the patchwork of prohibitions and exemptions in the municipal ordinances illustrated that suppression of the central element of the Santeria worship service was the object of the legislation.[268] Thus, the laws had to be subject to "the most rigorous of scrutiny."[269] Because the city permitted the killing of animals for virtually any other purpose, including sport, food, and convenience, and because the statutes were both over- and under-inclusive in substantial respects, the city failed to meet its burden of proving that the ordinances were enacted to serve the city's compelling interests in protecting public health and preventing animal cruelty.[270]

Although the *Hialeah* decision left intact the *Smith* holding, the opinion recently met its demise with passage of the Religious Freedom Restoration Act,

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261. 494 U.S. 872 (1990).
262. *Id.* at 889.
263. *Id.* at 890.
264. 113 S. Ct. 2217 (1993).
265. *Id.* at 2240 (Souter, J., concurring); *id.* at 2250 (Blackmun, J., O'Connor, J., concurring).
266. *Id.* at 2226.
267. *Id.* at 2227-28.
268. *Id.* at 2228-29.
269. *Id.* at 2233.
270. *Id.* at 2229.

which reinstates pre-*Smith* law, by creating a federal statutory right that subjects all threats to religious liberty to rigid scrutiny.[271]

271. P.L. 103-141 was signed into law on Nov. 16, 1993 (current version at 42 U.S.C. § 2000bb (1993)).