STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

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INTRODUCTION

These materials explore state and federal constitutional law developments over the past year. The first part of this survey examines state constitutional law cases, and the remaining materials focus on state and federal court cases that raise significant and recurring federal constitutional issues.

I. DEVELOPMENTS UNDER THE STATE CONSTITUTION

A. Parallel State Provisions Given Independent Significance

Several years ago Chief Justice Randall T. Shepard invited Indiana practitioners to reexamine the state constitution as a potential source for the protection of civil liberties.[1] Even where provisions in Indiana's Bill of Rights parallel those found in the federal Constitution, a different legal analysis may be used. In recent years the Indiana Supreme Court has recognized and applied this principle. For example, in *Moran v. State*,[2] the Indiana Supreme Court ruled that article I, section 11 of the Indiana Constitution,[3] which protects against unreasonable searches and seizures, requires a different analysis than that used under the Fourth Amendment.[4] Although the latter focuses on reasonable expectations of privacy, the court ruled that section 11 requires the inquiry be solely on the reasonableness of the officer's conduct.[5] This new analysis might still yield the same result—in *Moran*, the court held warrantless search of curbside trash was not an unreasonable search under the state constitution, thus reaching the same conclusion that the U.S. Supreme Court did under the Fourth Amendment.[6]

Another example of the court giving independent significance to a state provision involves article I, section 23, the state "Equal Privileges and

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

2. 644 N.E.2d 536 (Ind. 1994).

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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

IND. CONST. art. I, § 11.

4. *Moran*, 644 N.E.2d at 539-40 (comparing equivalent language in the Fourth Amendment).

5. *Id.* at 539.

6. *Id.* at 541 (quoting California v. Greenwood, 486 U.S. 35, 40 (1988)).

Immunities" clause.[7] The texts are not identical: section 23 may be described as an "anti-preference" clause, whereas the Equal Protection Clause is an "anti-discrimination" provision.[8] Nonetheless, state and federal courts in Indiana had for a number of years interpreted the provisions as coterminous.[9] In *Collins v. Day*, [10] the Indiana Supreme Court rejected this trend and ruled that federal equal protection analysis does not apply to article I, section 23. Looking to the text of the provision, the intent of the framers, as well as early decisions interpreting this section, the court rejected federal analysis and its emphasis on suspect classes and fundamental rights.[11] Instead, the Indiana Supreme Court found that the principal purpose of this anti-preference clause was to prohibit the state legislature from affirmatively granting any exclusive privilege or immunity, in particular to private, commercial enterprises.[12] Article I, section 23 requires that statutes that grant unequal privileges or immunities to differing classes of persons meet the following standard:

> 1. The disparate treatment must be "reasonably related to inherent characteristics which distinguish the unequally treated classes"; and
> 2. "The preferential treatment must be uniformly applicable and equally available to all persons similarly situated."[13]

The court emphasized, however, that substantial deference must be given to the legislative judgment, which should be invalidated "only where the lines drawn appear arbitrary or manifestly unreasonable."[14] Applying this analysis, the court sustained the state law that excluded agricultural employers from worker's

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7. "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." IND. CONST. art. I, § 23 .

8. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

9. Reed v. United States, 604 F. Supp. 1253, 1264 (N.D. Ind. 1984) (same standard of review for Fourteenth Amendment and article I, section 23); Reilly v. Robertson, 360 N.E.2d 171, 175 (Ind. 1977) (article I, section 23 intended to protect rights identical to those found in the Fourteenth Amendment's Equal Protection Clause); Haas v. South Bend Community Sch. Corp., 289 N.E.2d 495, 500 (Ind. 1972) (Because rights intended to be protected under both constitutional provisions are identical, a violation of the Fourteenth Amendment necessarily is a violation of article I, section 23.).

10. 644 N.E.2d 72 (Ind. 1994).

11. *Id.* at 75.

12. *Id.* at 77.

13. *Id.* at 80. This standard is derived from earlier Indiana cases that applied rational basis scrutiny but also required that differences used to classify be inherent, substantial, germane to the subject and purpose of the legislative classification, and that such schemes include all within the class. Bolivar Township Bd. of Fin. v. Hawkins, 191 N.E. 158, 163 (Ind. 1934); School of Elwood v. State *ex rel.* Griffin, 180 N.E. 471, 474 (Ind. 1932), *overruled on other grounds by* McQuaid v. State *ex rel.* Sigler, 6 N.E.2d 547 (Ind. 1937).

14. *Collins*, 644 N.E.2d at 80.

compensation coverage[15] because the plaintiff failed to carry his burden "to negative every reasonable basis for the classification."[16]

This past year several Indiana litigants sought to invoke article I, section 23 to invalidate state initiatives ranging from Indiana High School Athletic Association rules to Indiana's Medical Malpractice Act.[17] The requirement that disparate treatment be related to "inherent characteristics which distinguish the unequally treated classes"[18] might suggest some closer scrutiny than that applied under low-level rational basis analysis required by the federal Equal Protection Clause. However, the court's emphasis on deferring to the legislative judgment and its mandate that the plaintiff "negative every reasonable basis for the classification"[19] indicates that this independent analysis will not afford much greater protection to victims of alleged unfair classification schemes. Most appellate court decisions this past term support this conclusion.

For example, in *Indiana High School Athletic Ass'n v. Reyes*,[20] the Indiana Court of Appeals held that an IHSAA rule restricting participation in interscholastic sports to eight semesters met the *Collins* test.[21] Reyes sought to play baseball despite the fact that he was in his ninth semester, having been forced to repeat the ninth grade because of psychological problems and poor grades at the Academia Del Espiritu Santo in Puerto Rico.[22] The IHSAA Executive Committee denied his request for an extra year of eligibility, finding that granting this request would be contrary to the goal of placing academics first and athletics second and that Reyes could not show that enforcement of the rule would cause an "undue hardship."[23] The court overruled the trial court's finding that refusing Reyes an extra year of eligibility was arbitrary and capricious.[24] It also found that the Eight-Semester Rule did not violate article I, section 23, and it sustained the "hardship" exception for those who have suffered an injury, illness or accident, finding that the exception was reasonably related to an inherent characteristic, i.e., lack of opportunity to participate based upon disabling circumstances.[25] In addition, the rule was uniformly applicable and equally available to all persons similarly situated.[26] Although Reyes did not appeal the decision, the school corporation, which faced forfeiture of all baseball games for the "tainted" season, filed a petition to transfer regarding this forfeiture rule.[27]

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15. IND. CODE § 22-3-2-9(a) (1993).
16. *Collins*, 644 N.E.2d at 81.
17. *See infra* notes 18-54 and accompanying discussion.
18. *Collins*, 644 N.E.2d at 80.
19. *Id.* at 81.
20. 659 N.E.2d 158 (Ind. Ct. App. 1995), *trans. granted*, (Ind. May 15, 1996).
21. *Id.* at 168-69.
22. *Id.* at 160.
23. *Id.* at 161.
24. *Id.* at 164.
25. *Id.* at 168-69.
26. *Id.*
27. *Id.* at 169-70.

Similarly, in *Indiana High School Athletic Ass'n v. Avant*,[28] the appellate court sustained an association transfer rule, whereby students who transfer to member schools with a change of residence by their parents have immediate full varsity eligibility at the new school, while students who transfer without a corresponding move by their parents are ineligible for varsity membership for 365 days following the transfer unless the student qualifies under a listed exception.[29] The court ruled that the distinctions between the classifications were reasonably related to achieving the Association's purpose in deterring school jumping and recruitment and that the rule applied equally to all persons similarly situated.[30] The rule allowed a "hardship" exception when strict enforcement of the provision would not violate the spirit of the rule, and Avant's parents claimed the transfer from private to public school was financially, not athletically motivated. However, the IHSAA found that the parents could not meet the second requirement—that enforcement of the rule would cause undue hardship—because there was no change in the family's circumstances.[31]

Ironically, a different panel of the court of appeals held that this same transfer rule violates the purportedly less demanding federal equal protection standard. In *Indiana High School Athletic Ass'n v. Carlberg*,[32] the court relied on an earlier Indiana Supreme Court decision, *Sturrup v. Mahan*,[33] in which the court held that the transfer rule was "unconstitutionally overbroad" in violation of the Fourteenth Amendment.[34] Although the court noted that the *Sturrup* analysis was "out of the mainstream of case law on federal equal protection analysis" in that laws may not be invalidated due to overbreadth under traditional federal equal protection scrutiny, the court felt bound to follow this earlier ruling of the Indiana Supreme Court.[35] The plaintiff in *Avant* had simply failed to raise this federal claim.[36] Because the Indiana Supreme Court has ruled that classification schemes are presumed valid, and that laws may not be condemned for being somewhat under- or over-inclusive, provided they are appropriate as applied to the general subject matter upon which they are intended to operate,[37] this overbreadth

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28. 650 N.E.2d 1164 (Ind. Ct. App. 1995), *trans. denied.*

29. *Id.* at 1170.

30. *Id.*

31. *Id.* at 1168-69. This aspect of the rule appears harsh—provided a move is not athletically motivated, why should a student have to meet the additional "hardship" exception, particularly where such requires a significant "change in financial condition"? *See id.* at 1170. Obviously the concern is that parents not be permitted to thinly disguise athletically motivated transfers, but the strictly worded exceptions may exclude students whose parents simply decide to no longer pay private tuition.

32. 661 N.E.2d 833 (Ind. Ct. App. 1996), *trans. granted*, No. 29S05-9610-CV-681 (Ind. Oct. 24, 1996).

33. 305 N.E.2d 877 (Ind. 1974).

34. *Carlberg*, 661 N.E.2d at 834.

35. *Id.*

36. *Id.* at 834 n.2.

37. *Collins*, 644 N.E.2d at 80. Although underinclusive laws would appear to more directly

argument would be to no avail under state constitutional standards.

A few months after the ruling in *Carlberg*, a federal district court addressed the constitutionality of the transfer rule. Because federal courts, unlike state courts, are not bound by erroneous Indiana Supreme Court interpretations of federal equal protection doctrine, the court in *Robbins v. Indiana High School Athletic Ass'n*[38] rejected *Sturrup* and upheld the validity of the high school transfer rule.[39] It explicitly noted that "federal equal protection 'rational basis' analysis does not contain an 'overbroad' component."[40] In this case, Robbins had transferred from public school to a parochial school, and thus was subject to the IHSAA Transfer Rule, which prevented her from participating as a member of the varsity volleyball team during her first semester because the transfer was not accompanied by a move on the part of her parents. Although the district court conceded that the rule "catches some non-athletically motivated transfers into the net constructed to stop only athletically motivated transfers," it held that under traditional rational basis analysis the regulations must be sustained.[41] Further, it rejected the notion that the rule burdened Robbins' or her parents' First Amendment right to the free exercise of their religion because the rule on its face did not classify in terms of religion, and there was no evidence in the record that it unduly trammeled their religious beliefs.[42] Although recognizing the purported unfairness of the rule in this context, the court concluded that change should "occur through the IHSAA rule promulgation procedure and not by court fiat."[43]

In *Person v. State*,[44] the court sustained a special statutory classification of minors that prohibits them from possessing handguns, and that subjects violators to a mandatory five-day jail term.[45] Again, the court reasoned that the class was clearly defined, the classification was reasonably related to the subject and purpose of the law, and the statutory scheme applied uniformly to all persons under age eighteen.[46] The court emphasized that classifications are primarily a legislative

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violate the requirement that the privilege be equally available to all, the *Collins* court, citing earlier state decisions, stated that "Exact exclusion and inclusion is impractical" and that legislatures shouldn't be required to "provide for every exceptional and imaginary case" in order to survive a constitutional challenge. *Id.*

38. 941 F. Supp. 786 (S.D. Ind. 1996).

39. *Id.* at 793.

40. *Id.*

41. *Id.* at 792-93. *Cf.* Romer v. Evans, 116 S. Ct. 1620, 1632 (1996) (Scalia, J., dissenting) (quoting Beller v. Middendorf, 632 F.2d 788, 808-09 (9th Cir. 1980) (pointing out that although a law may be irrational as applied in certain cases, it does not make that law unconstitutional).

42. *Robbins*, 941 F. Supp. at 792. Because the rule did not cause "grave interference with important religious tenets" nor did it require the parents to act contrary to the fundamental tenets of their belief, strict scrutiny was not required. *Id.*

43. *Id.* at 794.

44. 661 N.E.2d 587 (Ind. Ct. App. 1996), *trans. denied.*

45. *Id.* at 593-94. *See* IND. CODE §§ 35-47-10-5, -8 (Supp. 1996).

46. *Person*, 661 N.E.2d at 593. *See also* Gambill v. State, 675 N.E.2d 668 (Ind. 1996) (verdict option of guilty but mentally ill is reasonably related to the inherent characteristic shared

question and that they "become a judicial question only where lines drawn appear arbitrary or manifestly unreasonable."[47]

In light of this highly deferential approach, it is unlikely that *Collins* will revolutionize equal protection law in Indiana. There are currently pending, however, attempts to utilize section 23 to challenge the constitutionality of a provision of Indiana's Medical Malpractice Act,[48] which requires minors to file claims by their eighth birthday or two years after the incident, whichever is later.[49] Because during the first round of litigation the constitutional claims were rejected using Fourteenth Amendment analysis, the cases were remanded, although one appellate panel cautioned that on remand the burden remains on the plaintiff to "negative every reasonable basis for the [challenged] classification."[50] In the meantime, two panels of the court of appeals have ruled that the general occurrence-based malpractice statute of limitations violates section 23 to the extent it bars a claim before the individual knows it exists or would reasonably be

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by all in the class, namely mental illness, and because it is a pathway to treatment which is uniformly applicable and equally available to all persons found guilty but mentally ill, it does not deny equal protection under art. I, § 23); Greer v. State, 669 N.E.2d 751 (Ind. Ct. App. 1996) (statute denying good time credit for probationers given home detention, while granting it to those on home detention awaiting trial is rationally related to unique nature of probation, which is a conditional liberty, as compared to those who have not yet been convicted of a crime), *trans. granted*, No. 57S03-9610-CR-953 (Ind. Oct. 15, 1996).

47. *Person*, 661 N.E.2d at 593. *See also* American Legion Post No. 113 v. State, 656 N.E.2d 1190, 1193 (Ind. Ct. App. 1995), *trans. denied.* In *American Legion Post*, the court evaluated statutes which prohibited gambling except for riverboat, parimutuel, and participation in state-operated lottery. *See* IND. CODE §§ 35-45-5-2 to -5 (1993 & Supp. 1996). The court determined that the riverboat and parimutuel wagering exceptions do not create unlawful classifications of individuals who may participate in those forms of gambling. *American Legion Post*, 656 N.E.2d at 1193. The court found that although the operation of lotteries is limited to the State Lottery Commission, this privilege was justified because the State Lottery Commission is "uniquely situated to regulate and control gambling activities." *Id.* In the case, *In re Train Collision at Gary*, 654 N.E.2d 1137, 1146-47 (Ind. Ct. App. 1995), *trans. denied*, the court evaluated whether treating a commuter transportation district as a political subdivision, violated article I, section 23. *See* IND. CODE §§ 34-4-16.5-2(b)(2), -20(a)(2) (Supp. 1992) (codified as amended at IND. CODE § 34-4-16.5-2(b)(2) (Supp. 1996); *id.* § 8-5-15-2 (1993)). In concluding that it did not, the court determined that despite the limitation of recovery based on the plaintiff's statutes as interstate travelers on a commuter railway, the regulation was rationally related to the legislative purpose of preserving operation of interstate commuter railways. *Train Collision*, 654 N.E.2d at 1146-47. The regulation did so by preserving the financial condition of counties served by the railways. *Id.* Moreover, the limitations applied "equally and uniformly to all persons injured while passengers . . . ." *Id.* at 1147.

48. IND. CODE § 27-12-7-1 (1993).

49. Ledbetter v. Hunter, 652 N.E.2d 543 (Ind. Ct. App. 1995); Cundiff v. Daviess County Hosp., 656 N.E.2d 298 (Ind. Ct. App. 1995), *trans. denied.*

50. *Ledbetter*, 652 N.E.2d at 550 (quoting Collins v. Day, 644 N.E.2d 72, 81 (Ind. 1994)); *accord Cundiff*, 656 N.E.2d at 302.

expected to discover its existence. In *Martin v. Richey*,[51] the court held that medical malpractice victims are clearly treated differently inasmuch as other tort victims enjoy a discovery-based statute of limitations, thus implicitly granting them a special privilege or immunity.[52] Although conceding that the law is "reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs,"[53] it failed *Collins'* requirement that the law apply equally to all persons who share the same inherent characteristics.[54] Because this is the first time a classification scheme has been invalidated under the new *Collins* test, the Indiana Supreme Court will likely have the final say.

Another area in which the Indiana Supreme Court has charted a different course from federal constitutional analysis in interpreting a parallel state provision involves free speech rights under article I, section 9, of the Indiana Constitution, which broadly guarantees free expression, but also provides that speakers may be held accountable "for abuse of that right."[55] Three years ago, in *Price v. State*,[56] the court held that political speech is a "core value"[57] and that the state cannot punish political speech, even in the context of resisting arrest, unless the political speech inflicts harm upon others "analogous to that which would sustain tort liability against the speaker."[58] In essence no "abuse" can be found unless the political speech causes private harm. Although Price's conduct in shouting profanities protesting the officer's arrest may have created a public nuisance, it did not rise above the level of a "fleeting annoyance" to the residents who were the alleged victims of her tirade, and thus the state could not punish her for her words.[59] The case was significant because it meant that even if Price's speech would be deemed unprotected "fighting words" under the First Amendment, her conviction still had to be overturned because of the state guarantee.[60] Further, unlike First Amendment analysis, the court clarified that under article I, section 9

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51. 674 N.E.2d 1015 (Ind. Ct. App. 1997); Harris v. Raymond, 680 N.E.2d 551 (Ind. Ct. App. 1997). *But see* Johnson v. Lupta, No. 64A03-9611-CV-401, 1997 WL 403702 (Ind. Ct. App. July 21, 1997) (disagreeing with *Martin*).

52. *Martin*, 674 N.E.2d at 1022.

53. *Id.*

54. *Id.* at 1023. The court further held that this occurrence-based statute of limitations violates article I, section 12 which guarantees that courts be open to redress injury to person, property and reputation. *Id.* at 1023-27. Although noting that challenges under section 12 have been rejected in the past, it carefully traced the history and intervening scholarship and concluded that in light of the large number of plaintiffs left without a remedy, section 12 required that a discovery-based statute of limitation apply equally to all tort victims. *Id.* at 1027.

55. "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." IND. CONST. art. I, § 9.

56. 622 N.E.2d 954 (Ind. 1993).

57. *Id.* at 963.

58. *Id.* at 964.

59. *Id.*

60. *Id.* at 964-65.

courts are not to weigh the burden on speech against the government interest: "'Material burden' analysis involves no such weighing nor is it influenced by the social utility of the state action at issue. Instead, we look only at the magnitude of the impairment."[61] In short, the state may not materially burden political speech, a core constitutional value, unless it proves that the expression has specifically harmed other individuals.

Subsequent appellate court opinions, however, have emphasized the unique fact situation in *Price* where the forum was a residential alley at 3 a.m. after a New Year's Eve party where a large group of "quarreling party-goers" had congregated.[62] It was in this pandemonium setting that Price's comments could be characterized as a mere "fleeting annoyance."[63] In each new context the court must decide when speech becomes sufficiently intrusive of the rights of others so as to constitute an unprotected private, not merely a public, nuisance. For example, in *Hooks v. State*,[64] the court reasoned that even if Hooks' speech was protected under the constitution because "it was aimed at protesting the actions of police rather than hindering or obstructing police duties or investigations,"[65] the conviction must nonetheless be affirmed because the State presented evidence that Hooks' screaming was heard by neighbors: "The jury could reasonably conclude from this evidence that Hooks' speech infringed upon the peace and tranquility of others."[66] In dissent, Judge Robertson argued that the verbal protest occurred on a city street and "[t]he magnitude of the infringement upon the peace and tranquility of others could not have surpassed the 'fleeting annoyance' described in *Price*."[67] In most situations speech which triggers an arrest for disturbing the peace will be considered more than "a fleeting annoyance," *Price* may therefore be relegated to its very unique fact pattern. Unfortunately, the Indiana Supreme Court denied transfer in *Hooks* and thus it remains uncertain as to when speech will be viewed as inflicting "harm of a gravity analogous to that required under tort law."[68]

The importance of context, as well as content, is discussed, however, in the Indiana Supreme Court's most recent decision analyzing article I, section 9, *Whittington v. State*.[69] The court began its analysis by noting that the context of Whittington's conduct was significantly different from that in *Price* in that the "expression" occurred inside a private apartment.[70] The conflict arose during police investigation of a domestic incident where Whittington had punched his pregnant sister in the stomach, and the facts demonstrated that his loud outburst

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61. *Id.* at 960 n.7.
62. *Id.* at 956.
63. *Id.* at 964.
64. 660 N.E.2d 1076 (Ind. Ct. App. 1996), *trans. denied.*
65. *Id.* at 1077.
66. *Id.*
67. *Id.* at 1078 (Robertson, J., dissenting).
68. *Price*, 622 N.E.2d at 964.
69. 669 N.E.2d 1363 (Ind. 1996).
70. *Id.* at 1367.

agitated other persons in the apartment, interrupted the officer's investigation, and aggravated the sister's trauma.[71] However, the court ultimately did not base its decision on this different context, but instead determined that Whittington failed to meet his initial burden of establishing that the content of his speech was political in nature.[72]

The court reiterated the governing principle—if political speech is not implicated, the state may sanction the speech provided it reasonably concludes that the expression was an "abuse" within the meaning of article I, section 9.[73] In contrast, where the expressive activity is political, the state must demonstrate that its action does not materially burden the opportunity to engage in this type of valued expression: "[P]ure political expression cannot be said to constitute an 'abuse' within the police power unless it 'inflicts upon determinable parties harm of a gravity analogous to that required under tort law.'"[74]

The core question in *Whittington* was whether the expressive activity could be defined as political. The court provided the following definition:

> Expressive activity is political, for the purposes of the responsibility clause,[75] if its point is to comment on government action, whether applauding an old policy or proposing a new one, or opposing a candidate for office or criticizing the conduct of an official acting under color of law. The judicial quest is for some express or clearly implied reference to governmental action.[76]

In short, an individual's expression that merely focuses on the person's own conduct or that of another private party will not be deemed political speech. Because Colleen Price was protesting police treatment of another citizen when the office warned her to be quiet, she fell within the rubric of political expression.[77] The court emphasized that the burden of proof is on the claimant to demonstrate that the expression would have been understood as political.[78] Further, "[i]f the expression, viewed in context, is ambiguous, a reviewing court should find that the claimant has not established that it was political and should evaluate the

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71. *Id.* at 1366.

72. *Id.* at 1370. The defendant must prove the expressive activity is political and then the burden shifts to the State to demonstrate its action did not materially burden that speech. *See id.* at 1369.

73. *Id.*

74. *Id.* at 1369-70 (quoting Price v. State, 622 N.E.2d 954, 964 (Ind. 1993)).

75. IND. CONST. art. I, § 9. The responsibility clause limits the right to free speech by a person's responsibility for the abuse of that right.

76. *Whittington*, 669 N.E.2d at 1370 (footnote omitted).

77. *Id. See also* Radford v. State, 640 N.E.2d 90, 94 (Ind. Ct. App. 1994), *trans. denied* (for speech to be considered "purely political" it must be directed to persuade, not to evade the performance of a legal duty by a police officer); Stites v. State, 627 N.E.2d 1343, 1344 (Ind. Ct. App. 1994) (because speaker was concerned with perpetuating a disagreement with a former boyfriend and not protesting police conduct, her speech was unprotected).

78. *Whittington*, 669 N.E.2d at 1370.

constitutionality of any state-imposed restriction of the expression under standard rationality review."[79]

Applying this analysis to the facts in *Whittington*, the court summarily concluded that the defendant's "expression was not political."[80] Whittington directed his frustration at his sister's boyfriend who he thought had called the police, and he in fact testified that his remarks were not directed toward the officer.[81] As a result, the rationality standard applied and Whittington's speech was an unprotected "abuse of the right to speak" both because of its volume and because it threatened peace, safety, and well-being.[82]

Two justices, concurring in the judgment in *Whittington*, expressed concern with the court's "all or nothing" approach to article I, section 9. Whereas protection for political speech is "enshrined" in article I, section 9, other forms of speech receive negligible protection under a rational basis analysis.[83] Although the majority can be commended for defining the meaning of "political expression," the decision leaves unanswered difficult questions as to what state interests will be sufficient to justify interference with this valued expression.[84]

B. Provisions Unique to the State Constitution

In addition to the numerous provisions in the Indiana constitution that parallel federal guarantees, there are several unique provisions in the state constitution that triggered significant litigation this past year. Perhaps the most noteworthy case was *Town of St. John v. State Board of Tax Commissioners*,[85] wherein the Indiana Tax Court ruled that the state's method of real property taxation violates the uniformity provision of the state constitution:[86] "The General Assembly shall

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79. *Id.* The court commented further that even where the plaintiff meets this burden, the state may still defeat the claim by demonstrating either that the state action does not impose a material burden on expression or that the expression "threatens to inflict 'particularized harm' analogous to tortious injury." *Id.* Although the *Whittington* court used "threatens to inflict" language, the *Price* court spoke of speech which *actually* inflicts harm that would sustain tort liability. *Price*, 622 N.E.2d at 964.

80. *Whittington*, 669 N.E.2d at 1370.

81. *Id.* at 1370-71.

82. *Id.* at 1371.

83. *Id.* at 1371-72 (Sullivan, J., concurring); *id.* at 1371-72 (Dickson, J., dissenting, concurring in result). Justice Dickson notes the confusion the *Price* framework has created in the lower courts, e.g., in *Radford v. State*, 627 N.E.2d 1331 (Ind. Ct. App. 1994), the court initially overturned the conviction, and then, on rehearing and after a change in court personnel, reversed itself and affirmed the conviction. Radford v. State, 640 N.E.2d 90 (Ind. Ct. App. 1994), *trans. denied. See also Whittington*, 669 N.E.2d at 1371 (Sullivan, J., concurring).

84. For example, it leaves open the question of whether injury to government's ability to carry out its administrative or policymaking functions would be harm analogous to tortious injury. *Whittington*, 669 N.E.2d at 1370 n.10.

85. 665 N.E.2d 965 (Ind. T.C.), *rev'd sub nom.* 675 N.E.2d 318 (Ind. 1996).

86. *Id.* at 974.

provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal."[87]

In interpreting this provision, the court carefully examined the history surrounding its drafting and ratification as well as judicial decisions contemporaneous with its adoption.[88] It concluded that the term "just value" must mean market value.[89] Thus, the State Board of Tax Commissioners' use of "true tax value system"[90] of real property taxation, which is unrelated to market value, violated the state constitution's uniformity requirement.[91] The decision was to be applied prospectively only, and the Indiana Legislature and the State Board were given until March 1, 1998 to bring the state's system of real property taxation into compliance with the constitution.[92]

The Indiana Supreme Court reversed the tax court decision, holding the tax system was constitutional, and vacated the deadline to the legislature.[93] Applying its own lengthy analysis of precedent and history, the court concluded "a system based solely upon strict fair market value is not expressly required by either the text of the constitution, by the purpose of its framers, or by subsequent case law."[94] The court added, "The Indiana Constitution requires that our property tax system achieve substantially uniform and equal rates of property assessment and taxation and authorizes the legislature to allow a variety of methods to secure just valuation."[95]

Another provision invoked by Indiana litigants this past year was article IV, section 22,[96] which prohibits the general assembly from passing local or special laws, and article IV, section 23,[97] which provides that all laws must be "general, and of uniform operation throughout the State." In *Indiana Gaming Commission v. Moseley*,[98] the Indiana Supreme Court emphasized that although the framers expressed a preference for general laws, at the same time they recognized that in many situations special laws may be necessary and that courts must grant a "high

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87. IND. CONST. art. X, § 1(a).

88. *Town of St. John*, 665 N.E.2d at 968-74.

89. *Id.* at 972.

90. *See* IND. ADMIN. CODE tit. 50, r. 2.1-2-1, *repealed by* State Board of Tax Commissioners, effective March 1, 1995; *id.* tit. 50, r. 2.2-1-8 (1996).

91. *Town of St. John*, 665 N.E.2d at 974.

92. *Id.*

93. Boehm v. Town of St. John, 675 N.E.2d 318, 327 (Ind. 1996).

94. *Id.*

95. *Id.*

96. There are 16 subject matters for which legislative authority is restricted including crimes, misdemeanors, court practices, divorce, regulating county and township business, and tax assessment. IND. CONST. art. IV, § 22.

97. "In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." *Id.* § 23.

98. 643 N.E.2d 296 (Ind. 1994).

degree of deference to the legislature on Section 23 questions."[99] Thus, it sustained the riverboat gambling statute[100] that allowed for a countywide vote in favor of riverboat gambling rather than a citywide vote depending upon the number of inhabitants in the area.[101] The court of appeals ruled the population restrictions were reasonable and article IV had not been violated.[102]

In the case, *In re Train Collision at Gary*,[103] the court explained that the fact that only one governmental unit presently qualifies under a statute[104] that was apparently drafted with that single unit in mind does not render the statute unconstitutional provided "the terms of the statute permit other units to eventually qualify."[105] Because interstate railway commuter transportation does not lend itself to a uniform law of general applicability, but must be limited to geographical areas where residents travel on a daily basis from one state to another for employment, the Commuter Transportation Districts Act[106] does not violate the prohibition against special laws, despite the fact that it singles out certain counties.[107]

Finally, two decisions addressed the state constitutional mandate found in article IX that the general assembly provide support for institutions that assist the deaf, the mute, the blind, the insane, as well as for institutions for the correction and reformation of juvenile offenders.[108] In *Y.A. v. Bayh*,[109] the court held that this article does not impose a mandatory duty to provide psychiatric residential treatment facilities for all emotionally disturbed children because the constitutional provision does not require unlimited, but rather only adequate care.[110] Even though only 400 of some 7000 children needing residential care were receiving it,[111] the court reasoned that it could not order the legislature to maintain a particular care level or to raise funding adequate for providing all members of a class with limitless support:

> [T]he constitutional provision is not without limitations. These limitations may be imposed by common sense, and by the constraints

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99. *Id.* at 300.

100. IND. CODE §§ 4-33-6-18 to -20 (1993 & Supp. 1996).

101. *Moseley*, 643 N.E.2d at 305.

102. *Id.*

103. 654 N.E.2d 1137 (Ind. Ct. App. 1995), *trans. denied.*

104. IND. CODE §§ 8-5-15-1 to -2 (Supp. 1996).

105. *Train Collision*, 654 N.E.2d at 1141.

106. IND. CODE § 8-5-15-1.

107. *Train Collision*, 654 N.E.2d at 1142.

108. "It shall be the duty of the General Assembly to provide, by law, for the support of institutions for the education of the deaf, the mute, and the blind; and for the treatment of the insane." IND. CONST. art. IX, § 1. "The General Assembly shall provide institutions for the correction and reformation of juvenile offenders." *Id.* § 2.

109. 657 N.E.2d 410 (Ind. Ct. App. 1995), *trans. denied.*

110. *Id.* at 417-18.

111. *Id.* at 413.

> placed upon government to wisely distribute and apportion available funds among the various needs and programs which exist and which must be established for the welfare of all citizens. In short, the constitutional provisions are to be construed in the light of reason and the logical intendment of the framers.[112]

Although the general assembly may not avoid the constitutional mandate by refusing to raise and appropriate adequate funds to provide care, the court held that it had satisfied its constitutional duty: "[W]e are not at liberty to fashion a degree of care for a particular segment of the class, nor are we able to direct the General Assembly to raise funds adequate for the executive to care for all members of the class in an unlimited fashion."[113]

In a similar vein, an Indiana appellate court ruled, in *Logansport State Hospital v. W.S.*,[114] that the trial court violated separation of powers when it ordered a facility to hire additional staff because it did not want to commit a patient to a facility that it viewed as woefully understaffed and unable to provide minimal care.[115] The court invoked article III, section 1, of the Indiana Constitution,[116] which mandates a three-part system of government and forbids one governmental branch from encroaching upon the responsibilities of another branch.[117] Because article IX, section 1, specifically makes it the duty of the General Assembly to provide for mental health institutions, the trial court "overstepped its authority" by ordering the institution to hire more medical staff.[118]

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112. *Id.* at 417.

113. *Id.* at 417-18 (the relevant statutory provisions are: IND. CODE §§ 12-21-1-1 to -3, 12-21-5-2, 12-21-2-3(a)(10), 12-21-2-3(4), 12-22-3-2, 12-22-3-4(5) (1993 & Supp. 1996)).

114. 655 N.E.2d 588 (Ind. Ct. App. 1995).

115. *Id.* at 590.

116. "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." IND. CONST. art. III, § 1.

117. *Logansport*, 588 N.E.2d at 589-90.

118. 655 N.E.2d at 590. *Cf.* Williams v. State, 669 N.E.2d 1372, 1377 (Ind. 1996) (although judge may intervene in the factfinding process and question witnesses in order to promote clarity or dispel obscurity . . . to the extent trial court's intervention in proceeding constitutes exercising prosecutorial function, it violates constitutional separation of powers mandated by article III, section 1), *cert. denied*, 117 S. Ct. 1828 (1997); Platt v. State, 664 N.E.2d 357, 366-67 (Ind. Ct. App. 1996), *trans. denied* (allowing the city-county council and the mayor to make appointments to serve on a Public Defender Board does not commingle powers of the three branches contrary to article III, section 1, nor is the effect of the ordinance to usurp judicial power), *and cert. denied*, 118 S. Ct. 1470 (1997).

II. FEDERAL CONSTITUTIONAL LAW

A. Procedural Due Process

In deciding whether procedural due process rights have been violated, the U.S. Supreme Court applies a two-pronged analysis, requiring that a plaintiff initially identify a property or liberty interest, and, assuming this burden is met, balancing the competing interests to determine whether sufficient procedural safeguards have been afforded.[119]

1. Identification of Protected Interest.—As to the first part of the analysis, state or local law or custom often dictates whether a property or liberty interest has been created. Generally, under state law, government workers are considered to be at-will employees, and attempts to establish property rights through "unwritten common law" or policy manuals have been unsuccessful. In *Lashbrook v. Oerkfitz*,[120] the Seventh Circuit explained that for a policy manual to create an enforceable right, its terms must be mandatory and not permissive.[121] Because of a prominent disclaimer displayed on the first page of the manual, statements could not have created a reasonable belief that an offer of employment was being made.[122]

Similarly, in *Warzon v. Drew*,[123] the Seventh Circuit held that a paragraph in a Wisconsin employment contract providing that the employee was subject to termination upon ninety days written notice did not establish a constitutionally protected property right because it placed no substantive restrictions on the county's authority to terminate, and merely provided for ninety days notice.[124]

On the other hand, it is well-established that if the government defames an individual in connection with a termination even from an at-will job, deprivation

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119. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (ruling applies to the Fifth Amendment Due Process Clause. "Nor shall any person . . . be deprived of Life, Liberty or Property without due process of law . . ." Identical language appears in the Fourteenth Amendment.).

120. 65 F.3d 1339 (7th Cir. 1995).

121. *Id.* at 1347.

122. *Id.*

123. 60 F.3d 1234 (7th Cir. 1995).

124. *Id.* at 1240. *See also* Flynn v. Kornwolf, 83 F.3d 924, 927 (7th Cir.), *cert. denied*, 117 S. Ct. 301 (1996) (Although court order appointing former bailiffs as court attendants set forth an expiration date for their positions, it placed no substantive restriction on the government's authority to terminate, and, thus, order did not create a property interest that would trigger due process protection; under Wisconsin law unless there is a civil service regulation or statute or contract or collective bargaining agreement, a public employee remains an employee at will.); Border v. City of Crystal Lake, 75 F.3d 270 (7th Cir. 1996) (City employee failed to establish enforceable implied employment contract based on a handbook, where such did not contain a promise of continuing employment and in fact contained a clear disclaimer, *id.* at 274-75, provision containing grievance procedures did not create property interest since such did not indicate "for cause" employment nor did it include termination procedures. *Id.* at 276).

of a federally protected liberty interest is implicated.[125] Recent Seventh Circuit decisions emphasize, however, that the damage to reputation must be severe in order to trigger federal procedural safeguards. For example, in *Lashbrook v. Oerkfitz*,[126] the court held that in order to infringe on an employee's liberty interest, "the circumstances of the termination must make it virtually impossible for the employee to find new employment in that field [and] the government must have actually participated in disseminating the [defamatory] information to the public."[127] In *Lashbrook*, the park district's public announcement of a firing, even if it suggested incompetence, was insufficient to impinge on a federally protected liberty interest.[128] Further, the fact that the park district requested the employee to vacate his office and turn in his keys did not suggest the type of stigmatizing information that triggered federal due process protection.[129]

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.[130] Many litigants have lost their procedural due process claims under this analysis. For example, in *Clifft v. Indiana Department of State Revenue*,[131] the Indiana Supreme Court ruled that the procedures afforded by the controlled substance excise tax law, which permits the Department of State Revenue to immediately seize property after assessment, did not violate procedural due process because the law granted review in a meaningful time and manner in an area where "the magnitude of the government's need to take action without administrative delay justifies the temporary deprivation of property."[132] The court emphasized that a full and fair opportunity to challenge the assessment was available post-deprivation, and that the taxpayer could also block collection efforts by seeking injunctive relief.[133] Similarly, in *Mitchell v. State*,[134] the court sustained the procedure used to suspend

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125. Board of Regents v. Roth, 408 U.S. 564, 573 (1972). *See also* McMath v. City of Gary, 976 F.2d 1026, 1031-1032 (7th Cir. 1992) (complaint alleging that defendants discharged employee in conjunction with publicly communicated false statements regarding alleged criminal activity properly sets out a violation of plaintiff's clearly established right to a name-clearing hearing).

126. 65 F.3d 1339 (7th Cir. 1995).

127. *Id.* at 1348-49.

128. *Id.* at 1349.

129. *Id. See also* Munson v. Friske, 754 F.2d 683, 693 (7th Cir. 1985) ("Liberty is not infringed by a label of incompetence or a failure to meet a specific level of management skills, which would only affect one's professional life and force one down a few notches in the professional hierarchy. A liberty interest is not implicated when the charges merely result in reduced economic returns and diminished prestige, but not permanent exclusion from or protracted interruption of employment.").

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

131. 660 N.E.2d 310 (Ind. 1995).

132. *Id.* at 318 (ruling on IND. CODE §§ 6-7-3-13 and 6-8.1-5-3 (1993)).

133. *Id.* (as applied to IND. CODE §§ 6-8.1-5-1 and 33-3-5-11 (1993)).

134. 659 N.E.2d 112 (Ind. 1995).

a driver's license of a defendant convicted of possession of cocaine.[135] The court reasoned that because the deprivation occurred after lawful conviction and a full sentencing hearing, there was no procedural due process violation.[136]

In the area of educational due process, the Indiana Court of Appeals in *Reilly v. Daly*,[137] rejected the claims of a medical student who was dismissed after she failed a course because professors determined she had cheated on an examination.[138] The court explained that in an academic dismissal, due process requires only the barest procedural protections, but that where dismissal is for disciplinary reasons, the fundamental requirements are notice and an opportunity for a hearing appropriate to the nature of the case.[139] Without characterizing Reilly's dismissal as academic or disciplinary, the court rejected all of her claims of alleged procedural deficiencies. Reilly's due process rights were not violated when she was denied the opportunity to cross-examine the professors.[140] Further, she was not entitled to be judged by a clear and convincing rather than a substantial evidence standard of proof.[141] In school suspension and dismissal cases, due process does not require "an elaborate hearing before a neutral party, but simply 'an informal give-and-take between student and disciplinarian' which gives the student an 'opportunity to explain his version of the facts.'"[142] Here, Reilly was fully apprised of the evidence against her and had an opportunity to present her side of the story.[143] The evaluation form sent to her after the examination fully set forth the professors' reasons for believing she had cheated

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135. *Id.* at 115 (ruling on IND. CODE § 35-48-4-15(a) (Supp. 1996)).

136. *Id.* at 115. *See also* Pro-Eco, Inc. v. Board of Comm'rs, 57 F.3d 505, 513 (7th Cir.) (Although the Due Process Clause protects a wider range of interests as property than does the Takings Clause, and thus an option to purchase real property may be construed as federally protected, county commissioners' promulgation of a moratorium following a public hearing where plaintiff's representative was present and could address the provision did not violate due process rights even if the board allegedly failed to follow state notice provisions.), *cert. denied.*, 116 S. Ct. 672 (1995); Haimbaugh Landscaping, Inc. v. Jegen, 653 N.E.2d 95, 107, 110 (Ind. Ct. App. 1995) (Landowners were not denied due process by the state's statutory scheme (IND. CODE §§ 32-8-3-1 to -11 (1993 & Supp. 1996)) that allows filing of a mechanic's lien without prior hearing or bond because the purpose of the lien would be defeated if a contested court hearing or bond was required before the notice of the lien took effect. Neither labor nor material can be reclaimed once it becomes a part of realty, this is the only method by which workmen who have contributed to the improvement of real property may be given a remedy against a property owner who defaults on a promise to pay.).

137. 666 N.E.2d 439 (Ind. Ct. App. 1996), *trans. denied.*

138. *Id.* at 442.

139. *Id.* at 444.

140. *Id.* at 445.

141. *Id.*

142. *Id.* at 444 (citations omitted) (citing Ingraham v. Wright, 430 U.S. 651, 693 (1977); Gormon v. University of R.I., 837 F.2d 7, 16 (1st Cir. 1988)).

143. *Id.* at 445.

and subsequent correspondence disclosed all of the evidence against her.[144] Thus, the informal conference, which afforded her the opportunity to confront the professors and explain her side of the story, was all the "process" to which she was entitled.[145]

In the employment area, the Seventh Circuit held in *Jones v. City of Gary*,[146] that a firefighter's termination without a prior hearing did not violate procedural due process because the interests of the city in maintaining a full complement of firefighters for the benefit of the entire community outweighed Jones' interest in his continued employment.[147] Thus, the post-suspension hearing provided adequate protection for Jones' property interest.[148] The firefighter claimed the discharge was invalid because a medical problem prevented him from appearing at work, but the record demonstrated that the medical condition had already been subjected to three independent administrative evaluations, and thus there was a low risk of error.[149] Further, the Gary Fire Department was facing an emergency situation.[150] The court emphasized that it was not generally endorsing an absolute elimination of pre-suspension hearings for firefighters, but rather it was holding that in this context, and with regard to this particular firefighter, the post-suspension hearing would sufficiently protect his property interest.[151]

A police officer challenging his disciplinary hearing before the City of Franklin Board of Public Works and Safety fared no better. In *Rynerson v. City of Franklin*,[152] the officer challenged the statutory procedure[153] whereby a city attorney who serves as an appointed member of the Board may temporarily resign in order to prosecute a disciplinary action before the same Board.[154] The court of appeals had ruled the procedure unconstitutional,[155] but the Indiana Supreme Court, although conceding that due process requires a neutral, unbiased decisionmaker, found that the statutory arrangement achieved a sufficient separation of prosecutorial functions and adjudicative functions so as to meet the due process requirement.[156] The court reasoned that it should presume that members of a board are persons of "conscience and intellectual discipline, capable

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144. *Id.*

145. *Id.*

146. 57 F.3d 1435 (7th Cir. 1995).

147. *Id.* at 1445.

148. *Id.*

149. *Id.* at 1443.

150. *Id.* at 1444.

151. *Id.*

152. 669 N.E.2d 964 (Ind. 1996).

153. IND. CODE § 36-8-3-4 (1988 & Supp. 1989) (codified as amended at IND. CODE § 36-8-3-4 (Supp. 1996)).

154. *Rynerson*, 669 N.E.2d at 966.

155. 655 N.E.2d 126, 129 (Ind. Ct. App. 1995), *vacated*, 669 N.E.2d 964 (Ind. 1996).

156. *Rynerson*, 669 N.E.2d at 967. Rynerson also claimed violation of article I, section 12, requiring "due course of law" but the court considered both challenges using a generic due process analysis.

of judging the particular controversy fairly."[157] Further, it explained that the inquiry should be a practical one. In this particular case, there was no evidence that the statute prohibiting the city attorney from participating as a safety board member was not scrupulously complied with, nor was there any evidence of actual bias or prejudice on the part of the two participating board members.[158] In addition, the court took into account the practical concern that much of the Board's work requires assistance of the city attorney and that prohibiting the city attorney from serving as a board member would "work a substantial disruption to the operations of city government."[159] Thus, the court concluded that due process is not violated by allowing a city attorney to serve as member of the Board of Public Works and Safety so long as the attorney does not simultaneously participate in any police or fire disciplinary proceeding.[160]

B. Substantive Due Process

The U.S. Supreme Court has recognized that the Due Process Clause also contains a substantive component that bars arbitrary, wrongful government conduct. However, the Court generally has been very reluctant to find a substantive due process violation, requiring that the conduct be truly "conscience-shocking" before it will intervene. The most hotly contested substantive due process issue addressed by the Supreme Court this term was the question of whether due process imposes a limitation on the jury's power to impose punitive damages. Although the Court has held that such a limitation can be read into substantive due process, in *TXO Production Corp. v. Alliance Resources Corp.*[161] the Court sustained a punitive damage award 526 times greater than the compensatory damage award. Justice Scalia, who has argued that there should be no substantive due process limitation on punitive damages at all, quipped that "the great majority of due process challenges to punitive damage awards can henceforth be disposed of simply with the observation that 'this is no worse than *TXO*.'"[162]

Contrary to the Justice's prediction, the Supreme Court in *BMW of North America, Inc. v. Gore*,[163] held that a $2 million punitive damages award was grossly excessive and therefore exceeded the constitutional limits.[164] An Alabama jury had awarded $4 million against BMW for failing to disclose that it repainted a new $40,000 car, thereby reducing its value by $4000.[165] Although the Alabama Supreme Court reduced the punitive damages award to $2 million, the company

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157. *Id.* at 968 (citing Withrow v. Larkin, 421 U.S. 35, 55 (1975)).
158. *Id.* at 969.
159. *Id.*
160. *Id.* at 970.
161. 509 U.S. 443, 444 (1993).
162. *Id.* at 472 (Scalia, J., concurring).
163. 116 S. Ct. 1589 (1996).
164. *Id.* at 1598.
165. *Id.* at 1594.

still argued the award was excessive.[166]

In reaching its conclusion that BMW's conduct was not sufficiently egregious to justify the severe punitive sanction imposed against it, a five-Justice majority pointed to three criteria: (1) the conduct was not particularly reprehensible in that it involved only economic harm and it evinced no indifference to or reckless disregard for the health and safety of others;[167] (2) the ratio between compensatory and punitive damages weighed against the plaintiff because the award was 500 times the amount of the actual harm;[168] and (3) the difference between this remedy and civil remedies authorized or imposed in comparable cases was great in that the $2 million was substantially more than the $2000 in fines and penalties imposed in other states for similar malfeasance.[169] The Court emphasized its concern that BMW would not have had adequate notice of the magnitude of the sanction that Alabama might impose in light of the pertinent statutes[170] and interpretive decisions.[171] Finally, because there was no history here of non-compliance, there was no basis for assuming that a more modest sanction would not have been sufficient.[172]

Despite the Supreme Court's decision in *Gore*, it is unlikely that we will see a huge revolution in the area of substantive due process. Generally the Supreme

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166. *Id.* at 1595.

167. *Id.* at 1599.

168. *Id.* at 1602.

169. *Id.* at 1603.

170. *See* ALA. CODE § 8-9-11(b) (1993).

171. *Gore*, 116 S. Ct. at 1603.

172. *Id.* The analysis in *Gore* was applied in *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760, 785-86 (N.D. Ind. 1996) in assessing whether a punitive damage award was excessive. Although the defendants did not allege the award violated substantive due process, the court noted that the inquiry in *Gore* was "akin to that posed" in a case seeking to determine whether under Indiana law an award is "grossly excessive." *Id.* at 785. Applying the three "guideposts" from *Gore*, the court concluded that a $600,000 award was grossly excessive where the defendant's tortious conduct consisted primarily of an insurance carrier's omissions in reckless disregard of plaintiff's rights under the policy, though not in reckless disregard of health or safety, *id.*, the disparity between the actual damages and punitive damages was great because the jury's award was 13 times the actual damages; and the award was disproportionate as compared to criminal and civil penalties imposed for similar conduct—under Indiana law every felony is punishable by a maximum fine of $10,000. *See* IND. CODE §§ 35-50-2-4 to -7 (1993 & Supp. 1996). None of the Indiana cases holding insurers liable for punitive damages involved an award of anything near $600,000. *Schmizzi*, 928 F. Supp. at 786. In short, the court concluded that the defendant's "conduct does not rank high on the reprehensibility scale, [plaintiff's] economic injury occasioned by non-payment is easily ascertained, the court already has considered damages for [plaintiff's] emotional distress (the factor that is difficult to determine) in examining the ratio, and [plaintiff's] economic damages were not small." *Id.* Indiana cases concerning the amount of punitive damages needed to vindicate the public policy behind Indiana law point in the same direction as the "guideposts" identified by the Supreme Court in *Gore*, and the $600,000 award was "monstrously excessive and without rational connection to the evidence." *Id.*

Court has shown great reluctance to intervene under this amorphous provision, as reflected in its decision in *Bennis v. Michigan*.[173] Tina Bennis was a joint owner, with her husband, of an automobile which was used by her spouse to engage in sexual activity with a prostitute.[174] The state invoked its public nuisance law[175] to seize the vehicle and permitted no off-set for the wife's interest even though she lacked any knowledge of her husband's activity.[176] Bennis claimed she was punished without any wrongdoing in violation of the fundamental fairness guaranteed by substantive due process.[177] The Supreme Court in a 5-4 decision ruled that Michigan's abatement scheme did not deprive Mrs. Bennis of her property without due process.[178] The majority relied on a long and unbroken line of cases holding that an owner's interest in property may be forfeited by reason of the use to which the property is put even absent the owner's knowledge or consent.[179] Cases dating to 1827 established this principle, and it was simply too firmly fixed to now be displaced despite Bennis' status as "innocent owner."[180]

Justice Ginsburg, whose fifth vote was necessary to create a majority, emphasized that the nuisance abatement proceeding was an equitable action, which should guard against "exorbitant applications of the statute."[181] Because the specific facts here involved an automobile that had been purchased for $600, the trial court could not be charged with "blatant unfairness."[182]

The Seventh Circuit has similarly expressed reluctance to find a substantive due process violation, especially where only property rights are at stake. In fact, it has held that where a plaintiff complains only of unreasonable deprivation of a state-created property interest, he must show the inadequacy of state law remedies in order to proceed with the federal claim.[183] In *Pro-Eco, Inc. v. Board of*

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173. 116 S. Ct. 994 (1996).

174. *Id.* at 996.

175. MICH. COMP. LAWS ANN. §§ 600.3801, -.3825 (West 1987 & Supp. 1997).

176. *Bennis*, 116 S. Ct. at 997.

177. *Id.* at 997-98.

178. *Id.* at 998.

179. *Id.* at 998-1000.

180. *Id.* at 1001.

181. *Id.* at 1003 (Ginsburg, J., concurring).

182. *Id.*

183. *See, e.g.*, Porter v. DiBlasio, 93 F.3d 301 (7th Cir. 1996). In order to state viable substantive due process claims, a plaintiff must, in addition to alleging that a decision was arbitrary and irrational, show either a separate constitutional violation or the inadequacy of state law remedies. *Id.* at 310. Plaintiff's allegation that the seizures of his animals constituted a Takings Clause violation was deficient. *Id.* at 310-11. Because he failed to make alternative showing that his state law remedies (a claim for conversion and a right to request the property be returned. *Id.* at 304 (citing WIS. STAT. ANN. § 968.20(1) (West Supp. 1996)) were inadequate, his substantive due process claims failed. *Id.* at 310. *See also* Doherty v. City of Chicago, 75 F.3d 318, 326 (7th Cir. 1996) (Because plaintiff challenging denial of zoning application failed to demonstrate that she did not have recourse in state court, her federal claims were properly dismissed.); Covington Court, Ltd. v. Village of Oak Brook, 77 F.3d 177, 179 (7th Cir. 1996) (A property owner may not avoid

Commissioners,[184] the court ruled that the county's moratorium on new landfills was rationally related to a legitimate state interest in public health and thus did not violate substantive due process even though the owner of the interest in the land had already invested capital and labor in excess of $200,000 at the time the legislative body took this action.[185] The court emphasized that government action survives the rational basis test imposed under the substantive due process clause provided a sound reason may be hypothesized; government is not required "to prove the reason to a court's satisfaction."[186]

Litigants alleging deprivation of a liberty interest fared no better. In *Estate of Cole v. Fromm*,[187] the court held that the plaintiffs could not recover following a jail suicide from the psychiatrist who classified the pre-trial detainee in a psychiatric ward as a "potential suicide" risk rather than as a "high risk."[188] The court explained that deliberate indifference to medical needs must be shown in order for a plaintiff to recover. Deliberate indifference may be inferred from a medical professional's erroneous treatment decision only when it is such a substantial departure from accepted professional judgment as to demonstrate that the person responsible did not base the decision on such judgment.[189] In this case, the psychiatrist's decision was not a substantial departure from accepted professional judgment so as to give rise to a constitutional violation.[190]

In *Pena v. Mattox*,[191] the court ruled that a natural father whose parenthood results from criminal intercourse with a minor has no liberty interest that would permit him to block adoption of the child.[192] Similarly in *Mitchell v. State*,[193] the Indiana Supreme Court held that because there is no fundamental right to drive, the state statute[194] that requires a sentencing court to revoke the driver's license of persons convicted of certain crimes need only bear a rational relationship to a legitimate state interest.[195] The state's interest in punishing and deterring lawbreakers, even if there is no nexus between the use of a vehicle and the underlying criminal conduct, satisfies this test.[196]

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the requirement that state remedies be exhausted by applying the label "substantive due process" to the claim; "federal courts are not boards of zoning appeals.").

184. 57 F.3d 505 (7th Cir.), *cert. denied.*, 116 S. Ct. 672 (1995).

185. *Id.* at 514.

186. *Id.*

187. 94 F.3d 254 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 945 (1997).

188. *Id.* at 263.

189. *Id.* at 261-62.

190. *Id.* at 263.

191. 84 F.3d 894 (7th Cir. 1996).

192. *Id.* at 899.

193. 659 N.E.2d 112 (Ind. 1995).

194. IND. CODE § 35-48-4-15 (Supp. 1996).

195. *Mitchell*, 659 N.E.2d at 116.

196. *See id. See also* Nowicki v. Ullsvik, 69 F.3d 1320, 1325 (7th Cir. 1995) (Although judge's order prohibiting paralegal from representing party in divorce action allegedly deprived him of his chance to pursue his liberty interest in his "occupation," state action that excludes a person

In another case the Indiana Court of Appeals emphasized that substantive due process should not be used "where the wrong committed by the state actor was traditionally governed by tort law principles."[197] Plaintiffs injured in a passenger train collision alleged that the government-operated railroad and its officials should be held liable for their gross negligence and deliberate indifference to passenger safety based on their failure to install and equip trains with devices that could avoid collision.[198] The victims also charged the defendants with failure to provide adequate warnings and signals that could have prevented the disaster. They argued that the railroad's conduct demonstrated deliberate indifference to "life, liberty, freedom from bodily harm, personal security and safe travel under the Due Process Clause of the Fourteenth Amendment."[199] Although the Supreme Court has held that the government has no general constitutional obligation to provide safe working conditions or other forms of governmental protection,[200] the plaintiffs argued that train passengers fit within the "in-custody" exception that applies when the government takes persons into custody without their consent; e.g., government owes a duty to protect inmates and others whom it has institutionalized.[201] However, the court concluded that train passengers are not in the custody of the state, but rather have on their own free will decided to board the trains.[202] Further, the court rejected the notion that the plaintiffs fell within the "state-created danger" exception suggested in Supreme Court dicta.[203] It noted that this exception has not been embraced universally and that it has been specifically rejected by other courts in situations involving railway accidents.[204] In short, the court concluded that the plaintiff's complaint was "analogous to a typical tort claim for negligence," and that federal civil rights law was "not intended to supplant state tort law by providing a remedy for every wrong."[205]

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from one particular job is not actionable under the Due Process Clause.).

197. *In re* Train Collision at Gary, 670 N.E.2d 902, 906 (Ind. Ct. App. 1996), *trans. denied* (pertaining to liability under 42 U.S.C. § 1983 (1994)).

198. *Id.* at 906.

199. *Id.*

200. *Id.* at 906-07.

201. *Id.* at 907 (citing DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200 (1989)).

202. *Id.*

203. *Id.* at 907-08.

204. *Id.* at 908. State constitutional challenges arising from this same incident are discussed *supra* note 47 and notes 103-07 and accompanying text.

205. *Id.* at 908-09. *See also* Hill v. Shobe, 93 F.3d 418, 421-22 (7th Cir. 1996) (plaintiff failed to state § 1983 claim when on-duty police officer ran a red light and killed the plaintiff, despite allegations that officers then conspired to cover up incident; the fact that public official commits a common law tort with tragic results fails to rise to level of violation of substantive due process absent a showing that official knew an accident was imminent but consciously and culpably refused to prevent it, and it does not suffice to demonstrate that public official acted in face of a recognizable but generic risk to the public at large). *See* 42 U.S.C. § 1983 (1994).

However, in *Camp v. Gregory*,[206] the Seventh Circuit concluded that plaintiffs stated a claim for deprivation of substantive due process where they alleged that a social worker knowingly returned a child to a previous guardian who could not provide adequate care and supervision with the result that the child was killed in neighborhood violence.[207] Similarly, in *Clark v. Donahue*,[208] a federal district court rejected a defendant's claim that patients who are voluntarily admitted to a state mental institution have no substantive due process right to be protected from mistreatment.[209] The court reasoned that "institutionalization which originated voluntarily may at some point involve restraint of personal liberty sufficient to trigger the protections of the due process clause."[210]

The most profound substantive due process issue addressed by the Supreme Court was the question of whether terminally ill patients have a right to choose to end their suffering by obtaining lethal medication from doctors. Two federal appellate courts struck down state laws barring doctor-aided suicide, calling into question the validity of similar legislation in some forty states. In *Quill v. Vacco*,[211] the Second Circuit ruled that New York statutes that impose criminal penalties on anyone who "aids another person to commit suicide"[212] violate equal protection to the extent they prohibit physicians from prescribing drugs to be self-administered by mentally competent, terminally ill persons who seek to hasten death, but do not prohibit physicians from acceding to requests by such persons to withdraw life support systems.[213] In *Compassion in Dying v. State*,[214] the Ninth Circuit held unconstitutional a Washington statute[215] based on the theory that such laws deny a liberty interest in choosing the time and manner of death.[216] Although the Second Circuit opinion was based on equal protection analysis, the Ninth Circuit found a substantive due process liberty interest in choosing "a dignified and humane death," which the court held outweighed the state's interest in preserving life.[217]

The Supreme Court unanimously overturned both decisions. In *Washington v. Glucksberg*,[218] four Justices joined Chief Justice Rehnquist's opinion concluding that the alleged "right" to assistance in committing suicide is not a fundamental liberty interest.[219] Chief Justice Rehnquist explained that substantive

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206. 67 F.3d 1286 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 2498 (1996).
207. *Id.* at 1294-98.
208. 885 F. Supp. 1159 (S.D. Ind. 1995).
209. *Id.* at 1162.
210. *Id.*
211. 80 F.3d 716 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293 (1997).
212. N.Y. PENAL LAW §§ 125.15(3), 120.30 (McKinney 1987 & Supp. 1997).
213. *Quill*, 80 F.3d at 727.
214. 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* 117 S. Ct. 2258 (1997).
215. WASH. REV. CODE ANN. § 9A36.060 (West 1988 & Supp. 1997).
216. *Compassion in Dying*, 79 F.3d at 839.
217. *Id.* at 837.
218. 117 S. Ct. 2258 (1997).
219. *Id.* at 2271.

due process analysis requires a "careful description" of the asserted liberty interest.[220] Because the Washington statute prohibits "aiding another person to attempt suicide," the court of appeals erred in addressing a general right to die or "right to choose a humane, dignified death."[221] Characterizing the issue as whether "liberty" includes a "right to commit suicide which itself includes a right to assistance in doing so," the Court readily concluded that this right has no place in our Nation's traditions given the country's consistent, almost universal and continuing rejection of the right, even for terminally ill, mentally competent adults.[222] Because such a right is not "deeply rooted in this Nation's history and tradition" it cannot be ranked as a fundamental liberty interest.[223]

The Court distinguished its earlier holding in *Cruzan v. Missouri Department of Health*,[224] which involved refusal of lifesaving hydration and nutrition. That interest is grounded in the Nation's history and tradition in light of the common-law rule that forced medication is a battery and the long tradition that protects the decision to refuse unwanted medical treatment.[225] Finally, the Court concluded that Washington's assisted-suicide ban was rationally related to legitimate government interests, including prohibiting intentional killing and preserving human life, protecting the medical profession's integrity and ethics, and protecting the poor, the elderly, disabled persons, the terminally ill, and other vulnerable persons from indifference, prejudice, or other pressure to end their lives.[226]

Justice O'Connor's concurring opinion, joined by Justices Ginsburg and Breyer, emphasizes that although she agrees there is no generalized right to "commit suicide," the parties all agreed here that the state statutes did not prevent qualified physicians from providing medication to alleviate suffering of those experiencing great pain, even to the point of causing unconsciousness and hastening death.[227] She specifically notes that the question of whether suffering patients have a constitutionally cognizable interest in obtaining relief from this suffering was not in question: "There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths."[228] The concurring Justices similarly emphasize that the Court addressed only the facial challenge to the law and that the decision should not be interpreted to mean that every possible application of the statute would be valid.[229]

In *Vacco v. Quill*,[230] the Court, for many of the same reasons articulated in

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220. *Id.* at 2269.
221. *Id.*
222. *Id.* at 2271.
223. *Id.*
224. 497 U.S. 261 (1990).
225. *Glucksberg*, 117 S. Ct. at 2270.
226. *Id.* at 2271-72.
227. *Id.* at 2203 (O'Connor, J., concurring).
228. *Id.*
229. *Id.*; *id.* at 2304 (Stevens, J., concurring); *id.* at 2311 (Breyer, J., concurring).
230. 117 S. Ct. 2293 (1997).

Glucksberg, rejected the equal protection challenge to New York's statutes.[231] Because the statutes did not infringe fundamental rights nor involved suspect classifications, they were entitled to a strong presumption of validity.[232] The Court reasoned that the articulated state interests justified the distinction between physician-assisted suicide and the withdrawal of life support: "[T]he distinction drawn between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical, it is certainly rational."[233] The distinction is recognized in tort law, in medicine, and by the overwhelming majority of the states.[234] Thus, the facial challenge to the law must fail.

C. Equal Protection

The basic demand of the Equal Protection Clause is that persons similarly situated be treated the same. Ordinarily, as is the case with substantive due process, the Court indulges a strong presumption of constitutionality.[235] The burden is on the challenger to demonstrate that the classification scheme is irrational.[236] However, under certain conditions the Court will strictly scrutinize the challenged governmental action, i.e., where the classification scheme burdens a fundamental right or singles out a "suspect" group.[237] To trigger this heightened scrutiny the Court asks whether the group burdened is politically powerless, whether it has traditionally been subject to discrimination, and whether members of the group have an immutable trait.[238] This past Term the U.S. Supreme Court

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231. *Id.* at 2297.

232. *Id.*

233. *Id.* at 2298.

234. *Id.* at 2299-2300.

235. FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993). *See also* Reilly v. Daly, 666 N.E.2d 439, 445-46 (Ind. Ct. App. 1996), *trans. denied* (Student was not denied equal protection by medical school's failure to adopt dismissal policies similar to those applied to undergraduate and law students because she is not similarly situated to those students but rather is enrolled in a wholly distinct educational forum; each school at Indiana University is permitted to adopt its own procedures for suspensions and dismissals, consistent with its individual needs and policies.).

236. *Beach Communications*, 508 U.S. at 315. The Supreme Court emphasized that in areas of social and economic policy a statutory scheme is valid if any reasonably conceivable state of facts provides a rational basis for the justification and that those attacking the rationality carry the burden of negating every conceivable basis that might support the law. *Id.*

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

238. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 360-66 (1978). In addition to finding that classifications based on race, national or ethnic origin, and to a certain degree alienage trigger strict scrutiny, the Court has applied a so-called intermediate approach to laws that classify based on gender or illegitimacy. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (gender discrimination); Mills v. Habluetzel, 456 U.S. 91 (1982) (children born out of wedlock).

addressed classification schemes based on gender and homosexuality; it confronted the question of what level of scrutiny should apply with regard to these groups and whether the government enactments would withstand that level of scrutiny.

In *United States v. Virginia*,[239] the Court ruled 7-1[240] that a state-supported military college's long tradition of excluding women violates the Equal Protection Clause. Although the Court refused to apply strict scrutiny, which governs racial classifications, the majority opinion reaffirmed that the Court will impose a fairly strict "intermediate scrutiny" for gender-based classifications.[241] Whereas under strict scrutiny the government's interest must be compelling and the means must be narrowly tailored, under intermediate scrutiny it suffices that the classification serves "important governmental objectives" and be "substantially related to the achievement of those objectives."[242] Citing earlier case precedent, the Court emphasized that the state must show an "exceedingly persuasive justification" for a gender classification.[243]

Justice Ginsburg rejected the state's argument that its desire to provide diversity in higher education and to preserve the "adversative" teaching method used to produce "citizen soldiers" justified the male-only policy at the Virginia Military Institute (VMI).[244] She stated that "[n]either recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options."[245] She rejected state expert testimony that women would not benefit from, and that their presence would require changes in, VMI's methodology, reasoning that the successful entry of women into federal military academies demonstrates that the adversative methodology is not inherently unsuitable for women.[246] She reasoned that the school would only have to make modest accommodations for privacy and for physical training to permit women's attendance.[247]

After the commencement of the litigation, Virginia attempted to cure the constitutional violation by establishing a separate "leadership" program for women at Mary Baldwin College, a private women's school.[248] The Court ruled that this was inadequate to redress "the categorical exclusion of women from an extraordinary educational opportunity afforded men."[249] Justice Ginsburg noted that the alternative program dropped the adversative training method completely, it provided inferior educational opportunities and no access to VMI's influential

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239. 116 S. Ct. 2264 (1996).
240. Because Justice Thomas' son was attending VMI, he recused himself from the decision.
241. United States v. Virginia, 116 S. Ct. at 2274-75.
242. *Id.* at 2275.
243. *Id.* at 2279.
244. *Id.* at 2279-82.
245. *Id.* at 2279-80.
246. *Id.* at 2281.
247. *Id.* at 2284 n.19.
248. *Id.* at 2282.
249. *Id.* at 2282, 2286.

alumni network.[250]

In dissent, Justice Scalia attacked the majority for in essence applying strict scrutiny to a gender-based classification scheme.[251] He opined that the Court's analysis may mark the end of all government support of single-sex education.[252] He argued that the decision was contrary to the well-established tradition of single-sex education, and that the majority ignored a record wherein the State established the importance of its male-only program and the likelihood that the admission of women would destroy that program—thus satisfying intermediate scrutiny.[253] Justice Ginsburg, however, was careful to say that single-sex education was not definitively closed by this decision[254]—the state had simply failed to show that the program for women was anything more than a "pale shadow" of its male counterpart.[255]

In a second major equal protection ruling, *Romer v. Evans*,[256] the Supreme Court struck down a Colorado constitutional amendment that barred state and local government from extending protection to gay, lesbian, and bisexual citizens.[257] Writing for a 6-3 majority, Justice Kennedy held that the enactment imposed a "special disability" on gays and seemed to be motivated by "animus" toward homosexuals.[258] The majority did not rule that homosexuals constitute a suspect or even quasi-suspect class, which would trigger heightened review of the amendment. Indeed, ten years ago the Supreme Court in *Bowers v. Hardwick*[259] rejected a due process challenge to Georgia's anti-sodomy law,[260] but Justice Kennedy did not even mention that decision.

Three dissenting Justices argued that the majority opinion contradicts *Bowers*.[261] If it is constitutionally permissible to make homosexual conduct a

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250. *Id.* at 2283-85.

251. *Id.* at 2294 (Scalia, J., dissenting).

252. *Id.* at 2306.

253. *Id.* at 2296-2302.

254. *Id.* at 2276 n.7.

255. *Id.* at 2285.

256. 116 S. Ct. 1620 (1996).

257. *Id.* at 1628. The Amendment not only repealed or rescinded all enacted ordinances which banned discrimination based on sexual orientation, but it also prohibited all future protective legislation or executive or judicial action. "Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." COLO. CONST. art. II, § 30(b).

258. *Romer*, 116 S. Ct. at 1627.

259. 478 U.S. 186 (1986).

260. GA. CODE ANN. § 16-6-2 (1984) (codified as amended at GA. CODE ANN. § 16-6-2 (1996)).

261. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

crime, then it must be permissible to enact laws "merely disfavoring homosexual conduct."[262] Although the majority did not mention *Bowers*, its holding that laws "born of animosity" toward homosexuals are unconstitutional[263] is difficult to square with the *Bowers* decision.

The majority held that the amendment failed even rational basis analysis.[264] Justice Kennedy reasoned that the breadth of the amendment (it precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on homosexual, lesbian, or bisexual orientation, conduct, practices or relationships) demonstrated that it is "so far removed" from the state's purported interest in respecting other citizens' freedom of association and in conserving resources to combat other forms of discrimination.[265] The amendment forced immediate repeal of all existing statutes, regulations, ordinances, and policies of state and local entities barring discrimination based on sexual orientation, and its ultimate effect was to prohibit any government entity in the future from adopting similar or more protective measures in the absence of another constitutional amendment.[266] Thus, the Court ruled that this broad disqualification of a class of persons from the right to obtain specific protection from the law is "unprecedented" and is "itself a denial of equal protection of the laws in the most literal sense."[267]

Rather than focusing on the nature of the group being disadvantaged, Justice Kennedy appeared to rely more on the basic principle that government must remain open to all who seek assistance and that any law that singles out a group because of animosity towards that group is prohibited by the Equal Protection Clause.[268] Although *Bowers* was based on a substantive due process claim—the defendant argued he had a fundamental right to engage in homosexual conduct—it is probably fair to say that the 6-3 decision suggests this Court is more receptive to gay rights.[269]

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262. *Id.* at 1631 (emphasis omitted).

263. *Id.* at 1628.

264. *Id.* at 1629.

265. *Id.*

266. *Id.* at 1624-25.

267. *Id.* at 1628. Justice Kennedy also quoted from *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), that a "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.*

268. *Id.*

269. However, it may not be terribly anxious to confront the issue. It recently denied certiorari in *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (en banc), *cert. denied*, 117 S. Ct. 358 (1996), which sustained the military's "Don't Ask, Don't Tell" policy (10 U.S.C.A. § 654 (West Supp. 1997)), under which the Department of Defense discharges service members who disclose their homosexuality unless they rebut a presumption that they do not engage in homosexual conduct. The appellate court held that the law is rationally related to the military's legitimate interest in preserving unit cohesion and thus does not violate the Fifth Amendment guarantee of equal protection. *Thomasson*, 80 F.3d at 931. The court also rejected a First Amendment challenge, reasoning that the law did not target speech. *See also* Able v. United States, 88 F.3d

The most significant equal protection claims raised by Indiana litigants involved race discrimination and discrimination against children born out of wedlock. In *Platt v. State*,[270] the plaintiffs challenged the inadequately staffed and funded public defender system on grounds that it discriminated against African-Americans.[271] Despite statistics indicating that 60% of persons represented by public defenders in the county were African-American whereas only 25% of the population was African-American, the court ruled that plaintiffs failed to sustain their burden of proving that the public defender system was enacted and operated with the purposeful intent of discriminating against African-Americans.[272] Because only intentional discrimination against a protected group triggers strict scrutiny, the plaintiffs failed to establish a prima facie case.[273]

In *Haas v. Chater*,[274] the plaintiffs challenged the constitutionality of an Indiana statute[275] requiring a child born out of wedlock to prove paternity of an intestate father within five months of the father's death in order to qualify for inheritance.[276] The Supreme Court has ruled that classification schemes that burden children born out of wedlock, like gender-based classification schemes, are subject to intermediate scrutiny, under which any law must be substantially related to an important government interest.[277] Although the Supreme Court has interpreted the Equal Protection Clause as forbidding unreasonable discrimination against children born out of wedlock, in *Lalli v. Lalli*,[278] it sustained a state statute that required a court order of filiation issued before the putative father's death. Reasoning that the restriction in *Lalli*, which foreclosed paternity suits brought after the father's death, was significantly more rigid than Indiana's, the Seventh Circuit sustained the Indiana law.[279] *Lalli* relied on the state's alleged substantial interest in protecting the decedent's estate against phony claims and in winding up these estates.[280] Since *Lalli*, the Supreme Court has struck down state statutes that impose unrealistic burdens on children attempting to establish paternity.[281] None

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1280 (2d Cir. 1996), rejecting the First Amendment challenge to this provision. *Id.* at 1295-97.

270. 664 N.E.2d 357 (Ind. Ct. App. 1996), *trans. denied, and cert. denied*, 117 S. Ct. 1470 (1997).

271. *Id.* at 364.

272. *Id.* at 365.

273. *Id.*

274. 79 F.3d 559 (7th Cir.), *aff'd by an equally divided court*, 89 F.3d 838 (7th Cir. 1996) (en banc) (unpublished table decision), *cert. denied*, 117 S. Ct. 942 (1997).

275. IND. CODE § 29-1-2-7(b) (1993).

276. *Haas*, 79 F.3d at 561.

277. Clark v. Jeter, 486 U.S. 456, 461 (1988).

278. 439 U.S. 259, 275-76 (1978).

279. *Haas*, 79 F.3d at 564-65.

280. *Lalli*, 439 U.S. at 268.

281. In *Clark*, 486 U.S. at 465, the Court held that a six-year statute of limitations for bringing a paternity action (42 PA. CONS. STAT. ANN. § 6704(b) (West 1982) (repealed 1990)) failed intermediate scrutiny because it was not substantially related to an important government interest. *Clark*, 486 U.S. at 462.

of these cases, however, have involved intestate fathers, and *Lalli*'s holding on probate matters has never been overruled. Several years ago the Indiana Court of Appeals similarly upheld the constitutionality of the five-month limitations period.[282]

D. Free Speech and Association

First Amendment issues figured prominently in recent decisions. As in past years, commercial speech cases, as well as cases involving the free speech rights of government employees, have generated the most litigation. In addition, this term the U.S. Supreme Court tackled difficult questions involving the free speech and association rights of independent contractors.

1. Commercial Speech.—Since 1976, the Supreme Court has recognized First Amendment protection for commercial speech, although it has never afforded that speech the full protection of non-commercial speech.[283] Commercial speech is protected only to the extent it conveys truthful information to consumers, and, thus, a state may ban false, deceptive, or misleading commercial speech.[284] Further, even if the commercial speech is truthful and non-misleading, it may be regulated provided the law directly and materially advances a substantial interest in a manner no more extensive than necessary.[285] Although on its face the standard is not a toothless one, several Supreme Court decisions dictate that government has greater leeway in regulating commercial as opposed to non-commercial speech.[286]

Nonetheless, in *44 Liquormart, Inc. v. Rhode Island*,[287] the Court ruled that a state law[288] that banned advertisement of retail liquor prices except at the place of sale violated the First Amendment.[289] Although the decision was unanimous, there was no majority opinion. The fundamental question posed by the case was whether government should be permitted to influence people's conduct by controlling the messages being advertised rather than regulating the products

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282. *See* S.V. v. Estate of Bellamy, 579 N.E.2d 144 (Ind. Ct. App. 1991).

283. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762-65 (1976).

284. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980).

285. *See id.* at 566.

286. *See, e.g.*, United States v. Edge Broad. Co., 509 U.S. 418, 425 (1993) (sustaining a federal statute (18 U.S.C. § 1304 (1994)) that criminalized television and radio broadcasting of lottery advertisements by licensees who operate in a state that prohibits lotteries); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) (upholding a content-based statute singling out advertising of gambling parlors because it served a substantial state interest in reducing the demand for casino gambling by Puerto Rican residents). *See* P.R. LAWS ANN. tit. 15, § 71 (1972) (codified as amended at P.R. LAWS ANN. tit. 15, § 71 (1995)).

287. 116 S. Ct. 1495 (1996).

288. R.I. GEN. LAWS § 3-8-7 (1987).

289. *44 Liquormart*, 116 S. Ct. at 1514.

themselves. Rhode Island defended the statute on grounds that the prohibition on advertising would reduce consumption and encourage temperance among the residents.[290] Justice Stevens, joined by Justices Kennedy, Ginsburg, and Souter, argued that regulations seeking to suppress commercial speech in order to pursue a policy not related to consumer protection with regard to the product must be viewed with "special care."[291] The *Central Hudson* standard was based on the state's greater authority to regulate potentially deceptive or overreaching advertising—concerns not implicated in "speech" that simply discloses retail liquor prices. Applying *Central Hudson* with this "special care," these Justices concluded that Rhode Island's ban on liquor price advertising did not directly advance the state's interest in temperance.[292]

Justice O'Connor, concurring in a separate opinion joined by Justices Rehnquist, Souter, and Breyer, declined to consider whether the *Central Hudson* test should be modified or displaced.[293] She reasoned that even applying that test, the state's goal of discouraging consumption could have been achieved through less speech restrictive means, e.g., per capita consumption limits, educational campaigns or increased sales tax.[294] Because "the fit between ends and means is not narrowly tailored," it failed the *Central Hudson* test.[295] Because alternatives, such as increased educational campaigns and taxation, are always available alternative means, Justice O'Connor's opinion may in reality preclude regulation that seeks to suppress consumption. Writing separately, Justice Thomas proposed to do away entirely with *Central Hudson*.[296] He rejected as per se illegitimate any government interest in keeping "legal users of a product or service ignorant in order to manipulate their choices in the marketplace."[297]

Although the Court failed to reach a majority consensus, *44 Liquor Mart* overturns much of the Supreme Court's 1986 decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[298] wherein the Court upheld regulations that barred advertising of Puerto Rican casinos within the Commonwealth.[299] In *44 Liquor Mart*, a majority of the Justices, albeit in separate opinions, repudiated the *Posadas* doctrine that the government can suppress non-misleading speech for the purpose of dampening public demand for a product.[300] Further, a majority rejected the suggestion in *Posadas* that gambling activity can be regulated more

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290. *See id.* at 1509.

291. *Id.* at 1508-09 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 n.9 (1980)).

292. *Id.* at 1510.

293. *Id.* at 1522 (O'Connor, J., concurring).

294. *Id.*

295. *Id.*

296. *Id.* at 1515 (Thomas, J., concurring).

297. *Id.* at 1515-16.

298. 478 U.S. 328 (1986).

299. *Id.* at 343.

300. *44 Liquormart*, 116 S. Ct. at 1512, 1513 n.20, 1519 (Thomas, J., concurring).

restrictively because it involves a "vice."[301] Thus, although the Court refused to overrule *Central Hudson*, certainly this case suggests that the test will be applied more stringently where the government's interest is to suppress truthful, non-misleading information for paternalistic purposes.[302]

2. Free Speech Rights of Government Employees and Independent Contractors.—The Supreme Court has held that government cannot condition employment upon relinquishing First Amendment rights.[303] However, it has also made it clear that the free speech rights of government employees are not the same as those enjoyed by other citizens. Rather, courts must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs."[304] In *Connick v. Myers*,[305] the Court somewhat refined this test by demanding that an initial inquiry be made as to whether the government employee's speech is a matter of public concern because "private" speech is entitled to little, if any, First Amendment protection.[306] In *Johnson v. University of Wisconsin-Eau Claire*,[307] the Seventh Circuit ruled that plaintiff's speech protesting her base salary rate as discriminatory related solely to a personal problem and therefore could not be fairly characterized as speech on a matter of public concern.[308] Similarly, in *Lashbrook v. Oerkfitz*,[309] the court reasoned that even if the alleged inappropriate firing of a park district director was a matter of public concern, plaintiff's specific speech addressed only a private dispute with a park district and was not an effort at whistleblowing or some other matter of concern to the public generally, and thus the speech was unprotected.[310]

Several litigants met the "public concern" threshold, but could not survive the

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301. *See id.* at 1513, 1520 n.10.

302. Actually, the notion that paternalism is an impermissible reason to ban advertising was a key holding in the Supreme Court's first decision to recognize any First Amendment protection for commercial speech. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (striking down Virginia's ban on advertising of prescription drug prices). Subsequent decisions like *Central Hudson* and *Posadas* found that restricting advertising in order to suppress the demand for the advertised product was a permissible end. After *Liquormart* it would appear that advertising bans designed to suppress consumption will nearly always be struck. *Compare* Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325, 327 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997) (city ordinance banning stationary outdoor advertising of alcoholic beverages in areas where children are likely to walk to school or play did not violate First Amendment's commercial speech guarantees). *See* BALTIMORE, MD. CITY CODE, art. 30, § 10.0-1(h) (1994).

303. Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

304. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

305. 461 U.S. 138 (1983).

306. *Id.* at 147.

307. 70 F.3d 469 (7th Cir. 1995).

308. *Id.* at 482.

309. 65 F.3d 1339 (7th Cir. 1995).

310. *Id.* at 1350.

"balancing" test.[311] In *Warzon v. Drew*,[312] the Seventh Circuit ruled that confidential or policymaking employees can be terminated even for speech that is of public concern if the speech advocates positions in conflict with the stated policy of their superiors.[313] The court reasoned that in this situation it can be inferred that the operations of government will be adversely affected to such a degree as to outweigh free speech rights.[314] However, the court left open the question of "whether an elected official may fire a policymaker for speaking out on issues not related to her job."[315]

Similarly, in *Jefferson v. Ambroz*,[316] the court held that a probation officer who participated in a radio talk show program on which he made extremely critical comments regarding the local criminal justice system could be terminated for his remarks even though he did not identify himself on the show.[317] The city's interest in the efficient operation of its probation department far outweighed the plaintiff's interest in the speech in question.[318] The court emphasized that loyalty and confidence are particularly critical to a probation officer's position, and that the plaintiff's statements potentially caused damage to the probation office's public image and relationship with other law enforcement agencies.[319] Further, actual disruption need not be proved since the Supreme Court has made it clear that judges are to "look to the facts as the employer reasonably found them to be," and that the government is entitled to consider the "potential disruptiveness of the speech."[320] Finally, the court rejected the plaintiff's claim that he should have simply been transferred but not terminated, ruling that government employers "need not accommodate those employees who engage in agency-damaging speech by finding non-public-contact positions for them until 'the heat blows over.'"[321]

In contrast, in *Dishnow v. School District of Rib Lake*,[322] the court sustained the First Amendment claims brought by a high school guidance counselor who was terminated after he informed the media about the school board's alleged violation of open-meetings law and vocally opposed removal of a novel from the school library.[323] The court first ruled that the counselor had engaged in speech that touched on matters of public concern despite the fact that the issues "were not of global significance" or "vital to the survival of Western civilization."[324]

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311. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).
312. 60 F.3d 1234 (7th Cir. 1995).
313. *Id.* at 1238-39.
314. *Id.* at 1238.
315. *Id.* at 1238 n.1.
316. 90 F.3d 1291 (7th Cir. 1996).
317. *Id.* at 1296-98.
318. *Id.* at 1296.
319. *Id.*
320. *Id.* (quoting Waters v. Churchill, 511 U.S. 661, 677, 680 (1994)).
321. *Id.* at 1298.
322. 77 F.3d 194 (7th Cir. 1996).
323. *Id.* at 196, 199.
324. *Id.* at 197.

Because the defendants had argued Dishnow's speech was not of public concern, they did not ask the court to engage in a *Pickering-Connick* balance.[325] The Seventh Circuit held that defendants should have asked the judge to determine whether the speech was so inimical to the maintenance of a proper educational atmosphere as to justify the discharge.[326] Because the defendants failed to do so, and this is a matter for the judge not the jury to decide, the defendants waived this defense.[327]

Where political affiliation alone, unaccompanied by other forms of expression, is the basis for the adverse employment action, the Court has applied a different analysis. In *Elrod v. Burns*[328] and *Branti v. Finkel*,[329] the Court held that government officials may not discharge public employees for refusing to support a political party or its candidates unless political affiliation is a reasonably appropriate requirement for the job in question.[330] In *Rutan v. Republican Party*,[331] the Court extended this protection to include patronage-based decisions regarding hiring, promotion, transfer, and recall decisions.[332] Once an employee has established that protected association was a motivating factor in the government's decision, the burden shifts to the government to prove that political affiliation is "an appropriate requirement for the effective performance" of the job in question.[333]

In *Americanos v. Carter*,[334] the Indiana Attorney General was able to meet this standard. She demonstrated that deputy attorneys general have meaningful input into deciding how to handle legal issues for the state.[335] Further, there was a potential for principled disagreement on which goals were primary in the Attorney General's representation of the state.[336] Thus, political loyalty was an appropriate requirement for the effective performance of the tasks involved.[337] A similar conclusion has been reached by the Seventh Circuit with regard to deputy sheriffs.[338] Nonetheless, in *Wallace v. Benware*, [339] the court ruled that even though a sheriff may *discharge* his deputy for political reasons, he will not escape First Amendment liability for retaliatory *harassment* of the deputy.[340] The court

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325. *Id.* at 197-98.
326. *Id.* at 197.
327. *See id.*
328. 427 U.S. 347 (1976).
329. 445 U.S. 507 (1980).
330. *Elrod*, 427 U.S. at 349; *Branti*, 445 U.S. at 518.
331. 497 U.S. 62 (1990).
332. *Id.* at 71.
333. *See Branti*, 445 U.S. at 518.
334. 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S. Ct. 1853 (1996).
335. *Id.* at 142.
336. *Id.*
337. *Id.*
338. *See* Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991).
339. 67 F.3d 655 (7th Cir. 1995).
340. *Id.* at 663-64.

could not see how harassing government employees in any way advances the government's interest in efficiency or productivity.[341]

Finally, the Seventh Circuit held that in so-called "hybrid" cases, where employees are terminated for speech that is part of their partisan activity, the *Pickering* balance rather than the straightforward *Elrod-Branti* analysis that governs "passive affiliation" should apply. In *Caruso v. DeLuca*,[342] the court reasoned that, "[t]he line between those cases that are appropriately analyzed under *Branti* and those that ought to be analyzed under the *Connick-Pickering* methodology is not a 'stark' one."[343] It concluded that where an employee is challenging an employer's incident-specific response to speech that was considered detrimental to future working relationships, the *Connick-Pickering* analysis "provides the most sure-footed analytical path."[344] Here the defendant's legitimate management concerns with respect to the efficient operation of the clerk's office outweighed the plaintiff's First Amendment interests.[345]

This past Term the Supreme Court was asked to decide whether these two lines of cases, involving free speech and free association rights of government employees, apply to independent contractors. The plaintiffs in both cases argued that they should be entitled to greater protection than government employees. The contractors argued that, like other private citizens, they should not be coerced into relinquishing their First Amendment freedoms unless the government can show a compelling government interest and means narrowly tailored to that interest. They argued that because they do not work on a daily basis with government officials, the government interests expressed in *Pickering* in maintaining harmonious working environment and relationships are attenuated. Further, because independent contractors would not be perceived as part of government, there would be less concern that political statements might be confused with the government's political positions.[346]

On the other hand, the government argued that independent contractors should be provided even less First Amendment protection than that afforded government employees. Independent contractors' First Amendment rights are much less significant because, unlike government employees, they probably do not rely for their livelihood on this government benefit.[347]

In both cases, the Court ruled, 7-2, that the First Amendment protects independent contractors and that the *Pickering* and *Elrod* standards should be applied. In *Board of City Commissioners v. Umbehr*,[348] the Court addressed the plight of an independent contractor whose ten-year hauling contract was

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341. *Id.*
342. 81 F.3d 666 (7th Cir. 1996).
343. *Id.* at 669.
344. *Id.*
345. *See id.* at 671.
346. *See* Board of City Comm'rs v. Umbehr, 116 S. Ct. 2342, 2348 (1996).
347. O'Hare Truck Service v. City of Northlake, 116 S. Ct. 2353, 2359 (1996).
348. 116 S. Ct. 2342 (1996).

terminated after he spoke out against the Board of Commissioners.[349] Umbehr not only wrote critical letters and editorials in local newspapers regarding the county's various practices, but ran unsuccessfully for election to the board.[350] Justice O'Connor recognized that there were differences between independent contractors and employees and that both the government's interest as well as the speaker's interests were of lesser magnitude.[351] She concluded, however, that the *Pickering* balancing test, adjusted to these varying interests, provided an adequate standard for reviewing such claims: "all of [these arguments] can be accommodated by applying our existing framework for government employee cases to independent contractors."[352]

Justice O'Connor reasoned that *Pickering* already involves a fact-sensitive and deferential weighing of the government's legitimate interests.[353] In achieving this balance, judges may take into account the fact that the government's interest as contractor may be less than its interest as employer. It should also realize that when government exercises its contractual power, rather than its sovereign power, against private citizens, it has a special "interest in being free from intensive judicial supervision of its daily management functions. . . ."[354] Justice O'Connor also expressed concern that constitutional claims should not be adjudicated based on such formal distinctions as whether the government agency classifies someone as a contractor or employee.[355]

The Court advised that on remand Umbehr must show that termination of his contract was motivated by his speech on a matter of public concern.[356] If he does so, the board may defend either by establishing by a preponderance of the evidence that board members would have terminated the contract regardless of the speech or by proving that the county's legitimate interests, deferentially viewed, outweigh the free speech interests at stake.[357] Further, even if Umbehr prevails, evidence that board members discovered facts after termination that would have led to a later termination anyway, or that Umbehr mitigated his losses by means of subsequent contracts, would be relevant in assessing an appropriate remedy.[358]

In a scathing dissent, Justice Scalia, joined by Justice Thomas, argued that there was no textual or historical basis for providing First Amendment protection to independent contractors.[359] To the contrary, there is a long American political tradition of awarding contracts based on political affiliation: "What secret knowledge, one must wonder, is breathed into lawyers when they become Justices

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349. *Id.* at 2345.
350. *Id.*
351. *Id.* at 2352.
352. *Id.* at 2348.
353. *Id.*
354. *Id.* at 2349.
355. *Id.*
356. *Id.* at 2352.
357. *Id.* (citation omitted).
358. *Id.*
359. *Id.* at 2362-65 (Scalia, J., dissenting).

of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have *regarded* as constitutional for 200 years, is in fact unconstitutional?"[360]

In a second case, *O'Hare Truck Service v. City of Northlake*,[361] the Court tackled the question of whether *Elrod* and *Branti* apply where government retaliates against a contractor, or a regular provider of services, for exercising free speech and association rights.[362] In *O'Hare*, the city maintained a rotation list of available companies to perform towing services at its request, and it had a policy of not removing companies from the list absent cause.[363] O'Hare Truck Service, which had provided services for some thirty years, was removed after its owner refused to contribute to the Northlake mayor's re-election campaign and instead supported his opponent.[364] Although the case appeared to involve the hybrid problem where political affiliation and free speech are intermixed, the lower courts apparently analyzed the case as a straightforward *Elrod-Branti* situation.[365] The Supreme Court held that the case-by-case adjudication required by that test in proving whether political affiliation is an appropriate requirement for job performance should be applied to independent contractors.[366] Further, it reasoned that this flexible analysis would accommodate those cases where speech and political affiliation claims are intermixed.[367] As in *Umbehr*, the Court was satisfied that judges could properly take into account the concerns of government in having discretion to allocate contracts as well as the concerns of independent contractors to be free from this form of coercion.[368]

Justice Kennedy reasoned that if the owner had been a public employee whose job was to perform tow-truck operations, he could not have been discharged for refusing to contribute to the mayor's campaign or for supporting his opponent.[369] He failed to see anything that could distinguish this situation, and, like Justice O'Connor, he expressed the fear that recognizing a distinction would invite manipulation by government to avoid constitutional liability simply by attaching different labels to particular jobs.[370] The Court rejected the argument that independent contractors had lesser rights than employees since contractors depend to a lesser degree on government sources for their incomes.[371] It cited an amicus brief that estimated that 75% of towing companies provide services in connection

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360. *Id.* at 2363 (emphasis added).

361. 116 S. Ct. 2353 (1996).

362. *Id.* at 2355.

363. *Id.* at 2356.

364. *Id.*

365. *Id.* at 2358. The Supreme Court noted that on remand the court must decide whether the case was governed by *Elrod-Branti* or by *Pickering*. *Id.* at 2361.

366. *Id.*

367. *Id.* at 2358.

368. *Id.*

369. *Id.*

370. *Id.* at 2359.

371. *Id.* at 2359-60.

with government requests and that referrals generated between 30% and 60% of their gross revenues.[372] In short, the Court refused to "draw a line excluding independent contractors from the First Amendment safeguards of political association afforded to employees."[373]

It should be emphasized that *Umbehr* involved termination of a contract that the plaintiff had enjoyed on an exclusive and uninterrupted basis for several years[374] and that in *O'Hare Truck Services* the company had been on the city's towing list since 1965.[375] In *Umbehr*, Justice O'Connor explained that because the suit concerned the termination of a pre-existing commercial relationship with the government, the Court did not have to and would not discuss "the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship."[376] Although the Supreme Court in *Rutan v. Republican Party of Illinois*[377] held that applicants for public employment cannot constitutionally be rejected on the basis of their political affiliation, the question of whether this ruling will be extended to independent contractors was left unanswered.[378]

E. Freedom of Religion: Prayer in Public Schools

Since the 1960s, the Supreme Court has closely adhered to the principle that prayer in public schools is prohibited by the Establishment Clause.[379] This is the rule regardless of whether students deliver the prayer and regardless of whether the prayer ceremony is voluntary.[380] Further, in *Lee v. Weisman*,[381] the Court, in a 5-4 decision, held that the Establishment Clause outlaws the practice of public schools inviting clergy to deliver non-sectarian prayers at graduation ceremonies.[382] Justice Kennedy found that graduation prayers "bore the imprint of the state and put school-age children who objected in an untenable position."[383] He emphasized the heightened concern with protecting freedom of conscience from subtle, coercive pressure in the elementary and secondary school setting.[384] The question of whether these same concerns apply in a university setting was addressed by a

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372. *Id.* at 2359.
373. *Id.* at 2361.
374. *Umbehr*, 116 S. Ct. at 2345.
375. *O'Hare*, 116 S. Ct. at 2355.
376. *Umbehr*, 116 S. Ct. at 2352.
377. 497 U.S. 62, 65 (1990).
378. *Umbehr*, 116 S. Ct. at 2352.
379. U.S. CONST. amend I ("Congress shall make no law respecting an establishment of religion . . . .").
380. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (invalidating the practice of having students read passages from the Bible); Engel v. Vitale, 370 U.S. 421, 431 (1962) (striking down voluntary prayer).
381. 505 U.S. 577 (1992).
382. *Id.* at 586.
383. *Id.* at 590.
384. *Id.* at 592.

federal district court in Indiana.

In *Tanford v. Brand*,[385] an Indiana University law school professor and some of his students, as well as one undergraduate student, alleged that the invocation and benediction delivered at Indiana University's commencement ceremonies violated the Establishment Clause.[386] The district court initially denied a preliminary injunction,[387] and this term it rejected the plaintiff's motion for summary judgment and granted judgment in defendant's favor.[388] Distinguishing *Lee*, the district court ruled that college students do not require the same protection from coercion that bars comparable prayers at the elementary and secondary school levels.[389] The plaintiffs were young adults being trained as lawyers, "a discipline that demands the ability to think independently, to analyze arguments skeptically and to disregard social pressures, peer or otherwise."[390] Further, although plaintiffs included one undergraduate student, the court cited earlier Supreme Court precedent finding that college students are also less impressionable and less susceptible to religious indoctrination.[391] In addition, any coercive impact of the commencement ceremony was lessened by the fact that the size and context of the program were impersonal—thousands of graduates choose not to attend and a non-adherent could readily dissent without being noticed and without fear of being identified as a non-conformist.[392]

The court then proceeded to analyze the claim under the three-prong analysis set forth by the Supreme Court in *Lemon v. Kurtzman*,[393] which requires that government programs share three characteristics in order to survive an Establishment Clause challenge: (1) the program must have a secular purpose; (2) the primary effect must not be to send a message of endorsement or disapproval of religion; and (3) the government program cannot create excessive entanglement between church and state.[394] At least five current sitting Justices have strongly criticized *Lemon* and urged adoption of a more "accommodationist" approach to church-state relations. Some have argued that the Establishment Clause is violated only where the government has endorsed or demonstrated affirmative approval of religion,[395] while others contend that the Establishment Clause bars only discrimination by government among religious organizations or coercive pressure by government to engage in religious activities.[396] However, because *Lemon* has

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385. 932 F. Supp. 1139 (S.D. Ind. 1996), *aff'd*, 104 F.3d 982 (7th Cir. 1997).

386. *Id.* at 1141.

387. *Id.* at 1139. *See* Tanford v. Brand, 883 F. Supp. 1231 (S.D. Ind. 1995).

388. *Tanford*, 932 F. Supp. at 1146-47.

389. *Id.* at 1143-44.

390. *Id.* at 1143.

391. *Id.* (citing Tilton v. Richardson, 403 U.S. 672, 686 (1971)).

392. *Id.* at 1144.

393. 403 U.S. 602 (1971).

394. *Id.* at 612-13. *See also* Agostini v. Felton, 117 S. Ct. 1997 (1997) (Court's latest Establishment Clause case).

395. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

396. *See* Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

never been overruled, the district court in *Tanford* proceeded to apply its analysis.[397]

As to the first *Lemon* prong, the court reasoned that solemnizing the occasion and continuing a 155-year-old university tradition satisfied the secular purpose test.[398] Next, in light of the non-sectarian and brief nature of the invocation and benediction, as well as the sophistication of the audience, the court did not see the thirty second prayer delivered as part of a larger secular ceremony as endorsing any particular religion or influencing people's religious beliefs.[399] Finally, it saw little entanglement because the University's involvement was limited to inviting the clergy persons and giving general suggestions that the invocation and benediction be "uplifting."[400] There was no need for frequent or pervasive contacts between university officials and local clergy.[401]

Because plaintiffs could not demonstrate that they were entitled to summary judgment under *Lee* or under the traditional *Lemon* tests, the court denied them relief, and entered judgment in favor of the defendant.[402] The Seventh Circuit affirmed this ruling, adopting almost verbatim the district court's analysis under *Lee* and *Lemon*.[403]

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397. *Tanford*, 932 F. Supp. at 1145.

398. *Id.*

399. *Id.* at 1146.

400. *Id. Cf.* Konkle v. Henson, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996) (holding that the First Amendment does not bar suit against a church for negligent hiring, supervision, and retention, brought by a woman alleging sexual molestation by a minister. However, respondeat superior claim could not prevail because the minister was not engaging in authorized acts or otherwise serving his employer's interests.).

401. *Tanford*, 932 F. Supp. at 1146.

402. *Id.* at 1146-47.

403. Tanford v. Brand, 104 F.3d 982, 985-86 (7th Cir. 1997).