IV. Constitutional Law*

A. Local Human Rights Commissions' Powers

One significant constitutional decision during the survey period was *Indiana University v. Hartwell*,[1] in which the Indiana Court of Appeals held unconstitutional the Indiana law[2] authorizing the creation of local human rights commissions. The 1978 General Assembly subsequently amended the law both to meet constitutional requirements and to limit the powers of the local commissions.[3]

Hartwell arose upon a challenge by Indiana University to a decision of the Human Rights Commission of the City of Bloomington. Hartwell had been employed by the University's Aerospace Research Applications Center (ARAC) from June 1, 1971, until May 1973. In June 1973, ARAC hired a man, Thor Semler, for a position similar to Hartwell's at a salary significantly higher than that paid to Hartwell. The Commission found that the University had discriminated against Hartwell by underpaying her because of her sex and granted her an award of back pay. The Monroe County Circuit Court found that the monetary award exceeded the commission's authority, but the court affirmed the rest of the order. The University appealed, alleging that the Commission had no authority to consider the discrimination charges, since the University was an arm of the state, and that the Commission's holdings were arbitrary and capricious. Hartwell and the Commission cross-appealed the ruling that the Commission lacked the statutory authority to award monetary damages.

The Indiana Court of Appeals found the Commission's findings of facts and the application of such findings to be unclear.[4] The court

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*For a discussion of two important due process cases decided during the survey period, see Price, *Administrative Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 30, 38-42 (1978).

[1]367 N.E.2d 1090 (Ind. Ct. App. 1977). For another discussion of this case, see Price, *Administrative Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 30, 35-36 (1978).

[2]IND. CODE § 22-9-1-12 (1976) (repealed 1978). The court's ruling did not affect the validity of the remainder of the Indiana Civil Rights Law, IND. CODE §§ 22-9-1-1 to 13 (1976).

[3]Act of Mar. 7, 1978, Pub. L. No. 123, § 2, 1978 Ind. Acts 1117 (codified at IND. CODE § 22-9-1-12.1 (Supp. 1978)).

[4]367 N.E.2d at 1091-92. The court held that the salary paid to Semler after June 1973, had no bearing on Hartwell's claim that she was subjected to sex discrimination by being underpaid for the period from May 1972 to May 1973. Semler's salary was paid after the time of the alleged discrimination and, therefore, is not relevant to whether Hartwell was underpaid during the earlier period. If the Commission had based its finding upon Semler's pay and duties, then its ruling would have been erroneous. *Id.* at 1092. The court, however did not reach this issue:

held the statute properly authorized the Commission to subject the state to its jurisdiction,[5] but did not decide whether the University is an arm of the state of Indiana.[6] The crucial issue in the case was whether the Commission had the power to award damages. The court held that the statute was broad enough to include that power, but that the very breadth of the statutory authority rendered the statute unconstitutional.[7] The statute authorized units of local government to invest their human rights agencies with "such powers . . . as may be deemed necessary or appropriate to implement its purpose and objective, whether or not such powers are granted to the state commission . . . ."[8] Referring to the scope of powers given to the local commissions, the court held that the law was unconstitutional since "we cannot say with certainty that the statute places *any* limitations on the powers which may be granted to the Commission."[9]

The court then discussed the theory of the separation of governmental powers. The court found that the Commission was granted statutory authority which constitutionally belonged to the legislative and judicial branches of government and that such authority could not be delegated to an administrative agency.[10] While acknowledging that the legislature may grant powers to administrative agencies in broad and general terms,[11] the court held that the human rights commission statute failed to meet the test im-

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> Although we *suspect* the above determination *was* the basis for the Commission's decision, the fact remains that we do not *know* how the Commission reached its decision . . . .
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> To facilitate an informed judicial review, we would remand and instruct the Commission to make clear, specific findings of fact and to state how they were applied. However, the questions of jurisdiction and of the authority of the Commission to award damages and our resolution of them renders unnecessary such a remand.

Id. at 1092-93.

[5] *Id.* at 1094. The court stated: "[W]e perceive nothing in the statute to preclude state government as it exists within such a territorial jurisdiction from being subjected to the jurisdiction of a local commission agency." *Id.*

[6] *Id.* at 1094 n.7.

[7] *Id.* at 1093.

[8] IND. CODE § 22-9-1-12 (1976). This broad language was followed by a list of specific powers which could be granted to local commissions. Local commissions were not, however, limited to the enumerated powers.

[9] 367 N.E.2d at 1093. The significant constitutional provision, IND. CONST. art. 3, § 1, divides the powers of state government into the three departments of legislative, executive including administrative, and judicial. It then provides: "[N]o 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." *Id.*

[10] 367 N.E.2d at 1094.

[11] *Id.* at 1094 (citing Matthews v. State, 237 Ind. 677, 681-82, 148 N.E.2d 334, 336 (1958)).

posed by the Indiana Supreme Court in *Matthews v. State*:[12] "Reasonable standards must be imposed where the Legislature delegates discretionary powers to an administrative officer."[13]

The 1978 Indiana General Assembly restored the authority of local governments to establish human rights commissions on a basis consistent with the requirements in *Hartwell*.[14] This statute limits the powers which can be exercised by local commissions. The local commissions are now denied any powers over the state or any of its agencies.[15] The power to award damages, which had not been specifically granted under the invalid law, is now granted in a limited fashion by the new law.[16] Another change is to make the jurisdiction of the state and local commissions exclusive. Under prior law, the state commission could refer cases to the local commissions.[17] Under the new law, once a case is filed with either the local or state agency, the complainant has no recourse to the other agency.[18]

Although the authority for the creation of local commisions has been re-established on a basis consistent with constitutional requirements, a case such as that brought by Hartwell could no longer be heard by a local human rights commission because the complaint involves a state agency.

B. Recounts of Legislative Elections

The Indiana Supreme Court, in *State ex rel. Wheeler v. Shelby Circuit Court*,[19] upheld the constitutionality[20] of a statute requiring a circuit court to appoint a recount commission upon the request of the apparent loser of an election to the Indiana General Assembly.[21] *Wheeler* was distinguished from two prior cases, *State ex rel. Beaman v. Circuit Court of Pike County*,[22] and *State ex rel. Acker v.*

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[12]237 Ind. 677, 148 N.E.2d 334 (1958).

[13]*Id.* at 681, 148 N.E.2d at 336.

[14]Act of Mar. 7, 1978, Pub. L. No. 123, § 2, 1978 Ind. Acts 1117 (codified at IND. CODE § 22-9-1-12.1 (Supp. 1978)).

[15]IND. CODE § 22-9-1-12.1(b) (Supp. 1978). The Indiana Civil Rights Commission continues to have jurisdiction over discriminatory practices by the state. *Id.* § 22-9-1-3(h) (1976).

[16]*Id.* § 22-9-1-12.1(c)(8) (Supp. 1978). Payment of actual damages is allowed, but is limited to "lost wages, salaries, commissions, or fringe benefits." *Id.*

[17]*Id.* § 22-9-1-12 (1976) (repealed 1978).

[18]*Id.* § 22-9-1-12.1(d) (Supp. 1978).

[19]369 N.E.2d 922 (Ind.), *rev'g on rehearing* 362 N.E.2d 477 (Ind. 1977).

[20]The issue was decided on the basis of IND. CONST. art. 4, § 10, which provides: "Each House, when assembled, shall . . . judge the elections, qualifications, and returns of its own members."

[21]IND. CODE §§ 3-1-27-1 to 17 (1976).

[22]229 Ind. 190, 96 N.E.2d 671 (1951).

Reeves,[23] which had invalidated an earlier recount law regarding state legislative races.[24] The earlier law required the judgment of the trial court's recount commission to be accepted by the legislature as "prima facie evidence of the votes cast for such office."[25] After the earlier law was voided, the Indiana General Assembly amended the recount statute to provide that the results of a judicially-ordered recount be delivered

> to the presiding officer of the house in which the successful candidate is to be seated . . . for such action as that body may find appropriate. . . .
>
> The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted . . . for the purpose of referring the information therein contained to the appropriate authorities.[26]

In *Acker*, the court had invalidated the recount statute as applied to a legislative race on the ground that the state constitution excluded the courts from jurisdiction over these elections.[27] In *Beaman*, the court held that the recount statute was unconstitutional because it purported to allow the courts "to determine the election, qualifications and returns of the members of the legislature . . . ."[28]

Writing for the majority in *Wheeler*,[29] Chief Justice Givan held that the recount was merely "an extension of the voting process,"[30] and that there was no judicial invasion of the legislative domain since "neither the original vote nor the recount are absolutely binding on the legislative body."[31] The majority found that the legislative intent in amending the recount statute was to allow

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[23]229 Ind. 126, 95 N.E.2d 838 (1951).

[24]Indiana Election Code Act of 1945, ch. 208, § 337, 1945 Ind. Acts 888.

[25]*Id.*

[26]IND. CODE § 3-1-27-14 (1976).

[27]229 Ind. at 130, 95 N.E.2d at 840.

[28]229 Ind. at 197, 96 N.E.2d at 674.

[29]The initial supreme court decision in *Wheeler* held 3-2 that the recount violated the state constitution. After Justice Arterburn left the court and was replaced by Justice Pivarnik, the court reversed its earlier decision. Chief Justice Givan wrote a dissenting opinion in the first decision and the majority opinion in the second decision. Justice DeBruler wrote the majority decision in the first decision and the dissenting opinion in the second. To simplify consideration of the opinions, Chief Justice Givan's opinions will be referred to as the majority opinions, while those of Justice DeBruler will be referred to as the minority or dissenting opinions.

[30]369 N.E.2d at 935.

[31]*Id.*

courts to participate in the recount process, while avoiding the constitutional infirmities of the prior statute.[32]

The dissent stated that the court had failed to follow past case law,[33] and that the decision would "endanger a court's image of impartiality"[34] by involving the courts in political turmoil. The dissent argued that the amendment of the recount statute, enacted after *Acker* and *Beaman*, did not correct the unconstitutionality because, under both old and new law, the legislature still made the final determination of its members, and in both instances the courts were still required to participate in a process reserved by the Indiana Constitution to the legislative branch.[35] The dissent claimed that the crucial issue was not whether the court's actions had a binding effect upon the legislature, but whether the court had any role in the process of legislative elections. The minority countered the majority's position regarding the legislative intent in amending the statute by arguing that the legislature has no right to surrender its constitutional powers to the courts.[36]

C. Indianapolis Massage Parlor Ordinance

The Indianapolis massage parlor ordinance[37] was upheld as constitutional by the Indiana Supreme Court in *City of Indianapolis v. Wright*.[38] The ordinance was challenged on three grounds. The first was that the city had attempted to pass a local law where a state law already pre-empted the area. The second was that the ordinance violated the due process or the equal protection provisions of federal or state law. The third was that the administrative inspection scheme authorized by the ordinance violated prohibitions in the federal or state constitutions.

The Indiana Supreme Court found that no state statute provided for the licensing of massage parlors and that the city ordinance did not provide for misdemeanor penalties;[39] consequently, the court held that the ordinance did not cover the same subject matter as

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[32] *Id.*

[33] *Id.* (DeBruler, J., dissenting).

[34] *Id.* at 936. (DeBruler, J., dissenting).

[35] 362 N.E.2d at 479.

[36] *Id.*

[37] INDIANAPOLIS-MARION COUNTY, IND. CODE § 17-729 (1975). The ordinance provides for detailed regulation of massage parlors. The persons employed by these establishments are prohibited from giving a massage to a person of the opposite sex, or from touching or offering to touch the genital or sexual area of any person. Those persons giving massages must wear nontransparent clothes over their sexual or genital areas.

[38] 371 N.E.2d 1298 (Ind. 1978).

[39] *Id.* at 1300.

state statutes.[40] The massage parlor ordinance was thus distinguished from an ordinance invalidated in *City of Indianapolis v. Sablica.*[41] That ordinance, prohibiting the interference with police officers, directly conflicted with Indiana constitutional provisions prohibiting the enactment of local laws "for the punishment of crimes and misdemeanors."[42]

The second claim was that the ordinance violated the due process and equal protection clauses of the state[43] and federal[44] constitutions. The court rejected these claims, based on the United States Supreme Court's dismissal, for want of a substantial federal question, of appeals from three state court decisions upholding the constitutionality of similar massage parlor ordinances.[45] Under the Supreme Court's decision in *Hicks v. Miranda,*[46] such dismissals are to be treated as dispositions on the merits of the issues raised.[47] Subsequent to *Hicks,* federal appellate courts have considered similar massage parlor ordinances and affirmed their constitutionality based upon the summary dispositions.[48]

The third claim was that the inspection provisions of the ordinance violated the prohibitions of the state[49] or federal[50] constitutions which protect against unreasonable search or seizure. The ordinance provided: "Every massage school, massage parlor, massage therapy clinic, or bath house shall be open for inspection during all business hours and at other reasonable times by police officers, health and fire inspectors and duly authorized representatives of the City Controller upon the showing of proper credentials by such persons."[51]

The court justified the warrantless search of a massage parlor on the grounds that surprise is necessary to avoid concealment of

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[40]*Id.*

[41] 342 N.E.2d 853 (Ind. 1976) (invalidating INDIANAPOLIS-MARION COUNTY, IND. CODE §§ 10-1021, 10-1023 (1975)).

[42]IND. CONST. art. 4, § 22. *See also* IND. CONST. art. 4, § 23.

[43]IND. CONST. art. 1, § 12.

[44]U.S. CONST. amend. XIV.

[45]Smith v. Keator, 419 U.S. 1043 (1974), *dismissing appeal from* 285 N.C. 530, 206 S.E.2d 203 (1974); Rubenstein v. Township of Cherry Hill, 417 U.S. 963 (1974), *dismissing appeal from* No. 10,027 (N.J. Sup. Ct. Jan. 29, 1974) (unreported); Kisley v. City of Falls Church, 409 U.S. 907, *dismissing appeal from* 212 Va. 693, 187 S.E.2d 168 (1972).

[46]422 U.S. 332 (1975).

[47]*Id.* at 343-45.

[48]Tomlinson v. Mayor, 543 F.2d 570 (5th Cir. 1976); Hogge v. Johnson, 526 F.2d 833 (4th Cir. 1975), *cert. denied,* 428 U.S. 913 (1976); Colorado Springs Amusements v. Rizzo, 524 F.2d 571 (3d Cir. 1975), *cert. denied,* 428 U.S. 913 (1976); Cullinane v. Geisha House, Inc., 354 A.2d 515 (D.C. App.), *cert. denied,* 428 U.S. 923 (1976).

[49]IND. CONST. art. 1, § 11.

[50]U.S. CONST. amend. IV.

[51]INDIANAPOLIS-MARION COUNTY, IND. CODE § 17-729(j) (1975).

violations of the ordinance, that the business is one subject to an extensive history of regulation, that a regulated business impliedly consents to searches at reasonable times and places, and that the ordinance does not provide for criminal penalties.[52] In the light of the cases cited by the court and the subsequent United States Supreme Court decision in *Marshall v. Barlow's, Inc.*,[53] the ruling on this issue is subject to serious challenge.

The massage parlors relied principally on the requirements for warrants for administrative searches in *Camara v. Municipal Court*[54] and *See v. City of Seattle*.[55] The former involved the right of building inspectors to make a warrantless inspection of a personal residence, while the latter involved a fire department inspector's warrantless inspection of a locked warehouse. In *Camara*, the Court required administrative searches to adhere to the requirements of the fourth amendment,[56] but held that the standard of probable cause required for warrants would be less stringent for administrative searches than that applied in criminal cases.[57] In *Colonnade Catering Corp. v. United States*,[58] the Court held that Congress had the power to authorize warrantless administrative searches under the liquor laws, but that, absent clear authorization, the warrant requirements of the fourth amendment were fully applicable.[59] *Colonnade* was limited to laws regulating the liquor industry, which has a history of substantial and pervasive federal regulation.[60] The Court found similarly exempt from the warrant requirement businesses engaged in selling weapons and ammunition, in *United States v. Biswell*,[61] stating:

> Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic is

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[52]371 N.E.2d at 1302.

[53]96 S. Ct. 1816 (1978).

[54]387 U.S. 523 (1967).

[55]387 U.S. 541 (1967).

[56]387 U.S. at 534.

[57]*Id.* at 538-39. The Court reached the same conclusion in See v. City of Seattle, 387 U.S. at 546.

[58]397 U.S. 72 (1970).

[59]*Id.* at 76-77.

[60]*Id.* at 75-76. The Court stated:

> What was said in *See* reflects this Nation's traditions that are strongly opposed to using force without definite authority to break down doors. We deal here with the liquor industry *long subject to close supervision and inspection.* As respects *that* industry . . . Congress has broad authority to fashion standards of reasonableness for searches and siezures.

Id. at 77 (emphasis added).

[61]406 U.S. 311 (1972).

> undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders.[62]

The Indiana court acknowledged that massage parlors have not been as pervasively regulated as liquor or gun businesses, but argued that under *Biswell* "a licensee does impliedly consent to inspections at any and all reasonable times and places by obtaining a license."[63] This pronouncement overstates the holding of *Biswell* which tied such consent to a decision "to engage in this pervasively regulated business and to accept a federal license," rather than to a decision to engage in any business requiring a license.[64]

Subsequent to the Indiana decision in *Wright*,[65] the United States Supreme Court again addressed the issue of warrantless administrative searches in *Marshall v. Barlow's, Inc.*,[66] a case challenging warrantless searches of business premises pursuant to the Occupational Safety and Health Act (OSHA).[67] In *Barlow's*, the Court indicated that "the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception."[68] That a business is subject to minimum wages and maximum hours legislation,[69] is engaged in interstate commerce, or is subject to the National Labor Relations Act[70] is not sufficient regulation to include that business in the category of "pervasively regulated."[71] While *Barlow's* does not clearly indicate whether *Colonnade* and *Biswell* should be extended to licensed massage parlors, it does suggest that the Court is hesitant to extend the exception to the warrant requirement far beyond the situations in those cases.

Another factor relied upon by the Indiana Supreme Court in *Wright* was that a requirement of warrants before search would be unreasonable under the fourth amendment because of "the ease with which some violations could be concealed."[72] However, the United States Supreme Court held in *Barlow's* that requiring warrants for OSHA searches would not make inspections less effective even though the OSHA Act "regulates a myriad of safety details that may be amenable to speedy alteration or disguise . . . ."[73]

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[62] *Id.* at 315.
[63] 371 N.E.2d at 1302 (construing United States v. Biswell, 406 U.S. 311 (1972)).
[64] 406 U.S. at 316.
[65] 371 N.E.2d 1298 (Ind. 1978).
[66] 98 S. Ct. 1816 (1978).
[67] 29 U.S.C. § 657(a) (1976).
[68] 98 S. Ct. at 1821.
[69] 41 U.S.C. § 35 (1976).
[70] 29 U.S.C. §§ 151-269 (1976).
[71] *See* 98 S. Ct. at 1820.
[72] 371 N.E.2d at 1302.
[73] 98 S. Ct. at 1822.

Even if a warrant requirement were held applicable to massage parlors, such warrants are easily obtainable. The criminal law standard of probable cause is not applicable to the issuance of warrants for administrative searches.[74] Under *Barlow's*, for administrative searches "probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' "[75] This diluted fourth amendment warrant requirement allows authorities to easily obtain warrants for administrative searches. Under this standard, the practical effect of overruling *Wright* by requiring warrants before searches of massage parlors would be minimal.

D. Freedom of Religion

In *Church of Christ v. Metropolitan Board of Zoning*,[76] the Indiana Court of Appeals held that the exclusion of a church from a residentially-zoned area is a violation of the fundamental right of freedom of worship[77] protected by the United States[78] and Indiana Constitutions.[79]

The case involved the Church of Christ's purchase of property with a residential classification of "D-5."[80] Churches were clearly excluded from this classification. The Church's application, seeking permission to construct off-street parking adjacent to their property, was denied by the Metropolitan Board of Zoning Appeals. The Church appealed, contending that the Board illegally denied its application because churches could not constitutionally be excluded from residential areas by zoning ordinances. The Board argued that, although the zoning ordinance did prohibit the establishment of a church in the area, this prohibition was not illegal because the zoning ordinance precluded only the primary usage of the property for church purposes. According to the Board, the Church members could meet for religious purposes in the residential structure located on the property, but to permit the Church to construct parking places would transform the structure into one primarily used as a church and, thus, would be in conflict with the ordinance.

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[74]*Id.* at 1824.

[75]*Id.* (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)).

[76]371 N.E.2d 1331 (Ind. Ct. App. 1977).

[77]*Id.* at 1333.

[78]U.S. CONST. amend. I & XIV.

[79]IND. CONST. art. I, § 2.

[80]The "D-5" designation limited permitted use to primarily one- and two-family dwellings and certain home occupations. INDIANAPOLIS-MARION COUNTY, IND. CODE app. D., pt. 4, ch. II, §§ 2.00, 2.06 (1975).

The majority held that the ordinance unconstitutionally infringed on the Church's right of freedom of worship.[81] The court stated that since 1954 the Indiana Supreme Court has followed "the principle that the building of a church may not be prohibited in a residential district . . . ."[82] The court recognized "that churches are subject to such reasonable regulations as may be necessary to promote the 'public health, safety, or general welfare,' " but concluded that restrictions that are tantamount to exclusion are not reasonable.[83]

The court characterized the city's refusal to permit the Church to use their property for religious purposes as the "classic confrontation" between the exercise of the police power and a fundamental constitutional right.[84] In holding the ordinance unconstitutional as applied to churches, the court apparently adopted the balancing test set forth in *Board of Zoning Appeals v. Jehovah's Witnesses.*[85] The test requires a balancing of the state interest in promoting the public welfare with the individual's right to freedom of religion.[86] Under this balancing test, the *Jehovah's Witnesses* court held that zoning restrictions establishing setback or front yard lines are reasonable restrictions on the right of freedom of religion,[87] but that avoidance of the hazard of increased traffic was an insufficient public interest to justify totally excluding churches from residential areas.[88] Similarily, in *Board of Zoning Appeals v. Schulte,*[89] the court held that prevention of depreciation in value of adjoining property is not a sufficient public interest to justify the total exclusion of churches.[90] The Indiana Courts of Appeal have also followed this ap-

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[81]371 N.E.2d at 1333.

[82]*Id.* at 1334 (citing Board of Zoning Appeals v. Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954)).

[83]371 N.E.2d at 1334 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[84]371 N.E.2d at 1334. The court explained: "If the citizen fails to heed Wendell Phillip's admonition that 'External Vigilance is the price of liberty,' encroaching government may devour that fundamental right (and what is more fundamental than freedom of religion, which is a vital part of freedom of thought?)." *Id.*

[85]233 Ind. 83, 117 N.E.2d 115 (1954).

[86]The *Jehovah's Witnesses* court stated the balancing test as follows:

> When, under the facts in this case, the welfare and safety of the people in the neighborhood is placed in the scales of justice on one side, and the right to freedom of worship and assembly is placed on the other, the balance weighs heavily on the side guaranteeing the right to peaceful assembly and to worship God according to the dictates of conscience, regardless of faith or creed.

Id. at 92, 117 N.E.2d at 121.

[87]*Id.* at 89-90, 117 N.E.2d at 118.

[88]*Id.* at 92, 117 N.E.2d at 121.

[89]241 Ind. 339, 172 N.E.2d 39 (1961).

[90]*Id.* at 351, 172 N.E.2d at 45.

proach. Thus, in *Keeling v. Board of Zoning Appeals*,[91] the court permitted the Methodist Church to operate in a residential area despite the "D-5" classification.[92] In *Board of Zoning Appeals v. Wheaton*,[93] a Catholic Sisters home was allowed in a residential district.[94]

The court's decision is well supported in Indiana case law. Indeed, it is consonant with the approach taken in most jurisdictions.[95] While the United States Supreme Court has not spoken to the zoning issue, it has established a more precise balancing test for free exercise cases.[96] The test requires the persons claiming an exemption to show that the state regulation burdens their practice of religion. Since the restriction impinges on a fundamental right, the state must show that its action is justified by a compelling interest.[97] That is, the state must be promoting an important interest which can not be achieved in a less restrictive manner.[98]

The Court has also recognized that churches are subject to such reasonable regulations as are necessary to promote the public health, safety, or general welfare.[99] Apparently, such regulations are

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[91]117 Ind. App. 314, 69 N.E.2d 613 (1946).

[92]*Id.* at 328, 69 N.E.2d at 618. The court stated: "[T]he right to erect and use a modern church building may in a proper case . . . include a parking lot for the use of the members in attending church services and any meetings held by the church . . . ." *Id.*

[93]118 Ind. App. 38, 76 N.E.2d 597 (1948).

[94]*Id.* at 48, 76 N.E.2d at 601-02.

[95]*See* Annot., 74 A.L.R.2d 377 (1960). *See also* cases discussed in 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.19 (1968); 3 E. YOKLEY, ZONING LAW AND PRACTICE § 28-14 (3d ed. 1967 & Supp. 1977). Only in California and Florida have the courts upheld zoning ordinances which exclude churches from residential areas. *See* Minney v. Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (1958); Miami Beach United Lutheran Church v. City of Miami Beach, 82 So. 2d 880 (Fla. 1955).

[96]Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).

[97]Sherbert v. Verner, 374 U.S. at 403.

[98]The court explained the compelling interest test in *Braunfeld* as follows:

> [I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

366 U.S. at 607. The test was expressed similarly in *Yoder:* "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215. The state, of course, is absolutely prohibited under the amendment from regulating or prescribing religious belief. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638-39 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Thus, the compelling interest test is applicable only when the state, in regulating conduct by such methods as zoning ordinances, burdens the practice of religion.

[99]West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Cantwell v. Connecticut, 310 U.S. 296, 306, 307 (1940).

ones which pass the balancing test described above. Thus, in *Braundfeld v. Brown*,[100] the Court held that Sunday closing laws were reasonable regulations as applied to Orthodox Jews despite the fact that they observed another day as the Sabbath.[101] On the other hand, in *Wisconsin v. Yoder*,[102] the Court held that reasonable regulations did not include a state statute requiring Amish children to attend public school after the eighth grade.[103] Furthermore, the Court, in *Sherbert v. Verner*,[104] held that reasonable regulations could not include denial of unemployment benefits to a Seventh Day Adventist because her religious beliefs required her to refuse work on Saturday.[105]

If the Supreme Court test had been applied in *Church of Christ*, the result, in all likelihood, would have been the same. The burden placed on the Church is not as great as was placed on the Amish in *Yoder*. The regulation in *Yoder* required the Amish to either violate their religious tenets or to suffer criminal sanction.[106] The burden in *Church of Christ* is less direct; the burden was not on the Church's religious beliefs, but on the geographical areas where it was permitted to practice those beliefs. It is doubtful, however, that the Zoning Board could establish that excluding the Church from a residential area promotes a sufficiently important state interest. To the contrary, most authorities express the belief that, notwithstanding the problem incident to increased traffic, the presence of churches in residential areas contributes to the general welfare of the community.[107]

According to the majority, there is a constitutionally permissible way to exclude churches.[108] The court stated that churches could be excluded from residential areas by the use of restrictive covenants between property owners which impose the appropriate servitudes on land.[109] The judiciary, of course, would be the vehicle for enforcing the restrictive covenants.

The issue raised by this dicta is whether it conflicts with the Supreme Court's decision in *Shelley v. Kraemer*.[110] *Shelley* involved the attempted sale of land to a member of a racial minority. The

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[100]366 U.S. 599 (1961).

[101]*Id.* at 603-06.

[102]406 U.S. 205 (1972).

[103]*Id.* at 213-14.

[104]374 U.S. 398 (1963).

[105]*Id.* at 410.

[106]406 U.S. at 218.

[107]*See* 2 R. ANDERSON, *supra* note 95, § 9.19; 3 E. YOKLEY, *supra* note 95, § 28-14.

[108]371 N.E.2d at 1334.

[109]*Id.* (quoting Board of Zoning Appeals v. Schulte, 241 Ind. 339, 349, 172 N.E.2d 39, 43 (1961)).

[110]334 U.S. 1 (1948).

land had been encumbered by a restrictive covenant which forbade its sale to such minorities. The Supreme Court stated that, so long as the agreements were voluntarily enforced, there was no "state action" and, therefore, no constitutional infringment,[111] but concluded that the judicial enforcement of these restrictive agreements was a violation of the fourteenth amendment.[112]

In light of *Shelley*, the majority's statement will not withstand constitutional scrutiny. The use of restrictive covenants to exclude churches from residential areas is clearly analogous to the method attempted in *Shelley*. In both situations the court is requested to enforce agreements which, except for the absence of state action, are violative of constitutional protections. Thus, the judicial enforcement of restrictive covenants totally excluding churches from residential areas is an infringement of the right to religious freedom.

ALAN RAPHAEL*

V. Contracts, Commercial Law and Consumer Law

*Harold Greenberg***

A. Contracts; Covenants Not To Compete.

The validity of an employment agreement containing a covenant not to compete was sustained by the court of appeals in *Advanced Copy Products, Inc. v. Cool.*[1] Late in 1971, six months after the employee had begun work as a copying machine sales and service representative, the employer and employee executed a written agreement which contained a covenant not to compete with the employer for one year, the employment being terminable at will by either party. In 1973, the parties executed a new agreement which contained the same terms except: (1) The covenant not to compete

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[111] *Id.* at 13.

[112] *Id.* at 20. The court stated: "It is clear but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." *Id.* at 19. Thus, those who seek judicial enforcement of racially restrictive covenants will be imbued with state action so as to bring the covenants within the scrutiny of the fourteenth amendment.

*The author wishes to extend appreciation to Gary Harter for his assistance in the preparation of this discussion.

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[1] 363 N.E.2d 1070 (Ind. Ct. App. 1977).