V. Constitutional Law

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A. Federalism

Indiana was a party in two recent cases, *National League of Cities v. Usery*[1] and *Brennan v. Indiana*,[2] challenging 1974 amendments to the Fair Labor Standards Act (FLSA).[3] The FLSA, originally enacted in 1938, establishes minimum wage and maximum hour protections for employees in the private sector. These employee benefits were extended to most public employees by the 1974 amendments. Indiana challenged the constitutionality of application of minimum wage and maximum hour provisions to state employees as a party plaintiff in *National League of Cities v. Usery*, in the United States District Court for the District of Columbia.[4] In *Brennan v. Indiana*,[5] the state was defendant in actions brought by the Secretary of Labor in the United States District Court for the Southern District of Indiana to enforce the FLSA. Both district courts and the Seventh Circuit, on appeal in *Brennan*,[6] upheld the 1974 FLSA amendments on the basis of *Maryland v. Wirtz*.[7] When *National League of Cities v. Usery* came before the United States Supreme Court, the Court overruled *Wirtz* and held the 1974 FLSA amendments unconstitutional.

Mr. Justice Rehnquist wrote the opinion for the Court. The decision is not the most widely heralded case decided by the Court in the 1975 term, but in the long run it may be the most significant. Given its narrowest reading, this is one of the most significant federalism decisions of the Court since 1937. Potentially, if the broad ramifications of the decision suggested by Mr. Justice Brennan in his dissent come to pass, the case may someday be

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[1]96 S. Ct. 2465 (1976).

[2]517 F.2d 1179 (7th Cir. 1975), *vacated sub nom.* Indiana v. Usery, 96 S. Ct. 3196 (1976). The Court vacated and remanded to the Seventh Circuit for further consideration in light of its decision in *National League of Cities v. Usery*.

[3]29 U.S.C. §§ 201-19 (1970).

[4]406 F. Supp. 826 (D.D.C. 1974).

[5]The district court proceedings were not reported.

[6]517 F.2d 1179 (7th Cir. 1975).

[7]392 U.S. 183 (1968). *Wirtz* upheld 1961 and 1966 amendments to the FLSA, which extended the Act to cover fellow employees of those protected by the 1938 Act and employees of hospitals and schools, including those owned and operated by states.

studied alongside *Marbury v. Madison*[8] and *Martin v. Hunter's Lessee*[9] as landmarks in development of the federal system.

The FLSA, and the 1974 amendments to the Act, are based on the power of Congress to regulate commerce among the states.[10] In reviewing congressional exercise of the commerce power, decisions of the United States Supreme Court invalidating legislation can be placed in two groups. First, there are those cases holding that Congress has overreached the power granted to it by the Constitution. In these cases the judgment of the Court has been that Congress has attempted to regulate an activity which is not a part of commerce and the legislation is invalid simply because Congress lacks the power to regulate the activity in question.[11] The second group of cases in which the Court has invalidated legislation based on the commerce power includes those cases in which the Court concludes the activity being regulated is subject to the power of Congress under the commerce clause, but the legislation is invalid because it contravenes a specific constitutional limitation on the power of Congress.[12]

An accurate assessment of which of these two lines of reasoning is the basis of the holding in a given case is indispensable to an assessment of the future ramifications of the case. Cases in the first group reflect the extent of the power granted to Congress by the enumerated powers of the Constitution, whereas cases in the second group define the specific limitations upon these enumerated powers. It appears the decision in *National League of Cities v. Usery* falls within the second group.

Mr. Justice Rehnquist begins his analysis by suggesting that the plenary power of Congress to regulate commerce is not at issue in this case.

> It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress. . . . Appellants in no way

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[8] 5 U.S. (1 Cranch) 137 (1803).

[9] 14 U.S. (1 Wheat.) 304 (1816).

[10] U.S. CONST. art. I, § 8, cl. 3.

[11] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[12] *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936). This basic model of constitutional decision making was first suggested by Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. 1 (1824). Chief Justice Marshall said:

> We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

Id. at 86.

> challenge these decisions establishing the breadth of authority granted Congress under the commerce power. Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained . . . in the Sixth Amendment . . . or the Due Process Clause of the Fifth Amendment. . . . Appellant's essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers.[13]

This introduction plainly suggests the Court is not concerned with the scope of the commerce power, but with specific limitations imposed on that power by other provisions in the Constitution. This characterization cannot, however, be made unequivocally, since the opinion concludes:

> We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.[14]

A strict reading of this concluding paragraph would be inconsistent with the Court's earlier statement of the case, and it is therefore probably not to be read too literally. Apart from this one sentence, the opinion is squarely based on constitutional provisions other than the commerce provision.

The constitutional provision which is held to restrict the commerce power so as to preclude extension of the FLSA to public employers is the tenth amendment.[15] Justice Rehnquist wrote,

> This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. . . . [A]n express declaration of this limitation is found in the Tenth Amendment . . . .[16]

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[13]96 S. Ct. at 2468-69 (citations omitted).

[14]*Id.* at 2474.

[15]U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[16]96 S. Ct. at 2469-70.

Although the Court relied on *Fry v. United States*,[17] *National League of Cities v. Usery* is the first case to invalidate congressional legislation on the basis of the tenth amendment since President Franklin D. Roosevelt announced his "court packing" plan in February 1937. This fact is the most significant aspect of the case and the source of the greatest concern regarding future impact of the decision.

A reliable guide to future impact of a newly-announced rule can often be found in the Court's statement of the rule. Justice Rehnquist's statement provides some assistance in analyzing the rule of this case:

> The question we must resolve in this case, then, is whether these determinations [the wages to be paid public employees, the hours they work and overtime compensation] are "functions essential to separate and independent existence," . . . so that Congress may not abrogate the States' otherwise plenary authority to make them.[18]

A further elaboration of which functions of a state government and its political subdivisions are "essential to separate and independent existence" is not given in the opinion. Some enlightenment may be found in the two reasons given by the Court for its holding that establishment of wages, hours, and overtime compensation by a public employer is such an essential function. First, the Court cites the increase in costs for personnel which the FLSA would impose on states. The opinion dramatizes this factor by reciting allegations from the complaint, which the Court accepts as true, regarding predicated costs and the programs which plaintiffs assert they will be forced to abandon in order to meet these increased costs.[19]

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[17]421 U.S. 542 (1975). The Court found no tenth amendment violation in wage regulations of the Economic Stabilization Act of 1970.

[18]96 S. Ct. at 2471.

[19]The Court's use of these figures is an intriguing example of judicial decision making. Plaintiff's complaint was dismissed by the district court so there is no evidence before the Supreme Court at the time it is deciding the case. Nonetheless, Justice Rehnquist says that since the district court decided the case below on a motion to dismiss, the Supreme Court will take all "well pleaded allegations as true." The Court in this case decides the issue raised by the complaint on its merit by declaring the challenged legislation unconstitutional. This is completely different from accepting well pleaded allegations as true for the purpose of deciding, on a motion to dismiss, whether the complaint states a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). A decision on a 12(b)(6) motion has no concrete impact on the basic controversy and benefits the plaintiff only if he can prove that the facts are as he has alleged in the complaint. Here the case has been decided on its merits, with the allegations providing part of the

Justice Rehnquist minimizes the impact of these allegations, emphasizing that they are not "crucial to resolution of the issue presented . . . ."[20] This leaves the conclusion that the critical fact is that the FLSA would cost money.

The second reason the Court gives for holding that the 1974 amendments interfered with essential functions of sovereignty is that "the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."[21] This reason is more basic to the judgment of the Court than the fiscal impact, but it gives little guidance concerning the manner in which the Court will determine what functions are essential.

Ramifications of the decision are wide open. The decision revives the tenth amendment and many "overregulated" institutions, public and private, will be anxious to utilize it. In that sense, this could be the start of something big. The most significant unanswered question, which is raised by Justice Brennan in dissent, is the impact the decision will have on state legislation. Mr. Justice Brennan says, "Certainly the paradigm of sovereign action—action *qua* State—is in the enactment and enforcement of state laws."[22]

The fears expressed by Justice Brennan are somewhat tempered for the short term by the fact that Mr. Justice Blackmun, the fifth member of the majority, qualifies his concurrence. In his opinion, the case "does not outlaw federal powers in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[23]

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basis of the decision, yet the plaintiff will never be called upon to prove the truth of the allegations.

Allegations of the fiscal implications of the amendments are not the kinds of facts on which the Court would ordinarily base a decision without some proof. The allegations are vague. For example, the estimate of California as to impact on its budget varies by 100 percent; the estimate is somewhere between 8 million and 16 million dollars. Some of the allegations are incredible. The Court says that Cape Girardeau, Mo., estimated its annual budget for fire protection might be increased by from $250,000 to $400,000 over the then-current figure of $350,000. 96 S. Ct. at 2471. Can it be possible that the imposition of a minimum wage provision and time and a half for overtime could more than double fire protection costs for any city?

[20]96 S. Ct. 2474.

[21]*Id.* at 2472. The Court noted that imposition of minimum wage requirements would interfere with a state's policy of hiring persons with little training or experience, such as students, at lower wages.

[22]*Id.* at 2485.

[23]*Id.* at 2476. Justice Blackmun interprets the majority opinion as adopting a "balancing" approach.

One significant issue left open by the case is the impact it will have on existing, pervasive federal regulations which are under broadside attack today. These bureaucratic regulations often control decisions of state officials in a much more comprehensive and restrictive way than the establishment of minimum wage and overtime provisions. Possibly, if the court is willing to invalidate congressional legislation on the basis of the tenth amendment, the regulations of the bureaucrats will also be exposed to a new level of scrutiny. At least, state officials who have been very vocal in their dissatisfaction with federal regulations in recent years will be given new confidence to challenge these regulations in litigation in federal court.

B. Trial by Jury

In *In re Public Law No. 305 & Public Law No. 309 of the Indiana Acts of 1975*,[24] a sua sponte proceeding,[25] the Indiana Supreme Court followed recent federal decisions[26] and held that a statutory provision for six-member juries is constitutional.

Upholding a statute[27] which requires six-member juries in both civil and criminal cases in county courts, the supreme court overruled *Miller's National Insurance Co. v. American State Bank*,[28] in which it had held that the article 1, section 20, provision of the Indiana Constitution holding the right to jury trial inviolate[29] prevents the legislature from changing the number of jurors.

The court relied on *Williams v. Florida*,[30] in which the United States Supreme Court held provision for a six-member jury does not offend the fourteenth amendment to the United States Constitution,[31] and noted the "obvious legislative intent" of the statute[32]

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[24]334 N.E.2d 659 (Ind. 1975). This case is also discussed in Harvey, *Civil Procedure*, *supra*, and Marple, *Evidence*, *infra*.

[25]334 N.E.2d at 662. The court noted that while the Supreme Court traditionally does not issue opinions sua sponte, this legislation, reorganizing portions of the state court system, required interpretation to give uniform effect to the legislative mandate.

[26]*See, e.g.*, Cooley v. Strickland Transp. Co., 459 F.2d 779 (5th Cir.), *cert. denied*, 413 U.S. 923 (1972); Lynch v. Baxley, 386 F. Supp. 378 (N.D. Ala. 1974).

[27]IND. CODE § 33-10.5-7-6 (Burns Supp. 1976).

[28]206 Ind. 511, 190 N.E. 433 (1934).

[29]*Id.* at 515, 190 N.E. at 435. The court cited Allen v. Anderson, 57 Ind. 388 (1877), holding that inviolate means "continue as it was."

[30]399 U.S. 78 (1970).

[31]The Court held in *Williams* that jury membership need not be fixed at twelve and individual states may develop their own views concerning larger or smaller juries. *Id.* at 103.

[32]334 N.E.2d at 663.

in holding that provision for six-member juries violates neither the Federal nor the Indiana Constitution.

C. Equal Protection

1. Classification Based on Sex

In *Kinslow v. Cook*[33] the Indiana Court of Appeals held that a mother was denied equal protection by the requirement of former Indiana Code section 34-1-1-8 that she show death, desertion, or imprisonment of her child's father before being permitted to sue in her own right for wrongful death of that child.[34] The complaint was filed by Mr. and Mrs. Kinslow as mother and father, and Mrs. Kinslow as administratrix of her son's estate.[35]

The court began its review of the statute with traditional low scrutiny language,[36] but struck down the classification and the statute, treating the legislature with less than maximum deference. Quoting *Haas v. South Bend Community School Corp.*,[37] the *Kinslow* court held:

> In order to withstand a constitutional challenge founded upon a denial of equal protection the statutory classification . . . must be reasonable . . . and *must rest upon some ground of difference* having a fair and substantial relation

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[33]333 N.E.2d 819 (Ind. Ct. App. 1975).

[34]The constitutionality of the following portion of the old statute was at issue: "A father, or in case of his death, or desertion of his family, or imprisonment, the mother, . . . may maintain an action for the injury or death of a child . . . ." IND. CODE § 34-1-1-8 (Burns 1973). The statute was amended in 1975 to provide: "The father or mother jointly, or either of them by naming the other parent as a co-defendant to answer as to his or her interest . . . may obtain an action for the injury or death of a child . . . ." IND. CODE § 34-1-1-8 (Burns Supp. 1976).

[35]Although refusing to decide whether Mrs. Kinslow had been erroneously dismissed as administratrix, the court noted that she obviously could not recover as both parent and administratrix under Indiana law.

[36]"The equal protection guarantees of both state and federal constitutions do not prohibit statutory classifications *so long as they are reasonable and not arbitrary.*" 333 N.E.2d at 821 (emphasis added). Standards of review appropriate to an equal protection case include a range from (1) a "strict" or "high scrutiny" test, applied to classifications based on certain "suspect" traits such as race or national origin, or which impinge on fundamental rights such as the right to travel or associate freely, to (2) a "low scrutiny" test, which presumes the constitutionality of the classification being examined. Under high scrutiny a statute will be invalidated unless it is justifed by a compelling governmental interest. When the low scrutiny test is applied the statute is valid if there is a reasonable relationship to a governmental interest.

[37]259 Ind. 515, 289 N.E.2d 495 (1972). For an extensive discussion of this case see Stroud, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661 (1973).

> to the object of legislation, so that all persons similarly circumstanced shall be treated alike.[38]

Under classic low scrutiny any "reasonably conceivable" set of facts may justify a statutory classification.[39] Terms like "substantial relationship" and "all persons similarly circumstanced" suggest that the court looked more closely at the classification than required by the low scrutiny test. Classification on the basis of sex appears to have triggered an intermediate level of review.

The court's failure to defer to legislative judgment is apparent in the closeness with which it scrutinized the stated purpose of the classification. Defendant asserted that a rational basis for the classification lay in its prevention of double recovery, disallowing an action in the name of each parent. Selection of the father as the one to bring the action was asserted to be permissible because of his superior right to the child's services and primary duty of support.

The court found that this purpose did not require preference of one parent over another, observing that the double recovery argument loses its force in view of the ease with which the omitted parent can be joined.[40] Assuming, however, that the double recovery purpose was served by providing a preferred class, the court disagreed with defendant's assertion that the preference of father over mother was reasonable. The court referred to recent legal trends undercutting the assertion that the

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[38]333 N.E.2d at 821 (emphasis in original). The language in *Haas* is taken from Reed v. Reed, 404 U.S. 71, 76 (1971). The court also cites Stanton v. Stanton, 421 U.S. 7 (1975), and Indiana High School Athletic Ass'n v. Raike, 329 N.E.2d 66 (Ind. Ct. App. 1975). Both *Reed* and *Stanton* deal with classification based on sex. In *Raike* the court recognized a classification bearing on the right of married persons to participate in high school athletics as triggering an intermediate type of scrutiny. See Stanmeyer, *Constitutional Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 99, 100-01 (1975), for a discussion of intermediate scrutiny. This test calls for a fair and substantial relation between the classification and the legislative purpose.

[39]Classic low scrutiny is defined by Professor Stroud as follows:

> First, the burden of showing the invalidity of the statutory classification is on the person asserting such invalidity. Secondly, it is sufficient to find any "reasonably conceivable" legitimate government purpose in the classification. Thirdly, a court will assume as true any "reasonably conceivable" set of facts which show that the members of the class burdened by the statute do possess the purpose-trait, i.e., are those persons similarly situated with respect to the purpose of the statute. Fourth, a court accepts as reasonable a significant deviation from the ideal classification in the form of under-inclusion and over-inclusion.

Stroud, *supra* note 37, at 663-64 (footnotes omitted).

[40]333 N.E.2d at 821 n.4.

father's rights and duties are superior,[41] and held that recognition of the father's primary rights and duties includes a tacit admission of the mother's secondary rights and duties which could allow damages to go to her.

The court found the classification was "arbitrary" and not based on "some ground of difference" between the parents substantially related to the object of the legislation.[42]

2. *Classic Low Scrutiny for Economic Classification*

In *Allen v. Pavach*,[43] the Indiana Supreme Court[44] refused to strike down a classification favoring surety bondsmen, who are employed by insurance companies, over professional bondsmen with respect to the amount of deposit required to obtain a license and limitations on bail bonds written. The court cited *Dandridge v. Williams*[45] and clearly indicated that it was applying low level scrutiny: "[L]egislative classifications will not be set aside if any state of facts rationally justifying them is demonstrated to or perceived by the courts."[46] Citing statutory provisions which require insurers to maintain substantial assets,[47] the court found a rational basis for a $25,000 difference in deposit requirements between the two classes of bondsmen. Over-inclusion and under-inclusion did not concern the court. "If the classification has some reasonable basis, it does not offend the Constitution merely because the classification is not mathematically precise or because in practice it results in some inequality."[48]

Discriminatory classification involved in limiting the amount of bail bonds which may be written by professional bondsmen and setting no limit for surety bondsmen was not dealt with in detail. The court relied on its discussion of the deposit issue

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[41]The court cited Troue v. Marker, 253 Ind. 284, 252 N.E.2d 800 (1969) for the proposition that spouses are equal before the law, and a section of the Indiana Code as establishing equality between parents with respect to support obligations. *See* IND. CODE § 31-1-11.5-12 (Burns Supp. 1976).

[42]333 N.E.2d at 822.

[43]335 N.E.2d 219 (Ind. 1975).

[44]Chief Justice Givan wrote the opinion, in which Justices Arterburn and Hunter concurred. Justice Prentice dissented without opinion and Justice DeBruler concurred in the result.

[45]397 U.S. 471 (1970). *Dandridge*, a classic low scrutiny case, is discussed in Stroud, *supra* note 37, at 664.

[46]335 N.E.2d at 222.

[47]IND. CODE §§ 27-1-6-15 to -16 (Burns 1975) and 23-1-16-2 (Burns 1972). The court also cited IND. CODE § 27-1-1-1 (Burns 1975), which provides for control over insurance companies by the Department of Insurance.

[48]335 N.E.2d at 222.

and quoted at length from *Ferguson v. Skrupa,*[49] which espoused a hands-off policy with respect to economic classification.

Justice DeBruler in his concurring opinion favored more fact-finding below, inquiring into the existence of a "rational basis for the disparate treatment . . . ."[50]

3. Indiana's Guest Statute

In *Sidle v. Majors,*[51] the United States Court of Appeals for the Seventh Circuit upheld the Indiana guest statute[52] in the face of an equal protection challenge. Plaintiff, a guest in an Indiana automobile, sued her Indiana host for negligence and for wanton or willful misconduct. The parties proceeded to trial on the count for wanton or willful misconduct, but defendant was granted summary judgment on the general negligence claim, on the basis of the guest statute. Pursuant to Indiana Appellate Rule 15(N)[53] the court of appeals certified to the Indiana Supreme Court questions of validity under the Indiana Constitution,[54] and the supreme court consolidated *Sidle* with a state case in which the trial court had ruled the guest statute unconstitutional.[55] Noting an obligation to refrain from undue interference with the legislature and a general presumption of a statute's constitutionality, the court

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[49]372 U.S. 726 (1963).

[50]335 N.E.2d at 224-25.

[51]536 F.2d 1156 (7th Cir.), *cert. denied,* 97 S. Ct. 366 (1976).

[52]IND. CODE § 9-3-3-1 (Burns 1973), which provides:

> The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle.

[53]IND. R. APP. P. 15(N) provides for certification of questions of state law from federal courts to the Indiana Supreme Court.

[54]Sidle v. Majors, 341 N.E.2d 763 (Ind. 1976). *See* 9 IND. L. REV. 885 (1976). Specifically, the Seventh Circuit wanted an opinion about possible violation of art. 1, section 12, and art. 1, section 23, of the Indiana Constitution. IND. CONST. art. 1, § 12, provides:

> All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

IND. CONST. art. 1, § 23, provides: "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."

[55]Dempsey v. Leonherdt, 341 N.E.2d 763 (Ind. 1976). Review in such a case proceeds directly to the supreme court under Indiana Rule of Appellate Procedure 4(A)(8).

rejected plaintiff's contention that high level scrutiny was appropriate,[56] and viewed the equal protection claim in these terms:

> Our guest statute precludes a guest passenger from recovering damages for personal injuries sustained merely by the negligence of the owner or operator. Being inoperative as to passengers who were not guests, the statute creates two classifications of passengers—guests and non-guests, who are treated vastly differently under circumstances that are otherwise identical. The inequity is patent. The issues are whether or not the classification is reasonable and bears a fair and substantial relation to the legitimate purpose of the statute. The presumptions are that it is and does, and the burden is upon the plaintiff to show the contrary.[57]

The court found two "reasonably conceivable" legitimate governmental purposes for the statute—fostering hospitality through insulating generous drivers from suit by ungrateful guests and eliminating collusive suits. Although acknowledging that these purposes are not immediately perceived from a reading of the statute and no legislative history is available, the court determined that it could look to any possible logical purpose for the statutory classification, even if "considerable speculation" was required.

The court found a third possible purpose for the legislative classification—prevention of the "benevolent thumb" syndrome. This was described as the tendency of juries, perceiving the real defendant to be an insurance company, "to weigh their 'benevolent thumbs' along with the evidence of the defendant's negligence."[58]

Having identified three probable purposes of the statute, the court held that resulting over-inclusion or under-inclusion would be acceptable: "We think it no constitutional infirmity that a statute may not operate to perfection, if it may reasonably be expected to operate effectively."[59]

Thus, applying pure low scrutiny reasoning and according maximum deference to the legislature, the court found the guest statute was not violative of the state equal protection clause.[60]

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[56]341 N.E.2d at 766. Plaintiff argued that the right to bring a common law negligence suit is a fundamental right.

[57]*Id.* at 767.

[58]*Id.* at 772.

[59]*Id.* at 770.

[60]The court also concluded that the statute did not violate art. 1, section 12, of the Indiana Constitution.

The Seventh Circuit did not agree with the analysis of the Indiana Supreme Court, but reached the same conclusion on the basis of a Utah case which was appealed to the United States Supreme Court.[61] The Utah court upheld the guest statute and the appeal was dismissed for want of a substantial federal question. Such a dismissal is an adjudication on the merits and thus binding on the circuit courts.[62]

Before reaching that result, the Seventh Circuit rejected the legislative purposes advanced by the Indiana court, suggesting that widespread liability insurance eliminates notions of ingratitude and that the anticollusion purpose is not met when guest and host are still free to collude on the existence of compensation or the existence of willful or wanton misconduct. Looking to the new "benevolent thumb" theory, the court noted that in Connecticut no reduction in automobile insurance premiums followed enactment of a guest statute.

The court distinguished *Silver v. Silver*,[63] a 1929 case relied on by the Indiana court, in which the United States Supreme Court upheld a guest statute against an equal protection attack based on the statute's application to motor vehicles only, as distinguished from other forms of transportation. *Silver* did not deal with the division of possible plaintiffs into burdened and benefited classes. In light of the age of the *Silver* decision, changes in the economic climate, the split among courts dealing with the question,[64] and the different nature of the equal protection claim now advanced, the Seventh Circuit suggested that there is a need for conclusive resolution of the issue.

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[61]Cannon v. Oviatt, 520 P.2d 883 (Utah), *appeal dismissed for want of a substantial federal question*, 419 U.S. 810 (1974).

[62]Hicks v. Miranda, 422 U.S. 332, 344-45 (1975). Appellate jurisdiction under 28 U.S.C. § 1257(2) is not discretionary, and thus dismissal because the court has branded the federal question insubstantial amounts to adjudication on the merits.

[63]280 U.S. 117 (1929).

[64]Cases which have upheld guest statutes include: Richardson v. Hansen, 527 P.2d 536 (Colo. 1974); Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Delany v. Baedame, 49 Ill. 2d 168, 274 N.E.2d 353 (1971); Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974); Duerst v. Limbocker, 525 P.2d 99 (Or. 1974); Behrns v. Burke, 229 N.W.2d 86 (S.D. 1975); Cannon v. Oviatt, 520 P.2d 883 (Utah), *appeal dismissed for want of a substantial federal question*, 419 U.S. 810 (1974). Cases which have declared guest statutes unconstitutional as a violation of equal protection include: Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212 (1973); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975); Laakonen v. Eighth Jud. Dist. Ct., 538 P.2d 574 (Nev. 1975); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

D. Substantive Due Process

In *Fitzgerald v. Porter Memorial Hospital*,[65] the Seventh Circuit Court of Appeals refused to extend the doctrine of marital privacy to include a right of a father to be present in the delivery room when his child is born if the public hospital has prohibited his presence for medical reasons. The court also held that exclusion of the father did not improperly restrict the right of a physician to practice medicine.

Plaintiffs brought suit in district court for a temporary restraining order, declaratory relief, and damages. Plaintiffs requested different remedies depending upon whether or not their child had been born; their request for class certification was not ruled on.[66] Jurisdiction was premised on 42 U.S.C. § 1983, and the first, fourth, ninth, and fourteenth amendments to the United States Constitution. After hearing testimony of one physician for the plaintiffs and taking affidavits from both sides, the district court granted defendant's motion to dismiss both the request for a temporary restraining order and the underlying claim. The motion to dismiss was granted on the grounds that plaintiffs lacked standing to assert the right of their doctors[67] and, since the hospital was not denying access to facilities or totally disapproving a recognized operation, the complaint failed to state a cognizable claim. On appeal, plaintiffs sought to have the case reversed and remanded for consideration on the merits at the district court level.

Judge Stevens, writing for the majority of the Seventh Circuit panel, upheld the dismissal for failure to state a cognizable claim. The court noted that the right to privacy protects individuals from "unwarranted public attention, comment or exploitation,"[68] and lamented a new breed of privacy cases designed to secure other types of protection. The court determined that the decision to allow a father's presence and participation during the birth of his child is not an issue which requires constitutional protection.

> The birth of a child is an event of unequalled importance in the lives of most married couples. But deciding the question whether the child shall be born is of a different magnitude from deciding where, by whom, and by what method he or she shall be delivered. In its medical aspects,

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[65]523 F.2d 716 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1518 (1976).

[66]*Id.* at 719.

[67]The court of appeals did not agree on the standing issue, but refrained from reversing the district court on that question since the determination of failure to state a claim was dispositive of the case.

[68]523 F.2d at 719.

> the obstetrical procedure is comparable to other serious hospital procedures. We are not persuaded that the married partners' special interest in their child gives them any greater right to determine the procedure to be followed at birth than that possessed by other individuals in need of extraordinary medical assistance.[69]

Since plaintiffs implicitly acknowledged that the husband had no right to be present absent consent of the attending physician, the court indicated that they should also recognize the necessity for hospital approval based on medical reasons. The court thus held that a hospital may exclude a father from the delivery room if that exclusion is for medical reasons.[70]

Plaintiffs had also asserted that the hospital rule interfered with their doctors' right to practice medicine. The court was unpersuaded, holding that the right asserted by plaintiffs was not entitled to constitutional protection and thus their physicians were not unconstitutionally restricted. The court concluded by deferring to the medical profession, suggesting that courts should not become involved in deciding the medical desirability of having fathers in the delivery room.

Focusing on the fact that no hearing on the merits was held at the district level, the dissent favored reversal and remand for trial.[71] Quoting at length from affidavits submitted by plaintiffs' expert supporting the medical desirability of permitting fathers to be present during delivery, the dissent found the right within the physician-patient relationship and within the right of a patient to control the manner in which his or her body is dealt with. The dissent also found the reasons presented by the hospital for its rule to be "so non-compelling as to be virtually non-existent . . . ."[72]

E. Free Speech

In *Stults v. State*,[73] the Indiana Court of Appeals examined circumstances surrounding a charge of disorderly conduct and found that certain modes of speech are not constitutionally protected and may constitute criminal conduct.

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[69] *Id.* at 721.

[70] The primary reason presented by the hospital for its rule was that the physical arrangement of the labor and delivery rooms would allow laboring mothers to be seen from a common corridor by husbands of other women. The hospital also relied on absence of facilities for husbands to put on surgical gowns. *Id.* at 718 n.6.

[71] 523 F.2d at 722-24 (Sprecher, J., dissenting).

[72] *Id.* at 724.

[73] 336 N.E.2d 669 (Ind. Ct. App. 1975).

Defendant was stopped by off-duty policemen working as security guards in a discount department store who suspected her and her sister of shoplifting. The sisters objected to being stopped. An argument ensued, a group of onlookers gathered, and the women's language became loud and interspersed with curses. One of the policemen warned the defendant to "cease with the language and all the noise,"[74] and eventually both women were arrested and charged with disorderly conduct. A search later revealed that they had no merchandise in their possession and thus were not guilty of shoplifting as the guards had suspected.[75]

A municipal court jury found the defendant guilty of disorderly conduct and she was sentenced to pay a fine of $15 and $50 costs. The Criminal Court of Marion County affirmed and this appeal was filed.

Defendant contended that the disorderly conduct statute[76] had been previously construed to apply to "pure speech"—*i.e.* spoken words unaccompanied by other acts—only if that speech has a tendency to lead to violence,[77] and that her behavior merely aroused the curiosity of onlookers.[78] While the court did not determine whether the defendant's contention had merit,[79] it ruled that her speech fell directly into the category of "fighting words" which the Supreme Court has held constitutionally unprotected

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[74]*Id.* at 671.

[75]*Id.* In Indiana there is no offense known as "shoplifting." The behavior usually referred to as shoplifting is a violation of a section of the Offenses Against Property Act, IND. CODE § 35-17-5-3(a) (Burns 1975) (repealed effective July 1, 1977).

[76]IND. CODE § 35-27-2-1 (Burns 1975) (repealed effective July 1, 1977), provides:

> Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct, and upon conviction, shall be fined in any sum not exceeding five hundred dollars [$500] to which may be added imprisonment for not to exceed one hundred eighty [180] days.

[77]336 N.E.2d at 673. *See also* Hess v. State, 260 Ind. 427, 297 N.E.2d 413 (1973); Miller v. State, 258 Ind. 79, 279 N.E.2d 222 (1972); Whited v. State, 256 Ind. 386, 269 N.E.2d 149 (1971).

[78]Defendant also argued that the entire incident arose because the police wrongfully accused her of shoplifting; that her speech was only directed toward police officers and as such a conviction for disorderly conduct cannot lie; and finally that the trial court erred in not giving certain instructions tendered by the defendant.

[79]The court noted, "No case has held that the failure of the proscribed speech behavior to produce violence is proof that the speech behavior did not have the tendency to lead to violence." 336 N.E.2d at 673.

since 1942.[80] Thus, although defendant's conduct was "pure speech," her behavior was not constitutionally protected. In affirming the disorderly conduct conviction, the court carefully limited its holding:

> We must note that we do not hold that speech containing vulgarities or obscenities is *per se* constitutionally unprotected. . . . Nor do we hold that "fighting words" *per se* constitute a violation of the disorderly conduct statute. Instead, we hold that personal epithets and verbal abuse (which may or may not contain vulgarities or obscenities) do not enjoy constitutional protection, and that engaging in such activity may under certain circumstances constitute disorderly conduct.[81]

F. Zoning

In *City of Evansville v. Reis Tire Sales*,[82] the court of appeals held that a city zoning ordinance unconstitutionally restricted the owner's use of property.

Reis was the owner of vacant real estate in Evansville which had been restrictively zoned for single family residences. Contending that the condition of the terrain substantially increased the cost of construction, Reis applied to the Area Plan Commission for rezoning to build multifamily residential apartments, development which would bring a greater return on investment and thus justify increased costs of construction. The commission recommended the change, but the Evansville Common Council denied the application for rezoning. Reis brought suit requesting a declaratory judgment allowing him to develop the property with multifamily dwellings.[83]

Evidence was presented at trial substantiating the claim that increased costs of developing the property would make it unprofitable to build single family residences. The city introduced evidence that building multiresidence apartments would create a safety

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[80]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942):

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72.

[81]336 N.E.2d at 674.

[82]333 N.E.2d 800 (Ind. Ct. App. 1975).

[83]The suit also requested a mandate for issuance of a building permit for such use. *Id.* at 801.

hazard due to increased traffic in the otherwise single family residential area.

The trial court entered judgment for Reis, ruling that the zoning ordinance as it applied to the property in issue violated article 1, sections 21 and 23 of the Indiana Constitution[84] and the fifth and fourteenth amendments to the United States Constitution.[85]

On appeal, the court acknowledged that zoning is a proper exercise of the state's police powers, but noted that exercise of that power may result in a taking of property without proper compensation, in violation of constitutional law.[86] While every burden placed on property is not to be viewed as a confiscation or taking,[87] zoning which prevents any use of property for any reasonable purpose is unconstitutional.[88]

Finding sufficient evidence to support a determination that Reis's property could not reasonably be used for the purpose for which it had been zoned, the court of appeals affirmed the lower court decision and held the ordinance unconstitutional as applied to the property in issue.[89]

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[84]IND. CONST. art. 1, § 21, provides: "No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." See note 54 *supra* for the text of IND. CONST. art. 1, § 23.

[85]The pertinent language is: "nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fourteenth amendment applies this provision to the states.

[86]The court relied on Town of Homecroft v. Macbeth, 238 Ind. 57, 148 N.E.2d 563 (1958); Board of Zoning App. v. Koehler, 244 Ind. 504, 194 N.E. 2d 49 (1963); and Metropolitan Bd. of Zoning App. v. Sheehan, 313 N.E.2d 78 (Ind. Ct. App. 1974). These opinions are grounded on Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), in which the Supreme Court held that zoning ordinances *may* be constitutional police power if asserted for the public welfare. Whether such assumption of power is legitimate was found to depend on surrounding circumstances and conditions.

[87]The court cited Board of Zoning App. v. Schulte, 241 Ind. 339, 172 N.E.2d 39 (1961), in which the Indiana Supreme Court stated, "The resulting depreciation in value to certain private property as a result of the passage of a zoning ordinance which is for the general welfare, health or safety is not a ground for unconstitutionality." *Id.* at 348-49, 172 N.E.2d at 43.

[88]333 N.E.2d at 802, *citing* Homecroft v. Macbeth, 238 Ind. 57, 148 N.E.2d 563 (1958). A zoning ordinance was found unconstitutional in *Homecroft* because it deprived the owner of use of his property for any purpose for which it was reasonably adapted. The *Homecroft* court cited Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938): "[A]n ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of property." 238 Ind. at 68, 148 N.E.2d at 569 (court's emphasis).

[89]333 N.E.2d at 802.

In *Board of Commissioners v. Kokomo City Plan Commission*,[90] the Indiana Supreme Court was asked to decide whether a statute authorizing extraterritorial land use planning was constitutional. The statute at issue[91] places cities in two categories. In one category are all cities in counties with master plans and a population of less than 84,000. The other category includes all cities having a master plan and a population of more than 84,000. A city in the former category may exercise extraterritorial planning on its own discretion; a city in the latter category must gain county approval in order to exercise authority outside its boundaries.[92] The record established that Howard County had a population of 83,000 and had enacted a master plan.

Suit was brought by the Board of Commissioners of Howard County alleging that the statute, which allowed the Kokomo City Plan Commission to exercise its authority outside the physical boundaries of the city without county approval, was unconstitutional in that it violated the fifth and fourteenth amendments to the Constitution guaranteeing equal protection and that the statute also violated article 4, section 23, of the Indiana Constitution.[93]

On cross motions for summary judgment, the trial court upheld the statute. The court of appeals reversed, holding that under article 4, section 23, of the Indiana Constitution the statute was unconstitutional.[94] The Indiana Supreme Court granted a petition to transfer and affirmed the trial court judgment.

Although the court engaged in an enlightening discussion of judicial review in equal protection cases, it never reached the merits, since it determined that the Board lacked standing.

Holding that none of the constitutional provisions relied on by the Board[95] provide protection for a county, the court held:

> Since the constitutional provisions have not been construed to assure a county, as a governmental entity, rights equal to those granted other counties, and since a county has not been recognized as a sovereign which may protect

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[90]330 N.E.2d 92 (Ind. 1976), *rev'g* 310 N.E.2d 877 (Ind. Ct. App. 1974). See Shaffer, *Administrative Law*, *supra*, for another discussion of this case.

[91]IND. CODE § 18-7-5-34 (Burns 1974).

[92]330 N.E.2d at 98.

[93]*Id.* at 95.

[94]310 N.E.2d 877 (Ind. Ct. App. 1974).

[95]The County Commissioners contended that the challenged legislation contravened "the Fourteenth Amendment, § 1, of the United States Constitution and Art. 1, §§ 21 and 23, and Art. 4, §§ 22 and 23 of the Indiana Constitution." 330 N.E.2d at 99.

> its citizens, we find that the County has no standing to raise the issue of constitutionality of this statute.[96]

The court perceived article 1, section 1, of the Indiana Constitution as guaranteeing the political and civil rights of only the human inhabitants of the state. Indiana's privileges and immunities clause was held applicable only to "citizens," and a county, which is not a citizen, is not protected. Similarly, the county was deemed to lack status to invoke article 4, section 23, of the Indiana Constitution,[97] but the court noted that an individual or nongovernmental corporation adversely affected by a statute would have standing to invoke this provision, which prohibits local or special laws.

The court did suggest in dictum that, as the record stood, the statute would have withstood low level scrutiny or the "reasonableness" test defined in the opinion, since the Board had not carried its burden of proof to overcome a presumption of constitutionality.[98]

VI. Consumer Law

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During the current survey period, major developments in consumer law involved the extension and redefinition of protections and remedies which were developed in previous years. Although no new major consumer-oriented legislation was enacted this year, several federal statutes were amended to extend or change their coverage.[1] Noteworthy cases in this survey period

[96] *Id.* at 101.

[97] The court noted that no claim was made that the county, as a governmental entity, was injured by the statute and that such a claim would not be valid against the power of the state over its subdivisions.

[98] 330 N.E.2d at 101.

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[1] Consumer Leasing Act of 1976, Pub. L. No. 94-240 (Mar. 23, 1976), amends the Truth in Lending Act, 15 U.S.C. §§ 1601-65 (1970); and the Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239 (Mar. 23, 1976), amends the Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691-91f (Supp. V, 1975); the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145 (Dec. 12, 1975), repealed a section of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970), and a section of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970).