Constitutional Law: Nude Dancing and Political Speech As Protected Expression — the Scope of the Due Process Guarantee

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I. INTRODUCTION

In a 1988 address, Chief Justice Shepard invited Indiana practitioners to reexamine the Indiana Constitution as a potentially significant source for the protection of individual liberty.[1] Although there has been some movement in this direction in defending the rights of criminals,[2] there has been little civil rights litigation brought under the Indiana Constitution.[3] Therefore, this Article will explore state and federal court cases that raise significant federal constitutional issues implicating Indiana law and Indiana litigants. The most noteworthy cases during the survey period dealt with freedom of expression and the due process clause.

II. FREEDOM OF EXPRESSION

A. Regulation of Adult Entertainment

The United States Supreme Court began its 1990-91 term by agreeing to decide the constitutional validity of Indiana's public indecency statute[4]

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

2. *See, e.g.*, Kammen and Polito, *Survey of Recent Developments in Indiana Criminal Law and Procedure*, 23 IND. L. REV. 303, 308 (1990) (discussing cases that focus on the state constitutional right to confront accusers face-to-face).

3. A notable exception was the Indiana Supreme Court's interpretation of the Indiana constitutional prohibition on takings to require compensation for work performed by former mental patients. *See* R.D. Orr v. Sonnenburg, 542 N.E.2d 201 (Ind. 1989). In September 1991, trial is set to determine whether Indiana's educational funding formula is contrary to the equal protection and education clauses of the state constitution. Lake Central School Corp. v. State of Indiana, No. 56C01-8704-CP-81 (Newton Cir. Ct.).

4. IND. CODE § 35-45-4-1(a)(3) (1988) makes public indecency, including appearing nude in public, a crime. Nudity is defined in the statute as

> the showing of the human male or female genitals, pubic area, or buttocks with less than opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered

as applied to non-obscene nude dancing. In *Miller v. Civil City of South Bend*,[5] suit was brought by J.R.'s Kitty Kat Lounge, a drinking establishment in South Bend which provided nude dancing as entertainment for its patrons, and by the Glen Theatre, an establishment that does not serve alcoholic beverages but similarly provides nude dancing. In addition, these businesses were joined by three dancers who engaged in this activity.[6] The Seventh Circuit, in a 7-4 en banc ruling, held that (1) non-obscene nude dancing performed as entertainment is expression and thus entitled to first amendment protection;[7] and (2) that Indiana's public indecency statute, which provides for a total ban on nudity in public places, is unconstitutional as applied to prohibit such dancing.[8] Each of these two holdings requires a separate analysis.

In *Miller*, Judge Flaum found grounds for constitutionally protecting nude dancing based on: the lengthy history of dance as a form of expressive entertainment dating back to classical Greece and ancient Rome;[9] Supreme Court precedent suggesting that nude dancing "is not without First Amendment protection;"[10] and the opinions of two other circuit courts of appeal that similarly have afforded protection to nude dancing.[11]

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male genitals in a discernibly turgid state.

Id. at (b).

The Indiana Supreme Court, in State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), *appeal dismissed for want of a substantial federal question sub nom.* Clark v. Indiana, 446 U.S. 931 (1980), interpreted the statute to apply to nude entertainment in theaters, nightclubs, and other establishments open to the public, although it carved out an exception for performances having an expressive character. In Adims v. State, 461 N.E.2d 740 (Ind. Ct. App. 1984), the court ruled that the indecency law may be constitutionally applied to peepshows in bookstores when there was "no hint of expressive content," and in Erhardt v. State, 468 N.E.2d 224 (Ind. 1984), it sustained the application of the law to nude dancing performed in an enclosed theater.

5. 904 F.2d 1081 (7th Cir.), *cert. granted sub nom.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 38 (1990).

6. *Id.* at 1082.

7. *Id.* at 1085.

8. *Id.* at 1089.

9. *Id.* at 1085-86.

10. *Id.* at 1083-84. The court cited three Supreme Court decisions which in dicta suggested that nude dancing enjoys some first amendment protection: Schad v. Mount Ephraim, 452 U.S. 61, 66 (1981) ("[N]ude dancing is not without its First Amendment protections from official regulation."); Doran v. Salem Inn, 422 U.S. 922, 932 (1975) ("Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized [in *LaRue*] that this form of entertainment might be entitled to First and Fourteenth Amendment protection in some circumstances."); California v. LaRue, 409 U.S. 109, 118 (1972) ("[S]ome of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression.").

11. The Ninth and Eleventh Circuits, relying on *Schad*, have assumed that nude

In a lengthy concurrence, Judge Posner stressed the difficulty of drawing lines between expression and non-expression, art and entertainment, speech and conduct, ideas and emotion,[12] and upper-class and lower-class "non-obscene erotica."[13] Judge Posner noted the absence of "objective standards of aesthetic quality" and his concern that judges not assume the role of "art critic and censor."[14] Judges Flaum and Posner both argued that the dancers were conveying a message — one of eroticism and sensuality.[15]

After finding expressive value in nude dancing, the majority conceded that Indiana's interest in protecting public morality may justify the regulation of nude dancing, including reasonable time, manner, and place restrictions as well as regulation under the power granted to the state by the twenty-first amendment to control establishments that serve liquor.[16] The Supreme Court actually has sustained the validity of California's ban on "grossly sexual exhibitions" in bars based on the twenty-first amendment.[17] However, because Indiana's public indecency statute on its face provides for a total ban of all forms of nudity in all public places, it is unconstitutional.[18] Judge Posner stressed that a local ordinance forbidding nude dancing in bars would be constitutionally unproblematic, but that "a statewide ban on such dancing, applicable to theaters as well as to bars, violates the First Amendment."[19] Thus, the Seventh Circuit was required to address the difficult issue of whether non-obscene nude dancing performed as entertainment is expression entitled to any first amendment protection.[20]

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dancing is constitutionally protected expression. *See* BSA, Inc. v. King County, 804 F.2d 1104, 1107 (9th Cir. 1986); International Food & Beverage Sys. v. Fort Lauderdale, 794 F.2d 1520, 1525 (11th Cir. 1986).

12. Miller v. Civil City of South Bend, 904 F.2d 1081, 1100 (7th Cir.), *cert. granted sub nom.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 38 (1990) (Posner, J., concurring).

13. *Id.* at 1098. Judge Flaum expressed the same view: "Any attempt to distinguish 'high' art from 'low' entertainment based solely on the advancement of *intellectual ideas* must necessarily fail." *Id.* at 1086. *See also* Cohen v. California, 403 U.S. 15, 25 (1971) ("[W]e think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual").

14. *Miller*, 904 F.2d at 1086.

15. *Id.* at 1087-88, 1092 (Posner, J., concurring).

16. *Id.* at 1088-89.

17. California v. LaRue, 409 U.S. 1109 (1972). In this case, however, evidence was presented that the nude dancing had encouraged prostitution and other lewd conduct. *See also* Newport v. Iacobucci, 479 U.S. 92 (1986) (ordinance prohibiting nude dancing in establishments licensed to sell liquor is permitted under the 21st amendment); New York State Liquor Authority v. Bellanca, 452 U.S. 714, 717 (1981) (per curiam) ("The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs.").

18. *Miller*, 904 F.2d at 1088.

19. *Id.* at 1102.

20. *Id.* at 1082.

The dissenters argued that nude dancing lacks any communicative element, and that even if an inherent message could be found, it is outweighed by society's interest in protecting morality.[21] Dissenting, Judge Easterbrook stressed that a person desiring to engage in expressive conduct has the burden of demonstrating "that the First Amendment even applies."[22] The district court in this case made explicit findings, based on the testimony of the dancers, that they were not trying to express any ideas.[23] Judge Easterbrook further argued that the lack of serious artistic value provides assurance that Indiana will not use its statute to forbid "important aspects of culture."[24] He found Supreme Court precedent allegedly establishing the protected status of nude dancing much less clear than asserted by the majority.[25] Easterbrook also emphasized that the Indiana statute proscribed nudity, not dancing, and that the reasons for the law had nothing to do with the purported communicative character of the conduct.[26]

In his dissenting opinion, Judge Coffey focused on the state's significant interest in protecting public morality, as well as the right of the people of Indiana "to implement their beliefs and conceptions of proper moral principles through their legislature."[27] He relied heavily on the final report of the Attorney General's Commission on Pornography which included findings on the harm caused by exhibitions, like nude dancing, that degrade women[28] — a harm that Judge Coffey found clearly outweighed any expressive value in this so-called "speech."[29] He charged the majority with engaging in unwarranted judicial activism in extending the first amendment to protect nude dancing, contrary to the intent of the framers.[30] Finally, Judge Coffey noted the contrary holding of the

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21. Judges Coffey, Easterbrook, and Manion authored separate dissenting opinions, and Judge Kanne joined in Judge Easterbrook's dissenting opinion. *Id.* at 1104-35.

22. *Id.* at 1123.

23. *Id.* at 1124-25 (Easterbrook, J., dissenting). Judge Easterbrook noted, "Neither the dancers nor their lawyers came up with a message in five years of litigation." *Id.* at 1129.

24. *Id.* at 1126.

25. *Id.* at 1127-28 (*Schad* was based on an overbreadth challenge, and its author, Justice White, later noted that the status of nude dancing remained unsettled).

26. *Id.* at 1120-22.

27. *Id.* at 1109. Judge Easterbrook, *id.* at 1129-30, and Judge Manion, *id.* at 1132-33, emphasized the same concern for federalism.

28. *Id.* at 1110-13.

29. Like Judge Easterbrook, Judge Coffey stressed that the plaintiffs "have clearly stated that they have no intention of conveying or expressing any political or ideological message." Thus, he found it difficult to see how any expression was being impeded through the state regulation. *Id.* at 1119.

30. *Id.* at 1105-06.

Sixth Circuit,[31] which found that nude dancing is plainly "not a fundamental right entitled to heightened scrutiny."[32] Following the Seventh Circuit decision, the Eighth Circuit joined in the foray, attacking the majority opinion in *Miller* as stretching the first amendment "beyond the pale."[33] The court found that since the primary message communicated by barroom dancers is one of "prurience," the communication is simply not entitled to first amendment protection.[34]

In resolving the apparent conflict regarding nude dancing, the United States Supreme Court must first decide whether this form of entertainment is expressive activity. Dealing with this issue in recent flag burning cases, the Supreme Court stated the question as whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[35] Compliance with this standard is problematic in light of the district court's factual findings that the dancers' conduct was not intended to be "expressive activity."[36] Although the Supreme Court has been reluctant to deny the communicative value of an individual's expressive conduct,[37] the record in this case is particularly troublesome because the district court relied on the dancers' own testimony that their purpose was not to express ideas, but rather to encourage patrons to buy drinks.[38] The

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31. *Id.* at 1116.

32. *Id.* (citing Wal-Juice Bar, Inc. v. Elliot, 899 F.2d 1502, 1507 (6th Cir. 1990)).

33. Walker v. City of Kansas City, Mo., 911 F.2d 80, 86 (8th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3503, 3566 (U.S. Jan. 4, 1991) (No. 90-1075).

34. *Id.* at 88. Note that this opinion was not joined by either of the other two panelists; one concurred solely on grounds of the 21st amendment, and the other dissented relying specifically on *Schad* as controlling precedent.

35. Texas v. Johnson, 109 S. Ct. 2533, 2539 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974)).

36. *Miller*, 904 F.2d at 1116.

37. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (Court assumes, without deciding, that overnight sleeping in a public park in connection with a demonstration to call attention to the plight of the homeless "is expressive conduct protected to some extent by the First Amendment."); United States v. O'Brien, 391 U.S. 367, 376 (1968) (Court assumes, without deciding, that O'Brien's conduct in burning his draft card has a communicative element "sufficient to bring into play the First Amendment.").

Cf. City of Dallas v. Stanglin, 109 S. Ct. 1591, 1595 (1989) ("[I]t is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."); United States v. O'Brien, 391 U.S. 367, 376 (1968) (rejecting the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"). *See also* Young v. New York City Transit Auth., 903 F.2d 146, 154 (2d Cir. 1990) (because most individuals who beg do not intend to convey a particularized message, transit authority may constitutionally prohibit begging and panhandling in the subway system).

38. *Miller*, 904 F.2d at 1116. At oral argument, counsel in fact stated that there

Supreme Court may find that no message was being conveyed, or that, at best, the case involves a purely commercial message that is entitled to less protection than noncommercial speech.[39] On the other hand, it could find, as a majority of the court of appeals did, that nude dancing "inherently embodies the expression and communication of ideas and emotions," thus entitling it to full protection under the first amendment.[40]

If the Supreme Court finds that nude dancing carries an "inherent message," whether ideological or purely emotive, it is still possible for it to sustain Indiana's regulation. Normally when the Court finds that government is trying to forbid speech because of its message or its communicative impact, it has applied a strict scrutiny standard, requiring the government to justify its regulation by a compelling reason and by means that are no more restrictive than necessary.[41] As the Supreme Court reaffirmed in the recent flag desecration cases, a "bedrock principle underlying the First Amendment" is that expression of an idea cannot be prohibited simply because society finds the idea offensive or disagreeable.[42] Nonetheless, the Court could sustain the application of Indiana's indecency law to nude dancing under one of two approaches. First, as suggested earlier, it could determine that although expression is implicated, such expression should not be entitled to the full protection afforded other forms of speech. Although the theory that courts may assess the value of different kinds of speech has not been adopted by a majority of the Court, at least outside the context of purely commercial speech, some Justices have suggested that sexually explicit material and those who engage in pandering such material should not be afforded full first amendment protection.[43] Adopting this approach, the Court could

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was no contention that an idea was being communicated. Indeed, two dancers testified that the purpose of their dance was to get customers to like them and buy them drinks, because their salary depended on the number of drinks purchased. *Id.* at 1123. *See also* Cowgill v. California, 396 U.S. 371 (1970) (sustaining appellant's conviction for flag desecration due to the lack of any recognizable communicative aspect to his conduct in wearing a flag sewn into a vest).

39. *See supra* note 37. *Cf.* Posadas De Puerto Rico Ass'n v. Tourism Co., 478 U.S. 328 (1986) (sustaining a Puerto Rican statute prohibiting commercial advertising of gambling parlors in order to protect the health, safety, and morality of its citizens).

40. *Miller*, 904 F.2d at 1085.

41. Texas v. Johnson, 109 S. Ct. 2533, 2544 (1989).

42. *Id. See also* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2754 (1989) (the primary inquiry "is whether government has adopted a regulation of speech because of disagreement with the message it conveys").

43. FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 622 (1990) (Scalia, J., dissenting) (establishments that exhibit public nudity are engaged in the business of pandering and the Constitution should not foreclose a state or city from prohibiting businesses that "intentionally specializ[e] in . . . live human nudity"); FCC v. Pacifica Foundation, 438 U.S.

find that the harmful consequences of this activity simply outweigh any marginal expressive value.[44]

In order to avoid the controversial problem of assessing the "value" of different types of speech, the Supreme Court could characterize the regulation as unrelated to the suppression of ideas. Some Justices, as well as other legal authorities, have argued that in light of the ambiguity of ascertaining intent underlying human conduct, it is better to focus on the state's purpose in suppressing the given conduct to determine whether allegedly communicative activity should be protected.[45] The question is whether government is punishing the conduct because government perceives the message and dislikes what it is being communicated; if so, strict scrutiny must be applied.[46] On the other hand, the Supreme Court held in *United States v. O'Brien*[47] that regulation of conduct that contains a communicative aspect is permitted when the regulation furthers an important government interest unrelated to the suppression of free expression. Although this analysis also requires that the regulation be narrowly tailored to serve the state's interest, arguably nothing less than

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726, 743 (1978) (plurality opinion of Justice Stevens) (although FCC regulation prescribing the broadcast of "indecent" material is overbroad because the provision will affect only references to excretory and sexual activities, *i.e.* references that lie at the periphery of the first amendment, the regulation should be sustained; the overbreadth doctrine should not be used to "preserve the vigor of patently offensive sexual and excretory speech"); Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion of Justice Stevens) (". . . even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

Cf. FCC v. Pacifica Foundation, 438 U.S. 726, 761 (1978) (Powell, J., concurring) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."). Justice Brennan similarly noted "the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content." *Id.* at 763 (Brennan, J., dissenting).

44. *Miller*, 904 F.2d at 1111 (Coffey, J., dissenting); *id.* at 1131 (Manion, J., dissenting).

45. *See* L. NIMMER, FREEDOM OF SPEECH § 3.06 (1984); TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 (2d Ed. 1988). *See also* Texas v. Johnson, 109 S. Ct. 2533, 2540 (1989) ("It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.").

46. *Johnson*, 109 S. Ct. at 2540; Boos v. Barry, 485 U.S. 312, 321 (1988).

47. United States v. O'Brien, 391 U.S. 367, 376 (1968) ("when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms").

a flat ban will meet the government's concern with public nudity.[48] Judge Easterbrook in dissent argued that Indiana's reasons for prohibiting public nudity have nothing to do with the expression of an opinion or viewpoint.[49] Adopting an analysis propounded by then-Judge Scalia, Judge Easterbrook argued that whenever a neutral law allegedly affects "expression" rather than "speech," the law should be sustained, provided the purpose of the proscription on conduct is not to suppress communication.[50] Further, he argued that even under the more restrictive traditional *O'Brien* analysis, the law should be upheld "as a neutral regulation of conduct."[51]

Relying on related Supreme Court doctrine,[52] Judge Coffey argued that the statute could be sustained as a valid "time, manner, place restriction" on speech.[53] Although the first requirement under this analysis is that the regulation be content-neutral, this obstacle may be overcome. The Supreme Court has sustained a zoning restriction aimed only at adult establishments by reasoning that the city's intent was not to suppress sexually explicit material, but rather was only to control the secondary effects caused by these businesses.[54] Similarly, Judge Coffey argued here

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48. *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984) (only a flat ban on posting signs on public property will address the city's concern with visual clutter and blight; where the medium of expression itself causes the harm, the law curtails no more speech than is necessary to accomplish its purpose). Judge Coffey finds this case validates a flat ban on public nudity. *Miller*, 904 F.2d at 1119 (Coffey, J., dissenting). *See also* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2757-58 (1989) (although regulation of protected speech must be narrowly tailored, "it need not be the least-restrictive or least-intrusive means of doing so;" it suffices that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation"); Frisby v. Schultz, 108 S. Ct. 2495, 2502-2503 (1988) ("A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.").

49. *Miller*, 904 F.2d at 1121-22 (Easterbrook, J., dissenting). Taking a contrary position, Judge Flaum argued that Indiana's purpose in promoting public morality cannot be separated from its desire to preserve a particular set of views. Thus, the statute restricts activity "precisely because it expresses a particular message contrary to the legislature's prescribed vision." *Id.* at 1088 n.7.

50. *Id.* at 1121-22 ("a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause").

51. *Id.* at 1123.

52. The Supreme Court has noted that the *O'Brien* standard for validating regulation of expressive conduct and the time, place, or manner analysis are essentially the same. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984). *See also* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2757 (1989) (the time, manner, place standard "in the last analysis is little, if any, different from the standard applied" in the *O'Brien* test).

53. *Miller*, 904 F.2d at 1115-16.

54. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986). *See also*

that Indiana's concern is not with the communicative effect of nude dancing, but only with its "secondary effects," namely prostitution, spread of AIDS, and deterioration of the neighborhood.[55] In short, by focusing on the purportedly content neutral reasons for imposing a ban on public nudity, the Supreme Court may sustain the regulation by finding that these reasons simply outweigh whatever limited first amendment rights are implicated.[56]

Even if the Supreme Court sustains the Seventh Circuit holding that Indiana's public indecency statute may not be applied to non-obscene nude dancing, Indiana is certainly not prevented from dealing with this alleged problem. As Judge Posner noted, the twenty-first amendment to the United States Constitution provides the trump card because it enables the states to pass regulations regarding distribution of alcohol, and thus permits Indiana to ban nude dancing in bars.[57] Indeed, Judge Posner stated that if Indiana is seriously concerned with the consequences of nude barroom dancing, "it will amend its public-indecency statute to prohibit nude dancing in establishments that serve liquor."[58]

As to the problem posed by nude dancing in non-liquor-serving establishments like the Glen Theatre, enact so-called reasonable time, manner, and, Indiana may place restrictions, such as zoning ordinances. The Supreme Court has sustained similar regulation of adult businesses even when the practical effect has been to deny any commercially viable locations for such establishments.[59] When coupled with the state's right

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Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("the principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys").

55. *Miller*, 904 F.2d at 1113. Note, however, that Indiana does not record legislative history. *Id.* at 1088. Further, the majority criticizes the State for the limited analysis in its brief that provides "no explanation of the evil at which the statute is aimed." *Id.* at 1100. The state presented no evidence establishing a link to prostitution or adultery. *Id.* at 1100-01. Judge Posner notes the problem of making this a state-wide ordinance, whereas evidence that prostitution was a local problem might justify a municipal ordinance. *Id.* at 1102.

56. *Id.* at 1135 (Manion, J., dissenting).

57. *Id.* at 1102.

58. *Id.* at 1104. Judge Posner noted that the amendment would be valid under the 21st amendment and would "moot the questions that divide this court." *Id.* He further recognized that Indiana is rather "exceptional" in imposing a ban on erotic dancing without recourse to the 21st amendment. *Id.* at 1090. *See also supra* note 17 and cases cited therein.

59. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54 (1986) (even if the zoning restriction had the effect of significantly restricting commercially viable sites for adult theatres, "respondents must fend for themselves in the real estate market," because the first amendment does not ensure "sites at bargain prices"). *See also* 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415, 1420 (4th Cir. 1989), *vacated and remanded*, 110 S. Ct. 2580 (1990) (sustaining the validity of a county's adult bookstore

to close down adult business establishments relying on facially neutral criminal statutes[60] or pursuant to Indiana's civil RICO law,[61] the practical implications of any Supreme Court holding in *Miller* are, in reality, negligible. On the other hand, the case raises highly sensitive constitutional questions regarding the proper role of the judiciary in assessing the expressive value of conduct, the significance of original intent in interpreting the constitution, and the proper balance of state and federal power[62] — questions that clearly transcend the interests of the dancers at the Kitty Kat Lounge or Glen Theatre.

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zoning regulations that do not regulate speech-related activities on the basis of content, but rather restrict "primarily noncommunicative aspects of Plaintiff's right to own and operate a bookstore."); Thames Enterprises, Inc. v. City of St. Louis, 851 F.2d 199 (8th Cir. 1988) (zoning regulation prohibiting location of adult establishment within 500 feet of residential area is sustained even though there were no detailed evidentiary findings as to the deleterious effects such establishments have on surrounding neighborhoods; personal observations and judgments of legislators coupled with research of other sources is sufficient under *Renton*); SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988) (choice of 750 feet is an appropriate distance in zoning restriction on adult establishments; the ordinance leaves open ample alternative avenues of communication, especially in light of the *Renton* holding that alternative sites need not be commercially viable); International Food & Beverage Sys. v. Fort Lauderdale, 794 F.2d 1520, 1525 (11th Cir. 1986) (constitutional protection of nude dancing is subject to reasonable time, place, and manner restrictions, such as the zoning ordinance in question that prohibited nude bars from operating within 750 feet of residentially zoned land or churches, schools, public parks, etc.); BSA, Inc. v. King County, 804 F.2d 1104, 1109-11 (9th Cir. 1986) (zoning, operating hour limits, and licensing fees may all be applied to deal with the additional problems posed by topless dancing clubs; further, regulation requiring all nude entertainment be performed on a stage 18 inches high and six feet from the nearest patron is valid).

Cf. Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988) (ordinance's 1,000-foot separation requirement between adult businesses that would have the practical effect of closing the only existing adult theater with no definite prospect of a place to relocate violates the first amendment).

60. *See, e.g.*, Arcara v. Cloud Books, Inc., 478 U.S. 697 (city's closure of adult establishment as a public nuisance does not implicate or trigger first amendment protections). *See also* O'Connor v. City and County of Denver, 894 F.2d 1210, 1217 (10th Cir. 1990) (revocation of adult theater's license because of a significant number of acts of public indecency does not implicate first amendment protections); Chulchian v. City of Indianapolis, 633 F.2d 27, 31 (7th Cir. 1980) (the fact that a commercial enterprise deals in material protected by the first amendment does not immunize it from police power regulations).

61. Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989) (upholding stiff RICO penalties against those who commit multiple violations of obscenity laws and who are accordingly defined to be "racketeers"). *See also* Studio Art Theater v. State, 530 N.E.2d 750 (Ind. Ct. App. 1988), *cert. denied*, 110 S. Ct. 1523 (1990) (sustaining conviction under state RICO Act for violation of obscenity statutes prohibiting sale of sexually explicit material harmful to minors within 500 feet of the nearest property line of a school or church).

62. *See, e.g.*, *Miller*, 904 F.2d at 1105-07 (Coffey, J., dissenting); *id.* at 1129-31 (Easterbrook, J., dissenting); *id.* at 1132-33 (Manion, J., dissenting).

B. Political Patronage

Questions regarding the authority of government employers to make decisions based on political affiliation continue to plague state and federal courts. In the 1976 landmark case of *Elrod v. Burns*,[63] the Supreme Court held that the dismissal of public employees for reasons of political patronage violates the first amendment unless a "policymaking" exception is met.[64] The Court subsequently explained that the critical question in deciding whether a particular job is insulated from patronage practices is not whether the position can be labeled "policy-making," but rather "whether the hiring authority can demonstrate that political affiliation is an appropriate requirement for the effective performance of the public office involved."[65] Applying this standard in *McDermott v. Bicanic*,[66] the Indiana Court of Appeals held that *Elrod* did not protect the city's administrator of parks and recreation because the position involved organization and coordination of park and recreation programs, budget preparation, contract negotiation, and a critical role in hiring decisions.[67]

A more controversial patronage question was posed in *Inner City Leasing & Trucking Co. v. City of Gary*.[68] In this case, the Indiana district court refused to extend *Elrod* to an independent contractor working for the city.[69] The plaintiff alleged that the city terminated his contract due to the proprietor's staunch support of former Mayor Richard Hatcher.[70] The court granted the city's motion to dismiss the complaint, finding no basis for a first amendment claim even if the plaintiff was terminated for political reasons.[71] The court's holding was dictated by *Triad Associates, Inc. v. Chicago Housing Authority*,[72] in which the Seventh Circuit reaffirmed its position that the first amendment does not protect an

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63. 427 U.S. 347 (1976).
64. *Id.* at 367-72.
65. Branti v. Finkel, 445 U.S. 507, 518 (1980).
66. 550 N.E.2d 93 (Ind. Ct. App. 1990).
67. The Seventh Circuit previously had reached the same conclusion in Bicanic v. McDermott, 867 F.2d 391, 393-94 (7th Cir. 1989). *Cf.* Meeks v. Grimes, 779 F.2d 417, 423 (7th Cir. 1985) (only those employees who work in direct and constant contact with a political official would be exempt from first amendment protection against patronage dismissals); Grossart v. Dinaso, 758 F.2d 1221, 1227 (7th Cir. 1985) (compilation of data according to generally accepted accounting principles and the need to base financial decisions on such data does not create the type of position as to which there is room for principled disagreement on goals or their implementation, and thus the individual is not a policymaker).
68. No. H89-169 (unpublished) (N.D. Ind. July 11, 1990).
69. *Id.*
70. *Id.* at 3.
71. *Id.* at 5.
72. 892 F.2d 583 (7th Cir. 1989).

independent contractor from termination of a public contract for partisan political reasons.[73]

Other circuits have also refused to recognize first amendment claims on behalf of independent contractors either for denial of new contracts or removal from existing contracts or contractor positions.[74] Although conceding that the respective interests identified by the Supreme Court in *Elrod* and *Branti* are basically the same interests implicated when patronage practices affect independent contractors, nonetheless, the lower courts have ruled that the balance should be struck differently. These courts have emphasized that public officials should be permitted to employ independent contractors based on political party affiliation in order to implement their programs.[75] Further, they argue that the coerciveness associated with public employees carries diminished weight when an independent contractor, as opposed to a government employee, is involved.[76] More basically, these lower courts have expressed a reluctance to expand the principle of *Elrod*, deciding instead to leave any extension to the Supreme Court: "Some day the Supreme Court may extend the principle of its public-employee cases to contractors. But there are enough differences in the strength of the competing interests in the two classes of cases to persuade us not to attempt to do so."[77]

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73. The court in *Triad* relied on its earlier holding in LaFalce v. Houston, 712 F.2d 292, 294 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

74. *See* Horn v. Kean, 796 F.2d 668, 673-75 (3d Cir. 1986) (permitting those who hold public office to employ independent contractors based on political party affiliation provides an effective method to implement the administration's program that outweighs the lesser burden posed when it is a contractor and not a state employee whose rights are at stake); Sweeney v. Bond, 669 F.2d 542, 545 (8th Cir. 1982), *cert. denied*, 459 U.S. 878 (1982) (politically motivated dismissal of Missouri Department of Revenue fee agents, whom the court found to be independent contractors, does not violate the first amendment); Fox & Co. v. Schoemehl, 671 F.2d 303, 305 (8th Cir. 1982) (politically motivated dismissal of a public accounting firm from its position as city auditor does not contravene the first amendment because the firm is merely an independent contractor). *Cf.* Lundblad v. Celeste, 874 F.2d 1097, 1102 (6th Cir.), *vacated*, 882 F.2d 207 (1989) (because it was not clearly established that refusal of public employees to grant a public contract to the lowest bidder solely because of a political affiliation violated first amendment rights, the defendants are entitled to qualified immunity from civil damages under §1983).

75. *See Horn*, 796 F.2d 668; *Triad*, 892 F.2d at 587 (the cost of further subjecting this country's long-established patronage system to first amendment scrutiny outweighs the benefits to a contractor's exercise of first amendment rights).

76. *See, e.g., Horn*, 796 F.2d at 674-75 (independent contractor normally would feel a lesser sense of dependency, and thus first amendment interests are more attenuated and insufficient to justify tampering with political institutions).

77. *LaFalce*, 712 F.2d at 295. *See also Horn*, 796 F.2d at 677 ("[A]s the force of a First Amendment assault on state patronage practices moves from public employment into the outer spheres of political life, we are extremely hesitant to realign radically, in the name of the Constitution, a political constellation that has been with us since the

Although the Supreme Court has not yet addressed the applicability of *Elrod* to independent contractors,[78] its recent decision in *Rutan v. Republican Party of Illinois*[79] suggests that the lower courts may be required to reevaluate the issue. In *Rutan*, the Supreme Court extended first amendment protection to employment decisions regarding hiring, promotion, transfer, and recall after layoff.[80] It reversed the Seventh Circuit's holding that unless the employment decisions challenged were "the substantial equivalent of a dismissal," first amendment rights were insufficiently implicated.[81] In rejecting this analysis, the Supreme Court stated that "we find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless pressed state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy."[82] The Court held that denial of a transfer or a promotion based on partisan political reasons constituted a significant penalty imposed for exercise of rights guaranteed by the first amendment.[83] Further, the Court failed to understand how "preservation of the democratic process" was served by such patronage actions any more than by patronage dismissals.[84]

The Supreme Court in *Rutan* also addressed the subject of politically based hiring decisions. It held that conditioning hiring decisions on political belief and association imposed "an unconstitutional condition," and it failed to find a vital interest to support such decision-making.[85] Government's asserted interests in securing loyal employees and in preserving the democratic party and the two-party system were insufficiently vital, or could be served without relying on patronage practices.[86] In reaching its conclusion, the Court relied on precedent which found generally that government may not condition valuable benefits on relinquishing constitutional rights.[87]

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republic was formed."). The Seventh Circuit in *Triad* similarly left this extension to the Supreme Court. 892 F.2d at 588.

78. *See* Branti v. Finkel, 445 U.S. 507, 513 n.7 (1980) (specifically noting that it was not addressing the question of "granting political supporters lucrative government contracts"); Elrod v. Burns, 427 U.S. 347, 353 (1976) ("Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons.").

79. 110 S. Ct. 2729 (1990).

80. *Id.* at 2737.

81. Rutan v. Republican Party of Illinois, 868 F.2d 943, 954-57 (7th Cir. 1989), *modified*, 110 S. Ct. 2729 (1990).

82. *Rutan*, 110 S. Ct. at 2737.

83. *Id.*

84. *Id.* ("A government's interest in securing effective employees can be met by discharging, demoting or transferring staff members whose work is deficient.").

85. *Id.* at 2739.

86. *Id.*

87. *Id.* at 2736.

The logic of *Rutan* would appear to control the question of government contracts. Patronage contracting is coercive in the same manner that patronage employment is coercive. The Supreme Court already has recognized this rationale in a related context. In *Lefkowitz v. Turley*,[88] it invalidated a state statute requiring public contractors to waive their fifth amendment immunity from self-incrimination in any proceeding related to their government contract or face a five-year ban on doing further business with the government. The Court specifically rejected the argument that there was "a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor."[89] The same reasoning should govern first amendment claims.[90]

The Seventh Circuit's position on independent contractors relies heavily on the argument that loss of one contract is not so significantly penalizing that it triggers the protection of *Elrod*.[91] The Supreme Court's holding in *Rutan* requires a reexamination of the viability of this distinction. If loss of a transfer or promotion is considered a significant penalty triggering strict scrutiny, loss of a lucrative government contract should evoke the same analysis. It is difficult to understand how the patronage practice regarding independent contractors is necessary to preserve the democratic process.[92] As in the case of government employees, an exception would be recognized for those situations in which political affiliation is an appropriate requirement for effective job performance. Further, the Court's broad language in *Rutan* denouncing unconstitutional conditions on government benefits appears to encompass government

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88. 414 U.S. 70 (1973).

89. *Id.* at 83.

90. *But see* Fox & Co. v. Schoemehl, 671 F.2d 303, 305 n.3 (8th Cir. 1982) (rejecting the analogy to *Lefkowitz*, reasoning that the balance could be struck differently when weighing governmental interests against first amendment as compared to fifth amendment rights).

91. The Seventh Circuit, in *LaFalce*, specifically focused on the difference between losing a contract and losing one's job. 712 F.2d at 294. This same distinction was relied upon by the Third Circuit in *Horn*, 796 F.2d at 675. As argued in *Horn*, an independent contractor with substantial economic dependence on the state could obviously suffer harm as severe as that of an employee who is discharged. *Id.* at 675 n.9. More basically, the Supreme Court's opinion in *Rutan* suggests that loss of employment is not the only form of penalty which triggers the protection of the first amendment.

92. *See also* Comment, *Political Patronage in Public Contracting*, 51 U. CHI. L. REV. 518 (1984). The author persuasively argued that there is "no legally relevant distinction" between employees and contractors in terms of either the government's interest in using patronage or the contractor's interest in free speech. *Id.* at 520. He also noted that patronage pressure on the contractor may lead to pressure on the contractor's employees, thus allowing government to do indirectly that which it is forbidden to do directly by *Elrod*. *Id.* at 536.

contracts.[93] On the other hand, *Rutan* was a 5-4 decision, authored by Justice Brennan, and his absence from the Court could signal the end of the expansionist approach to providing first amendment protection from political patronage practices.[94] In fact, Justice Scalia in dissent predicted that the unmanageable flood of litigation that inevitably will be triggered by this new decision will lead the Court "to reconsider [its] intrusion into this entire field."[95]

III. Due Process Claims

In recent years, the United States Supreme Court has significantly restricted the scope of the due process clause as a means of challenging government official wrongdoing.[96] Nonetheless, the due process guarantee continues to be one of the most litigated constitutional provisions, as demonstrated by the large number of state and lower federal court decisions that address both procedural and substantive due process issues.[97]

A. Procedural Due Process

In adjudicating procedural due process claims, the lower courts continue to apply the Supreme Court's well-established two-pronged analysis. It requires a plaintiff initially to identify a property or liberty interest. If this burden is met, the court balances the competing interests to determine whether sufficient procedural safeguards have been afforded.[98]

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93. *See supra* note 87 and accompanying text.

94. Justice Scalia argued in dissent not only that the extension of *Elrod* is impermissible, but that history has proved that *Elrod* itself should be overturned because the Court was wrong in failing to recognize the significance of the patronage system in terms of promoting political stability and facilitating the social and political integration of previously powerless groups. *Rutan*, 110 S. Ct. at 2756-58.

95. *Id.* at 2758-59 (Scalia, J., dissenting).

96. *See, e.g.*, Zinermon v. Burch, 110 S. Ct. 975 (1990) (when deprivation of liberty has occurred as a result of random, unauthorized official misconduct, procedural due process is not violated provided an adequate post-deprivation remedy exists under state law); DeShaney v. Winnebago County Dept. of Social Serv., 109 S. Ct. 998 (1989) (government cannot be held liable for injury inflicted by third parties absent a special relationship where government assumes an affirmative duty to provide protective or other services); Graham v. Connor, 109 S. Ct. 1865 (1989) (claims that law enforcement officials used excessive force in the course of an arrest, investigatory stop, or other seizure of a person must be analyzed under the fourth amendment rather than the more general substantive due process clause); Daniels v. Williams, 474 U.S. 327 (1986) (claims of mere negligent deprivation of property or liberty are not actionable under the due process clause).

97. Although procedural due process prescribes the manner in which government may proceed when affecting an individual's legal interests or status, substantive due process serves as a more general bar against arbitrary government action. *See Daniels*, 474 U.S. at 337.

98. Mathews v. Eldridge, 424 U.S. 319 (1976).

Under the first part of the analysis, state or local law, contract, or custom often dictates whether a property or liberty interest has been created.[99] In Indiana, most employees are viewed as "at-will" employees whose jobs may be terminated without any procedural protection. For example, in *McMillian v. Svetanoff*,[100] the Seventh Circuit held that because under Indiana law, court reporters serve "at the pleasure of [the] senior judge,"[101] plaintiff was an at-will employee and had no constitutionally protected property interest in retaining her position as a court reporter.[102] Thus, she could be terminated without notice, a statement of reasons, or an opportunity to respond. In *Merritt v. Broglin*,[103] the Seventh Circuit examined the Indiana administrative code to determine whether it created a liberty interest on behalf of inmates seeking temporary leave upon the death of certain relatives. In denying the existence of a liberty interest, the court emphasized that before a liberty interest will be found, the state must have placed substantive and not merely procedural limitations on official discretion.[104] The court noted that generally it should be wary to find state-created liberty interests on behalf of prisoners in light of the special circumstances of the prison environment.[105]

In contrast to these decisions, the Indiana Supreme Court in *Speckman v. City of Indianapolis*[106] found that a previous settlement agreement reached between Speckman and the city was a written employment contract that may have created a legitimate claim of entitlement on behalf of Speckman to continued employment.[107] Thus, the trial court erred in granting a motion to dismiss the property interest claim. In addition, Speckman argued that he had a liberty interest in his good name and reputation and was therefore entitled to an opportunity to clear his name at a pre-termination hearing.[108] Although the Supreme Court has held that defamation alone is not a deprivation of liberty,[109] the Court has

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99. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (a legitimate claim of entitlement is created, and its dimensions defined "by existing rules or understandings that stem from an independent source such as state law").

100. 878 F.2d 186 (7th Cir. 1989).

101. IND. CODE § 33-5-29.5-8(a) (1988).

102. *McMillian*, 878 F.2d at 192.

103. 891 F.2d 169 (7th Cir. 1989).

104. *Id.* at 172.

105. *Id. Cf.* Colon v. Schneider, 899 F.2d 660 (7th Cir. 1990) (penal regulations governing the use of mace did not create a federally protected liberty interest on behalf of inmates; regulations must employ language of an unmistakably mandatory character in order to find a constitutionally protected liberty interest).

106. 540 N.E.2d 1189 (Ind. 1989).

107. *Id.* at 1193.

108. *Id.*

109. Paul v. Davis, 424 U.S. 693 (1976).

implied that if government defames an individual in connection with a termination even from an at-will job, deprivation of a liberty interest in pursuing one's career may be implicated.[110] Because at the time of Speckman's discharge, city employees made statements to the press and to other city employees indicating that Speckman had been dishonest or even criminal in his handling of city funds,[111] the trial court erred in dismissing the claims without determining whether the alleged defamation of Speckman "was so maligning as to foreclose Speckman from continuing in the same occupation and to damage his standing in the community."[112] Regarding both the property and liberty claims, a remand was necessary to determine whether the procedures followed by the city fulfilled the due process requirement.[113]

As the Indiana Supreme Court in *Speckman* suggested, the identification of a constitutionally protected liberty or property interest does not necessarily mean that due process has been violated. The sufficiency of the procedural safeguards is determined by balancing the private interest affected, the risk of erroneous deprivation, the value of additional procedural safeguards, and the government's interest — the so-called "Mathews balancing."[114] For example, in *Hopper v. State*,[115] the Indiana Court of Appeals found that although Indiana law created a protected liberty interest on behalf of individuals placed under drug treatment supervision in lieu of prosecution or imprisonment,[116]plaintiffs failed to prove a violation of procedural due process.[117] The statute provided that before an individual could be sent back into the criminal justice system, the state must provide the same safeguards required for parole or probation revocation; namely, an opportunity to be heard prior to termination, written notice of the charges, disclosure of the state's evidence, the right to confront and cross-examine witnesses, a neutral hearing body, a statement of reasons, and a hearing at which the state bore the burden of proof.[118] Because Hopper was afforded all of these procedural safeguards, no due process violation was found.[119] Similarly, in *Cholewin v. City of Evanston*,[120] the court of appeals held that a police officer denied "injured-on-duty" pay was not deprived of due process when the city

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110. *See* Board of Regents v. Roth, 408 U.S. 564, 573 (1972).
111. *Speckman*, 540 N.E.2d at 1190.
112. *Id.* at 1195.
113. *Id.*
114. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).
115. 546 N.E.2d 106 (Ind. Ct. App. 1989).
116. *Id.* at 109.
117. *Id.*
118. *Id.*
119. *Id.*
120. 899 F.2d 687 (7th Cir. 1990).

provided notice of the investigation concerning his eligibility as well as an interview with the investigator at which the officer was represented by counsel.[121] The court reasoned that a full evidentiary hearing with the right to examine all documents and confront all witnesses was not required by due process.[122]

Other procedural due process claims were disposed of based on the so-called *Parratt* defense. In *Parratt v. Taylor*,[123] the Supreme Court held that procedural due process is not violated when a deprivation of property has occurred as a result of random, unauthorized official misconduct (precluding the possibility of pre-deprivation process), provided an adequate post-deprivation remedy exists under state law.[124] In *Zinermon v. Burch*,[125] the Court extended the *Parratt* rationale to deprivations of liberty. The distinction between the application of *Mathews* balancing and *Parratt* analysis is reflected in the Indiana district court's opinion in *Pennington v. Hobson*.[126] The court reasoned that the plaintiff's challenge to the state's established criminal procedural rules was to be assessed under the *Mathews* balancing standard.[127] Claims of alleged false imprisonment are in essence a challenge to random, unauthorized official misconduct. Therefore, this claim was precluded based on the existence of an adequate state tort remedy under the Indiana Tort Claims Act.[128]

The *Parratt* doctrine was also relied upon to preclude due process claims brought against the city mayor for discharging members of the board of the Gary Municipal Airport Authority District. In *Thornton v. Barnes*,[129] the Seventh Circuit concluded that because under Indiana law the plaintiffs had a fixed term in office and the right to remain in office for that term absent misconduct that would justify impeachment, they established a protectable property interest within the meaning of the due process clause.[130] Further, because the Airport Authority was a separate political subdivision, rather than an agency of the city, board members were not subject to removal by the mayor.[131] Nonetheless, because Indiana law provided a remedy pursuant to a writ of *quo warranto*, the court held that the deprivation could not be deemed a denial of federal due process.[132]

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121. *Id.* at 689.
122. *Id.* at 689-90.
123. 451 U.S. 527 (1981).
124. *Id.* at 538.
125. 110 S. Ct. 975 (1990).
126. 719 F. Supp. 760 (S.D. Ind. 1989).
127. *Id.* at 776.
128. *Id.* at 775.
129. 890 F.2d 1380 (7th Cir. 1989).
130. *Id.* at 1387-88.
131. *Id.* at 1387.
132. *Id.* at 1389-90.

The court's analysis in *Thornton* raises a difficult question about whether the decision of the mayor, the city's final policymaker, can be viewed as merely "random and unauthorized." A few months after *Thornton*, the Supreme Court in *Zinermon v. Burch*[133] held that the failure of hospital officials to provide a hearing to an incompetent patient prior to his institutionalization could not be considered random and unauthorized because the "State delegated to [hospital officials] the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to . . . guard against unlawful confinement" by providing mandated procedures.[134] In other words, those who perpetrated the harm occupied high-ranking policymaking positions and thus could have instituted pre-deprivation process. Their failure to do so is not cured by the existence of post-deprivation remedies.[135]

At the time of *Zinermon*, the circuits were split on whether *Parratt* applied to the conduct of high-ranking officials. Some, like the Seventh Circuit, held that *Parratt* applies "even to deprivations effected by the very state officials charged with providing pre-deprivation process."[136] These courts emphasized that any official who acts contrary to state law is acting in an "unauthorized" fashion.[137] Other courts have held *Parratt* inapplicable when officials have state-clothed authority to provide the plaintiff with a hearing.[138] These courts focus on the feasibility of providing pre-deprivation process as the key element in *Parratt*.[139] The Supreme

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133. 110 S. Ct. 975 (1990).

134. *Id.* at 990.

135. *Id.*

136. *Id.* at 978 n.2.

137. *See e.g.* the earlier opinion in Easter House v. Felder, 879 F.2d 1458, 1470-74 (7th Cir. 1989), *vacated*, 110 S. Ct. 1314 (1990) (although defendant employees of state department were high-ranking officials who allegedly conspired to deprive plaintiff of its operating license, because officials acted in disregard of state policy and procedures, their conduct was "random and unauthorized" within the meaning of *Parratt*); Martin v. Dallas County, Texas, 822 F.2d 553, 555 (5th Cir. 1987) (quoting Holloway v. Walker, 790 F.2d 1170, 1174 (5th Cir. 1987) ("[f]ederal constitutional guarantees are not breached merely because some state employee, even a highly-placed one, might engage in tortious conduct")).

138. *See* cases cited in *Zinermon*, 110 S. Ct. at 978 n.2.

139. *See e.g.*, Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1405 (9th Cir. 1989) (decision to destroy plaintiff's property made by senior ranking officials does not constitute random, unauthorized conduct within the meaning of *Parratt*); Matthiessen v. North Chicago Community High School Dist. 123, 857 F.2d 404, 407 n.3 (7th Cir. 1988) (because a single act of a sufficiently high-ranking policymaker may be deemed established state procedure, the decision of the school board, even if contrary to the school code, is not insulated by *Parratt*); Merritt v. Mackey, 827 F.2d 1368, 1372 (9th Cir. 1987) (*Parratt* does not apply when defendants' conduct should have been apparent to defendants' supervisors, thus making predeprivation process feasible).

Court appears to adopt the latter approach in *Zinermon*. Although the hospital officials in *Zinermon* acted contrary to the state statute governing the admission of "voluntary" patients by admitting an individual who was clearly incapable of making an informed decision at the time of his admission,[140] the Court nonetheless concluded that the deprivation was not "unauthorized."[141]

The Supreme Court's approach in *Zinermon* correctly redirects the lower courts to focus on the feasibility of providing pre-deprivation process. Further, it clarifies that due process claims are not barred merely because an official is acting contrary to state law.[142] As the Court explained, the plaintiff "is not simply attempting to blame the State for misconduct of its employees . . . . He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation."[143] The meaning of "broadly delegated, uncircumscribed power" remains unclear. In *Thornton*, for example, the mayor had broad power "to effect the deprivation," and he obviously could have provided a hearing before he terminated the contracts of Board members. Although Mayor Barnes acted contrary to the statute requiring removal only "for misconduct that would justify impeachment," *Zinermon* makes clear that this alone does not trigger *Parratt*. On the other hand, unlike *Zinermon*, Indiana never broadly delegated power to the mayor to effect *this* deprivation. Indeed, the court found that the mayor had no authority whatsoever over the politically independent Airport Authority.[144] Arguably, the conferral of authority problem should affect only the question of municipal liability,[145] thereby allowing suit

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140. *Zinermon*, 110 S. Ct. at 982. Florida's statute allowed admission under its voluntary provision only for adults "making application by express and informed consent," and the latter clause was defined as "consent voluntarily given in writing after sufficient explanation and disclosure . . . to enable the person . . . to make a knowing and willful decision . . . ." *Id.*

141. *Id.* at 990.

142. *Id.*

143. *Id.* at 989.

144. *See* Thornton v. Barnes, 890 F.2d 1380, 1387 (7th Cir. 1988). The mayor's raw abuse of power is perhaps better analyzed as a violation of substantive due process, which guarantees protection from government conduct that cannot be taken regardless of the procedural safeguards provided. *See* discussion, *infra* notes 173-74 and accompanying text. Especially enlightening in this context is the Indiana Court of Appeals holding in *Stewart v. Ft. Wayne Community Schools*, discussed *infra* notes 182-85, that cancellation of a tenured psychometrist's contract was so arbitrary and irrational as to violate substantive due process.

145. The question of municipal liability for isolated government official misconduct is governed by the Supreme Court decision in Pembaur v. City of Cincinnati, 475 U.S. 469 (1986), in which a divided Court held that a city may be held liable for a single decision of a policymaker. The breadth of *Pembaur* was somewhat limited, however, by

against Mayor Barnes but not the entity, for depriving the plaintiffs of their property right without due process of law.[146] Whether courts will interpret *Zinermon* this broadly remains to be seen. If the Supreme Court's analysis is founded on "the State's inappropriate delegation of duty,"[147] the outcome in *Thornton* would be the same.

The Seventh Circuit apparently has chosen to give *Zinermon* a narrow construction. Although the Supreme Court appeared to limit *Parratt* by requiring a critical inquiry into whether the state official charged with misconduct occupies a high or low level position in the state hierarchy,[148] the Seventh Circuit has rejected this broad interpretation. In *Easter House v. Felder*,[149] the court of appeals stressed that the deprivation in *Zinermon* was not only arguably "authorized," but was also highly predictable and could be avoided in the future through the implementation of additional pre-deprivation procedural safeguards.[150] In essence, the state of Florida was held accountable because the state statute gave hospital officials broad discretion in admitting patients without providing necessary procedural safeguards, and it was this "statutory oversight" that caused the deprivation.[151] The court of appeals reasoned that when the state circumscribes an official's discretion and that official's actions are patently inconsistent with state law, the conduct should be described as random and unauthorized regardless of the status of the official.[152]

The Seventh Circuit's narrow construction of *Zinermon* is not totally unfounded. In rejecting the applicability of *Parratt*, the Supreme Court listed three separate distinguishing features: (1) the deprivation was fore-

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the plurality decision in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), in which the Court noted that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id.* at 127.

146. Regarding the mayor's own personal liability, unless the plaintiffs proved that the mayor violated rights that were clearly established at the time the action occurred, he enjoyed immunity from liability for damages. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Because, however, the plaintiffs on appeal sought only reinstatement, and not damages, this is not an issue in this case. *Thornton*, 890 F.2d at 1385 n.7.

147. *Zinermon*, 110 S. Ct. at 995 (O'Connor, J., dissenting).

148. *Id.* at 987-90.

149. 910 F.2d 1387 (7th Cir. 1990).

150. *Id.* at 1401.

151. *Id.*

152. *Id.* at 1400. This conclusion is not necessarily dictated by *Zinermon*. In *Zinermon*, the hospital officials' discretion was circumscribed by a requirement that "voluntary" admissions be limited to those who are truly capable of giving informed consent, and it was conceded that the officials acted contrary to state statute. 110 S. Ct. at 982. The Court's concern, however, was with the officials' failure to provide constitutionally required procedural safeguards, even if the state constitutionally could have a statutory scheme that gave officials broad power and little guidance as to the admission process. *Id.* at 988.

seeable because it is highly likely that persons requesting treatment for mental illness might be incapable of informed consent; (2) pre-deprivation process was not impossible; and (3) the officials' conduct could not be characterized as "unauthorized" since the state delegated to them the power and authority to effect the deprivation.[153] If *Zinermon* is interpreted to require the coalescence of all three of these factors, its precedential value is significantly limited. In *Thornton*, for example, even if state law had delegated authority to the mayor to remove members of the board of the Airport Authority, it cannot be seriously argued that deprivations of property in this context are foreseeable and likely to occur. If interpreted to require this element, *Zinermon* will be limited to unique cases involving blatant "statutory oversight."[154]

The Seventh Circuit's analysis in *Easter House* expands *Parratt* far beyond its appropriate reach. The logic of the *Parratt* doctrine is that because the state cannot foresee random and unauthorized deprivations, it is not possible to provide pre-deprivation process; thus, the existence of post-deprivation relief defeats the federal claim.[155] When the state vests high ranking officials with authority and power to provide pre-deprivation process, and it is clearly feasible for them to do so, the existence of state remedies should be irrelevant. Contrary to the Seventh Circuit's narrow construction, the Fifth Circuit has interpreted *Zinermon* to limit *Parratt* "to cases where it truly is impossible for the state to provide pre-deprivation procedural due process before a person unpredictably is deprived of his liberty or property through the unauthorized conduct of a state actor."[156] Rather than requiring that a particular deprivation be foreseeable,[157] the court construed *Zinermon* to require only that the deprivation be one that occurs at a predictable time, thus making the

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153. *Zinermon*, 110 S. Ct. at 989-90.

154. *See, e.g.*, Caine v. Hardy, 905 F.2d 858, 865 (5th Cir. 1990) (Jones, J., dissenting) (arguing that the "import" of *Zinermon* must be judged by its unique facts, namely, "both a high risk of erroneous deprivation of a mentally ill person's liberty, and the substantial likelihood that minimal further procedural safeguards could readily have avoided the deprivation"). As Judge Jones explained, *Zinermon* requires "a hard look . . . to determine whether the state official's conduct, under all the circumstances of the deprivation, could have been adequately foreseen and addressed by procedural safeguards." *Id.* Under this analysis, because the state of Indiana could not anticipate that Mayor Barnes would act contrary to state law and assume authority to discharge Airport Authority members, *Parratt* would control. *Cf.* Katz v. Klehammer, 902 F.2d 204, 207 n.1 (2d Cir. 1990) (*Zinermon* does not affect the situation in which defendants are charged with violating various laws and regulations because a state rule directing persons in their position to hold a hearing before violating any rule or regulation would be senseless).

155. Parratt v. Taylor, 451 U.S. 527, 535 (1981).

156. Caine v. Hardy, 905 F.2d 858, 862 (5th Cir. 1990).

157. *Id.* at 861 (citing *Zinermon*, 110 S. Ct. at 989).

institution of procedural safeguards "feasible."[158] Under this analysis, a mayor with broad authority over personnel decisions could be charged with procedural violations, regardless of "the likelihood" that violations would occur.

The *Thornton* court, without the guidance provided in *Zinermon*, summarily concluded that the existence of a post-deprivation remedy precludes the federal claim without any critical inquiry into whether the mayor's conduct should be deemed "random and unauthorized," or whether his failure to provide pre-deprivation process violated the due process clause.[159] Although the mayor's lack of statutory authority over the Airport Authority makes this a more difficult case, the Seventh Circuit's subsequent focus on "predictability" and "statutory oversight" in *Easter House* unnecessarily restricts *Zinermon* to its unique facts. Nonetheless, since *Zinermon* was a close decision, and one of those in the majority, Justice Brennan, no longer sits on the bench, the Seventh Circuit's narrow interpretation could prevail.[160]

Finally, in a case involving an alleged clash between two competing constitutional rights, the Indiana Supreme Court was asked to balance the due process rights of county officers against the first amendment rights of the press. In *Merit Board v. People's Broadcasting Corp.*,[161] the media sought to enjoin the county sheriff's Merit Board's plans for a closed executive session to discuss the need for disciplinary action against sheriff deputies.[162] Initially, the state supreme court determined that Indiana's Open Door Law specifically authorized closed executive sessions to discuss "an individual's status as an employee."[163] Although

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158. *Id.*

159. *Thornton*, 890 F.2d at 1389.

160. *See, e.g.*, *Easter House*, 910 F.2d at 1409 (Easterbrook, J., concurring) (acknowledging the potential broader interpretation of *Zinermon*, but then concluding that Judge Kanne "offers the best estimate of the course a majority of the [Supreme] Court will take. . ."). Ironically, in *Caine v. Hardy* the Fifth Circuit predicted that the earlier *Easter House* opinion, pending on appeal at the time of *Zinermon*, would have to be reversed on remand because the Supreme Court's new analysis was controlling. Instead, by focusing on the "uncircumscribed" authority aspect of *Zinermon* and the element of predictability, the Seventh Circuit on remand reaffirmed its previous opinion that *Parratt* foreclosed claims brought by a private adoption agency against state officials for allegedly conspiring to delay the agency's licensing and violating state procedural steps in granting a license to a competitor. Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990).

161. 547 N.E.2d 235 (Ind. 1989).

162. *Id.* at 236.

163. *Id.* at 237 (citing IND. CODE § 5-14-1.5-6(b)(5)(A)(B) (1987). The statute provides, "(b) Executive sessions may be held only in the following instances: (5) 'With respect to any individual over whom the governing body has jurisdiction: (A) To receive information concerning the individual's alleged misconduct; and (B) To discuss, prior to any determination, that individual's status as an employee . . . .' " IND. CODE ANN. § 5-14-15-6(b)(5)(A)(B) (West Supp. 1989).

another Indiana statute requires the Merit Board to conduct a "fair public hearing"[164] before taking disciplinary action, the court concluded that this meant presentation of evidence and the entertainment of argument about the evidence in public, but it did not foreclose private discussions and deliberations as permitted under the Open Door Law.[165]

After discussing the statutory conflict, the court addressed the constitutional claims. First, the court sustained its interpretation as comporting with federal due process. Recognizing that a property interest had been created on behalf of the deputies,[166] it reasoned that the risk of an erroneous deprivation actually would be enhanced if board members were required to conduct their deliberations in public.[167] The court stressed "the chilling effect of requiring board members to muse publicly about the relative credibility or dubiosity of the witnesses and parties before them."[168] Thus, under *Mathews*, interpreting the statutes to require the deputies' fate to be deliberated at less protective open sessions would mean a deprivation of the deputies' due process rights.[169] Although normally the assertion that closed deliberations are more protective of individual property rights than open deliberations appears incongruous, it must be noted that in this case it was the press, not the deputies, who sought an open hearing.[170] Regarding the latter's claim, press rights were summarily rejected, based on precedent holding that the first amendment does not afford the press a right of access to internal agency deliberations.[171] Thus, the trial court's order that the Merit Board's deliberations had to be conducted openly was erroneous.[172]

B. Substantive Due Process

In the absence of so-called fundamental rights,[173] the Supreme Court has held that the due process clause is not violated unless the government's

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164. *People's Broadcasting Corp.*, 547 N.E.2d at 237 (citing IND. CODE § 36-8-10-11 (1987). The statute provides, in pertinent part, "The sheriff may dismiss, demote, or temporarily suspend a county police officer for cause after preferring charges in writing and after a fair public hearing before the board . . . ." IND. CODE ANN. § 36-8-10-11 (West Supp. 1989).

165. *People's Broadcasting Corp.*, 547 N.E.2d at 238-39.

166. *Id.* at 239. The court reasoned that the Merit Board statute, Ind. Code § 36-8-10-11(a), created a legitimate claim of entitlement on behalf of the sheriff deputies.

167. *People's Broadcasting Corp.*, 547 N.E.2d at 240.

168. *Id.* at 239-40.

169. *Id.* at 240.

170. *Id.*

171. *Id.*

172. *Id.*

173. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965), recognizing a funda-

action is totally arbitrary and capricious.[174] The deferential approach dictated by this standard is reflected in several decisions. For example, in *Estate of Himelstein v. City of Ft. Wayne*,[175] the Seventh Circuit held that requiring the plaintiffs in a contested zoning dispute to appear before the governmental body and subsequently denying them building permits was not the type of arbitrary, irrational action that triggers a viable substantive due process claim.[176] The court emphasized that government decisions motivated by local interests do not violate substantive due process, and that courts should be reluctant to assume the role of a zoning board of appeals.[177] Similarly, in *Northside Sanitary Landfill, Inc. v. City of Indianapolis*,[178] the Seventh Circuit held that the city could rationally prohibit the plaintiff from using the city's landfill based on its fear that chemicals might seep into its water supply and expose the city to liability for clean-up costs.[179] The court noted that government action passes the rational basis test for due process if sound reasons are hypothesized, even if they cannot be proved to the court's satisfaction.[180] Thus, the district court was not required to hold a trial to determine whether the city's reasons were the real reasons for declaring its dump "off limits."[181]

Despite this highly deferential approach, the Indiana Court of Appeals, in *Stewart v. Fort Wayne Community Schools*,[182] held that cancellation of the contract of a tenured psychometrist was so irrational and arbitrary that it violated plaintiff's federal right to substantive due process.[183] Because the school board followed rescinded procedures that were in-

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mental right to marital privacy, which triggered the beginning of modern substantive due process analysis. This right to privacy has been extended to include the controversial right to terminate a pregnancy, Roe v. Wade, 410 U.S. 113 (1973), as well as the right to make basic familial decisions, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

174. Zinermon v. Burch, 110 S. Ct. 975, 983 (1990). *See also*, Washington v. Harper, 110 S. Ct. 1028, 1037 (1990) (even if individuals have a fundamental right to be free from the administration of antipsychotic medication absent compelling justification, when dealing with prisoner's rights, it suffices that the state's involuntary medication policy be "reasonably related to legitimate penalogical interests").

175. 898 F.2d 573 (7th Cir. 1990).

176. *Id.* at 577-78.

177. *Id.* at 578.

178. 902 F.2d 521 (7th Cir. 1990).

179. *Id.* at 522.

180. *Id.* The court noted that although states can give their own courts "greater superintendence of legislation than the fourteenth amendment requires," federal courts may ask only "whether the law has a rational basis, not whether the facts support the decision." *Id.* at 523.

181. *Id.* at 522.

182. 545 N.E.2d 7 (Ind. Ct. App. 1989).

183. *Id.* at 12.

consistent with state statutory licensing requirements, the court found a viable substantive due process claim which would entitle the plaintiff to damages, equitable relief, and attorneys fees.[184] The court of appeals relied on a 1974 Seventh Circuit decision suggesting that a substantive due process violation exists when the reason for an employment termination is "so inadequate that the judiciary will characterize it as 'arbitrary.' "[185] Although more recent Seventh Circuit precedent casts doubt on whether substantive due process should ever be available to protect a state-created property interest in employment,[186] other appellate courts have used substantive due process in employment discharge cases, although at the same time imposing a heavy burden on the employee to show that there is no rational basis for the discharge.[187]

IV. Conclusion

This past year Indiana litigants have presented state and federal courts with a host of novel federal constitutional claims. The protection to be afforded nude dancing and independent contractors seeking insulation from patronage practices poses extremely difficult, controversial questions. Although many of the due process claims were resolved under traditional, well-established doctrine, other cases raised difficult questions about both the appropriateness of relying on state tort remedies to defeat federal procedural due process claims and the scope of substantive due process as a means of challenging abuses of government power.

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184. *Id.*

185. *Id.* (citing Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1, 3-4 (7th Cir. 1974)).

186. *See, e.g.*, Brown v. Brienen, 722 F.2d 360, 366-67 (7th Cir. 1983) (substantive due process does not provide protection for a state-created property interest in employment).

187. *See, e.g.*, Morris v. Clifford, 903 F.2d 574, 577 (8th Cir. 1990) (plaintiff had a clearly established substantive due process right as a tenured faculty member to be discharged only for adequate cause); Newman v. Massachusetts, 884 F.2d 19, 25 (1st Cir. 1989) (allegations that school authorities made an arbitrary and capricious decision that significantly affected a tenured teacher's employment status states a viable substantive due process claim); Honore v. Douglas, 833 F.2d 565, 569 (5th Cir. 1987) (although judicial restraint should be used in employment cases, courts should not provide "slavish deference" to a university's arbitrary deprivation of a vested property right); Schaper v. City of Huntsville, 813 F.2d 709, 716-17 (5th Cir. 1987) (police captain has a substantive due process right to continued employment); Gargiul v. Tompkins, 704 F.2d 661, 668 (2d Cir. 1983), *vacated on other grounds*, 465 U.S. 1016 (1984) (substantive due process requires that actions impeding a tenured teacher's property interest in continued employment must have a rational basis to a proper governmental purpose). *See also* Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 867 (1990) (noting the conflict among the circuits about whether substantive due process creates a right to be free of arbitrary, capricious, or pretextual discharges from employment).