INDIANA CONSTITUTIONAL DEVELOPMENTS: THE WIND SHIFTS

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The modern era in Indiana constitutional law began in 1989, when Chief Justice Shepard published "Second Wind for the Indiana Bill of Rights" in this law review.[1] His invitation to revivify Indiana constitutional law has been taken to heart by the bar and many of the chief justice's judicial colleagues. But progress over the fourteen years since the article was published has not followed the pattern the chief justice forecast.

New individual rights—beyond those guaranteed by the U.S. Constitution—have not been the primary product of the last fifteen years of state constitutional development.[2] Although much litigation has addressed article I of the Indiana Constitution, the portion of the constitution covering individual rights, the Indiana Supreme Court has expanded individual rights beyond the federal standard in only a few cases. Rather, the most significant Indiana constitutional decisions have come from articles III through X, the provisions dealing with separation of powers, the responsibilities of the branches of government, and state institutions and finance.[3] Indiana's appellate courts *have* brought new attention to the Indiana Constitution, but the largest impact on everyday Hoosiers has not come from decisions applying article I.

I. THE FADING PROMISE OF NEW INDIVIDUAL RIGHTS

A. The Starting Point

In his 1989 article, the chief justice reviewed the history of Indiana's Bill of Rights, which was the primary source of individual rights protections before provisions of the Federal Constitution were applied to state action.[4] He discussed the earliest history, when Indiana's courts declined to enforce fugitive slave laws.[5] He noted *Callender v. State*,[6] Indiana's adoption of the exclusionary rule

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

2. *See infra* Part I.B-C.

3. *See infra* notes 246-56 and accompanying text.

4. Shepard, *supra* note 1, at 576-85.

5. *Id.* at 576-77 (citing State v. Laselle, 1 Blackf. 60 (Ind. 1820)). More recent scholarship reveals a less savory history between Indiana's legal system and African-Americans. The 1851 constitution contained provisions excluding Negroes from the state altogether, and legislatures in the 1850s created and supported the State Board of Colonization, designed to encourage Negroes to emigrate to Africa. *See* John Martin Smith, *Bondage, Banishment, and Deportation of Indiana*

in criminal cases thirty-nine years before its adoption by the United States Supreme Court.[7] He concluded, however, that active development of federal constitutional law relating to individual rights in the 1960s and 1970s reduced the need to rely on state constitutions, resulting in fewer decisions applying the Indiana Constitution.[8]

Chief Justice Shepard noted that the Indiana Constitution contains several provisions without federal analogues, including more expansive language relating to free expression and religious freedom.[9] Other unique provisions include "guarantees that all courts shall be open and that every person shall have a remedy,"[10] provisions guaranteeing bail, the provision "that the citizens on a criminal jury shall determine for themselves both the facts and the law of the case,"[11] and the guarantee of proportional penalties in criminal cases.[12]

Chief Justice Shepard said that "[t]hese and other sections clearly provide occasions when a litigant who would lose in federal court may win in state court."[13] He invited lawyers to participate in development of new law under the Indiana Constitution by identifying and vigorously arguing state constitutional issues.[14] He closed the article by specifically identifying "horizontal" separation of powers under federalism—dividing judicial power between independent state and federal judiciaries—as a guaranty of personal liberty.[15] He concluded that "[t]he protection of Americans against tyranny requires that state supreme courts and state constitutions be strong centers of authority on the rights of the people."[16]

B. Subsequent Developments

Since the chief justice's article, there has been only marginal change—not a revolution—in individual rights jurisprudence under the Indiana Constitution.[17]

Negroes (paper delivered at 81st Annual Historical Conference of the Indiana Historical Society, 2001).

6. 138 N.E. 817 (1923).

7. The exclusionary rule was adopted as a matter of federal constitutional law in *Mapp v. Ohio*, 367 U.S. 643 (1961).

8. Shepard, *supra* note 1, at 580.

9. *Id.* at 580-81 (citing IND. CONST. art. 1, §§ 2-9).

10. *Id.* at 581.

11. *Id.* at 582.

12. *Id.* at 583.

13. *Id.*

14. *Id.* at 584-85.

15. *Id.* at 586.

16. *Id.*

17. Because this article focuses primarily on cases decided during the past year, the discussion of developments in individual rights litigation under the Indiana Constitution between 1989 and 2001 is necessarily brief. For a more developed account, see the relevant materials from those years in the case compilation *Indiana Constitutional Law* (Jon Laramore & Janice E.

The case that ushered in the modern era of individual rights litigation under the Indiana Constitution, *Price v. State*, set out a bold framework.[18] The decision invalidated the conviction of a woman charged with disorderly conduct for her loud objections to police tactics in arresting her friend, finding that the conviction could not withstand analysis under the Indiana Constitution although it was valid under federal law.[19] "Political speech," the court said, was a "core value" under the Indiana Constitution that could not be diminished.[20] But there has been little further development of the "core value" of "political speech," and as of now it appears to protect only the right to vehemently protest police action.

Developments in other areas of state constitutional law were less bold. In *Moran v. State*, the court applied article I, section 11, the state search and seizure clause, to a search of garbage that the defendant had placed at the roadside for pickup.[21] Like the United States Supreme Court, the Indiana Supreme Court concluded that a roadside garbage search was not prohibited, although it applied a slightly different standard to reach the same result.[22] Although *Brown v. State*[23] forcefully articulated the warrant requirement under the Indiana Constitution in invalidating a search, the court indicated that the outcome would have been the same under the Fourth Amendment analysis. More recently, in *City Chapel Evangelical Free Church, Inc. v. City of South Bend*, the court found a right to corporate worship in sections 2 and 3 of article I, but did not break significant new ground in religious freedom.[24]

The instances in which individuals' freedoms under the Indiana Constitution extend beyond those guaranteed by federal law remain few and far between. For example, none of the provisions of the Indiana Constitution that Chief Justice Shepard identified as having no federal counterpart has been the source of significant new rights.[25] Of those that have been litigated, the "open courts" and "right to a remedy" provisions in article I, section 12 recently have been held not to prevent legislative abolition of causes of action or to impede application of

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Kreuscher, eds. 2003). *See also* Patrick Baude, *Has the Indiana Constitution Found Its Epic?*, 69 IND. L.J. 849 (1994).

18. 622 N.E.2d 954 (Ind. 1993).

19. *Compare id.* 960-65 (Indiana analysis), *with id*. at 965-67 (federal analysis).

20. *Id.* at 961-64.

21. 644 N.E.2d 536 (Ind. 1994).

22. *Compare id.* at 541 (analyzing only the reasonableness of law enforcement conduct) *with, e.g.*, California v. Greenwood, 486 U.S. 35 (1988) (analyzing objective reasonableness of expectation of privacy in roadside garbage).

23. 653 N.E.2d 77 (Ind. 1995).

24. 744 N.E.2d 443, 450-51 (Ind. 2001). The subject matter of the dispute in *City Chapel* was whether the city would violate the church's constitutional rights by taking its downtown property through eminent domain. The only holding in the case, by a 3-2 margin, was that the church was entitled to a trial to show that taking its specific property would harm the "core value" of religious exercise. *Id.* at 451.

25. Shepard, *supra* note 1, at 580.

statutes of limitation and other procedural limitations.[26] The right of a criminal jury to "determine the law and the facts" under article I, section 19, recently has been interpreted to mean that the jury should follow the judge's instructions[27] (although it prohibits certain kinds of mandatory instructions[28]). Also, although Indiana's "equal privileges and immunities" language has been held to have a different meaning from the Federal Equal Protection Clause, the linguistic difference has not led to significantly different outcomes, and the Indiana standard may be less restrictive of legislative classification than the federal rule.[29]

C. Recent Developments

Individual rights decisions under the Indiana Constitution in the most recent year continued the pattern of only marginal differences in outcomes under federal and state standards. In two search and seizure cases, the Indiana Supreme Court aligned itself with federal law, in one case with almost eerie prescience.[30] The Indiana Court of Appeals marginally expanded the reach of free expression rights under the Indiana Constitution.[31] And the reach of Indiana's constitutional double jeopardy protection—which once had the possibility of being significantly broader than its federal analogue—fell into line with the federal rule.[32]

The most awaited individual rights decisions of the Indiana Supreme Court's last year both presented search-and-seizure issues under article I, section 11. *Gerschoffer v. State* addressed police roadblocks set up for the purpose of interdicting drunk drivers. *Linke v. Northwestern School Corp.* addressed mandatory student drug testing in public schools. The supreme court decisions

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26. *See, e.g.*, McIntosh v. Melroe Co., 729 N.E.2d 972 (Ind. 2000).

27. Fuquay v. State, 583 N.E.2d 1154 (Ind. Ct. App. 1991). In a law review article, Justice Rucker has taken issue with this interpretation, arguing that the historical evidence supports the view that article I, section 19 permits jury nullification. Hon. Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449 (1999). The Indiana Supreme Court has granted transfer in *Meeks v. State*, 759 N.E.2d 1126 (Ind. Ct. App. 2001), *trans. granted*, 774 N.E.2d 509 (Ind. 2002), to address this issue.

28. *See, e.g.*, Parker v. State, 698 N.E.2d 737 (Ind. 1998) (permitting jury to decline to find habitual offender status even if it finds all necessary predicate facts); Seay v. State, 698 N.E.2d 732 (Ind. 1998) (same).

29. Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994) ("the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes . . . [and] the preferential treatment must be uniformly applicable and equally available to all persons similarly situated"). No statute has been invalidated under this standard since it was announced in 1994. *See, e.g.*, Lake County Clerk's Office v. Smith, 766 N.E.2d 707 (Ind. 2002) (upholding bail statute against challenge under article I, section 23).

30. Linke v. Northwestern Sch. Corp., 763 N.E.2d 972 (Ind. 2002); State v. Gerschoffer, 763 N.E.2d 960 (Ind. 2002), both discussed *infra* in Part I.C.1-2.

31. Mishler v. MAC Sys., Inc., 771 N.E.2d 92 (Ind. Ct. App. 2002).

32. Spivey v. State, 761 N.E.2d 831 (Ind. 2002).

were much anticipated because, in each case, the Indiana Court of Appeals had ruled that article I, section 11 forbade suspicionless searches.[33] The court of appeals ruled that both kinds of searches—automobile stops and drug tests—could take place only if the authorities had reasonable suspicion that the individual being searched had committed a driving offense or had used illegal drugs.[34]

1. Drunk Driving Roadblocks.—In its *Gerschoffer* opinion, the Indiana Court of Appeals had broken new ground in analysis under article I, section 11.[35] The court examined a drunk-driving roadblock (also called a "sobriety checkpoint") that appeared to satisfy Fourth Amendment standards because it was set up pursuant to a neutral plan, minimized police discretion in determining which cars to stop, and otherwise hewed to the Fourth Amendment standards set forth in *Michigan Department of State Police v. Sitz*.[36]

The Indiana Court of Appeals applied article I, section 11 to drunk-driving roadblocks using the test enunciated by the Indiana Supreme Court to determine the independent meaning of provisions of the Indiana Constitution: "Questions arising under the Indiana Constitution should be resolved by 'examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions.'"[37] The court concluded that this standard

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33. State v. Gerschoffer, 738 N.E.2d 713 (Ind. Ct. App. 2000), *vacated by* 753 N.E.2d 6 (Ind. 2001); Linke v. Northwestern Sch. Corp., 734 N.E.2d 252 (Ind. Ct. App. 2000), *vacated by* 763 N.E.2d 972 (Ind. 2002).

34. *Gerschoffer*, 738 N.E.2d at 723; *Linke*, 734 N.E.2d at 259.

35. 738 N.E.2d 713.

36. 496 U.S. 444 (1990); *see also* State v. Garcia, 500 N.E.2d 158 (Ind.), *cert. denied*, 481 U.S. 1014 (1986) (earlier Fourth Amendment analysis of sobriety checkpoints).

37. *Gerschoffer*, 738 N.E.2d at 720 (quoting Ind. Gaming Comm'n v. Moseley, 643 N.E.2d 296, 298 (Ind. 1994)). More recently, the Indiana Supreme Court provided an even fuller statement of the standard for deriving the independent significance of provisions of the Indiana Constitution:

> Our methodology for interpreting and applying provisions of the Indiana Constitution is well established. It requires: a search for the common understanding of both those who framed it and those who ratified it. Furthermore, the intent of the framers of the Constitution is paramount in determining the meaning of a provision. In order to give life to their intended meaning, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions. In construing the constitution, we look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy. The language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place.

City Chapel Evangelical Free Church, Inc. v. City of South Bend, 744 N.E.2d 443, 447 (Ind. 2001) (quoting McIntosh v. Melroe Co., 729 N.E.2d 972, 986) (Ind. 2000) (internal quotation marks and indentation omitted).

dictated that "the intent of the framers is paramount in determining the meaning of a provision . . . ."[38] The court noted that the Indiana Supreme Court's cases interpreted the populist, Jacksonian roots of the Indiana Constitution to focus search and seizure analysis on the reasonableness of police conduct.[39]

With this prelude, the court of appeals concluded that "Section 11 requires probable cause or, at a minimum, individualized suspicion of criminal activity before the police may stop a motorist, and that absent either, a stop constitutes an unreasonable seizure as proscribed by the Indiana Constitution."[40] In seeking to differentiate the Indiana Constitution's prohibition against unreasonable searches and seizures from its federal analogue, the court emphasized the populist distrust of government, the importance placed on privacy by the framers and by recent Indiana Supreme Court decisions, and the lack of Indiana constitutional precedent supporting warrantless searches and seizures.[41] The opinion's analysis is animated by skepticism of governmental authority and the importance of individualized determination of responsibility (through probable cause or reasonable suspicion) before police intervention. The opinion concludes, "In Indiana, there is still a presumption that Hoosiers are law-abiding citizens. Under our state constitution, a motorist is free to travel Indiana's public highways without unreasonable interference from the government, and he is treated as a suspect only if his actions justify it."[42]

The Indiana Supreme Court's take on the same facts was different. In a unanimous opinion determining the proper constitutional standard,[43] Chief Justice Shepard recited the same standard-of-review language that the court of appeals had used in its opinion.[44] But he rapidly concluded that historical evidence regarding any independent meaning of article I, section 11 was lacking.[45] He also noted previous case law holding that "Article 1, Section 11 must be liberally construed to protect Hoosiers from unreasonable police activity in private areas of their lives," leading to the principle that police conduct is judged on its reasonableness.[46]

Then, based in part on studies showing that drunk-driving roadblocks can provide significant protection, the court announced an approach that balanced privacy rights under article I, section 11 against the importance of roadway safety. "A minimally intrusive roadblock designed and implemented on neutral

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38. *Gerschoffer*, 738 N.E.2d at 720.

39. *Id.* at 721 (citing Moran v. State, 644 N.E.2d 536, 539 (Ind. 1994)).

40. *Id.*

41. *Id.* at 722-26. The court of appeals relied particularly on *Baldwin v. Reagan*, 715 N.E.2d 332 (Ind. 1992), in which the Indiana Supreme Court had stated the necessity of reasonable suspicion before a highway stop would be proper.

42. *Id.* at 726 (footnote omitted).

43. Justice Dickson dissented in part, but only as to the application of the standard. *Gerschoffer*, 763 N.E.2d at 971 (Dickson, J., dissenting in part).

44. *Id.* at 965.

45. *Id.*

46. *Id.*

criteria that safely and effectively targets a serious danger specific to vehicular operation is constitutionally reasonable, unlike the random and purely discretionary stops we have disapproved."[47] In support of its conclusion, the court also cited Professor Amar's assertion that a broader search may sometimes be fairer and more reasonable than an individual search because the broader approach minimizes the potential for official arbitrariness and discrimination.[48] The court thus concluded that drunk-driving roadblocks are not per se forbidden by the Indiana Constitution.

The court went on to set forth a framework—which differs in scope and emphasis from the federal standard—by which lower courts may judge the constitutionality of drunk-driving roadblocks in future cases. The court's review under the Indiana Constitution focused on the following factors:

- The roadblock should occur pursuant to a neutral plan "approved by appropriate officials."[49]
- The roadblock should be designed to effectuate its *road-safety related* purpose, so its timing and location must be keyed to road safety.[50]
- Roadblock procedures should be designed to minimize law enforcement discretion, not only as to which cars are stopped but also as to all procedures used once the stops occur.[51]
- The roadblocks should minimize the intrusion on motorists' time. Motorists also should have sufficient notice of the roadblocks so that they may avoid the roadblocks.[52]
- Roadblocks should be administered safely.[53]
- Roadblocks should be effective as measured by arrests for drunk driving.[54]

These factors are to be balanced to determine whether the roadblock meets constitutional standards. The court gave no precise formula to judge whether a particular roadblock meets constitutional standards.

The court focused on several of the factors in ruling that the roadblock did not meet constitutional standards. First, the court noted that the roadblock did not seem to be designed especially to deter drunk driving. Rather, both its

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47. *Id.* at 966. The opinion relied upon John H. Lacey et al., *Evaluation of Checkpoint Tennessee: Tennessee's Statewide Sobriety Checkpoint Program*, Technical Report Prepared for U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin. (Jan. 1999), http://www.nhtsa.dot.gov/people/injury/research/ChekTenn/ChkptTN.html.

48. *Gerschoffer*, 763 N.E.2d at 966 (citing Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994)).

49. *Id.* at 967.

50. *Id.* at 967-68.

51. *Id.* at 968-69.

52. *Id.* at 969.

53. *Id.* at 970.

54. *Id.*

location and its timing appeared to be established for reasons of convenience.[55] Drunk driving had not been a particular problem at the location of the roadblock, and the timing appeared more oriented to general traffic flow issues than to expected arrests.[56] Second, although officers' discretion was controlled regarding which cars were to be stopped, there was little control over procedures used once the stops took place. "No standardized instructions were given to ensure that officers addressed drivers in a consistent manner,"[57] so motorists were not treated alike once they were stopped.

Third, and related to discretion, the court seemed especially troubled by the requirement that each motorist (or at least those motorists asked by officers) be required to produce a license and registration.[58] The court emphasized that drunk-driving roadblocks are permissible only as they relate to the particular dangers of drunk driving, so matters not directly related to drunk driving, such as lack of registration or unlicensed operation, could not be the target of a suspicionless search such as the roadblock at issue in this case.[59] "[T]he thought that an American can be compelled to 'show his papers' before exercising his right to walk the streets, drive the highways or board the trains is repugnant to American institutions and ideals."[60]

Fourth, and also related to the previously listed factor, the number of arrests undermined the constitutionality of the roadblock. The seventy stops that took place at the roadblock resulted in fourteen arrests and thirty-four warnings, but only two of the citations were for operating under the influence.[61] The court concluded that this record undermined the assertion that the roadblock was appropriately targeted to get drunk drivers off the road and was instead "more like a generalized dragnet . . . ."[62] Fifth, the court also noted that the average four-minute detention time appeared unduly long, making the roadblock appear unduly intrusive.[63] Because it was applying a balancing test, the court did not explain which of these factors led to the roadblock's invalidity, resting its decision on the totality of circumstances.

The result in *Gerschoffer* is that, contrary to the court of appeals' view, drunk driving roadblocks are valid under the Indiana Constitution just as they are under the Federal Constitution. The standards by which the roadblocks are judged, however, are somewhat different under the two constitutions, with Indiana applying a stricter standard.[64]

The Indiana Supreme Court's decision in *Gerschoffer* applies the

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55. *Id.* at 968.
56. *Id.*
57. *Id.*
58. *Id.* at 968.
59. *Id.*
60. *Id.* (quoting State v. Kirk, 493 A.2d 1271, 1285 (N.J. Super. Ct. App. Div. 1985)).
61. *Id.* at 970; *see also* IND. CODE § 9-30-5-2(1) (operating while intoxicated).
62. *Gerschoffer*, 763 N.E.2d at 968.
63. *Id.* at 969.
64. *See id.* at 963-65 (discussing federal roadblock jurisprudence).

constitutional standard of review more loosely than the court of appeals' opinion in the same case. The court of appeals rooted its decision in Indiana's historical antipathy to police discretion; its historic strict adherence to the warrant requirement; and the lack of case law departing from probable cause and reasonable suspicion standards.[65] Its opinion rested firmly on the portions of the standard of review relating to the historic roots of the constitutional provision at issue and cases interpreting the provision. The supreme court's opinion eschewed the historical approach because of the dearth of specific information about the intent of Indiana's framers when enacting article I, section 11.[66] It relied more heavily on federal case law, other states' cases, and statistical studies about roadblocks.[67] Moreover, the roadblock standards set in the supreme court's opinion also rely heavily on cases from other states and the federal system.[68] The supreme court's approach may suggest leeway in applying the standard of review in future cases.

2. Random Drug Tests by Schools.—The Indiana Supreme Court's other foray into search-and-seizure jurisprudence produced similar results, but this time by a narrow 3-2 margin. In *Linke v. Northwestern School Corp.*,[69] the court analyzed a "random drug testing program" for high school students. The drug testing program applied to all students in grades seven through twelve who participated in specified extra-curricular and co-curricular activities as well as students wishing to park their cars on campus.[70] The activities included athletics, academic teams, student government, musical performances, drama, Future Farmers of America, National Honor Society, and Students Against Drunk Driving.[71] Students in those activities, and those wishing to park on campus, had to execute forms (also signed by parents) consenting to random drug tests.[72]

If a student who had consented to testing was selected at random by a computer program, she was escorted across the school parking lot to a trailer, where a contractor operated the testing program.[73] The student was required to produce a urine sample in a private setting inside the trailer, and each specimen was tested by a private company for the substances banned by the school's policy. Any positive result was automatically re-tested. If the re-test also was positive, the result was communicated to school authorities. Students testing positive were required to meet with school authorities, and at that time could provide information that would explain the positive result, such as use of a

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65. State v. Gerschoffer, 738 N.E.2d 713, 720-24 (Ind. Ct. App. 2000).

66. *Gerschoffer*, 763 N.E.2d at 965.

67. *Id.* at 964 (discussing federal cases); *id.* at 966 n.7 (discussing other states); *id.* at 966 (discussing statistical study).

68. *Id.* at 966-70.

69. 763 N.E.2d 972 (Ind. 2002).

70. *Id.* at 975.

71. *Id.*

72. *Id.*

73. The program is described in full at *id.* at 975-76.

prescription drug.[74]

Absent a satisfactory explanation, a student testing positive could be banned from participating in the school activity covered by the drug policy for up to 365 days, although "the consequences vary based upon the activity and the substance."[75] Under some circumstances, a student could return to the activity after a negative re-test. At no time were test results made available to law enforcement authorities.

The court of appeals' opinion in *Linke* had provided a lengthy explication of federal cases that addressed school drug testing programs.[76] The court then quoted Indiana Supreme Court case law to the effect that article I, section 11 provides more protection than the Fourth Amendment, based in part on the framers' fear of "abuses of police power similar to those experienced in colonial times."[77] Motivated by historical fears of police power, the court concluded that precedents required individualized suspicion before a search, and found "no reason to depart from requiring individualized suspicion to protect against the abuses associated with blanket suspicionless searches of school children."[78]

The Indiana Supreme Court, in a majority opinion by Justice Sullivan, began its analysis with the proposition that drug testing is a search, and as such must be "reasonable" to satisfy article I, section 11.[79] The court then rejected the court of appeals' view that the drug test had to be based on individualized reasonable suspicion.[80] The court rejected analogies linking the schools' conduct to law enforcement conduct because of the difference between police functions and the role of schools.[81] Because the drug tests were not made available to law enforcement and were used solely for internal school purposes, the court concluded that the rationale for individualized suspicion is weaker than in a law enforcement setting, where criminal penalties could be at issue.[82]

Noting that reasonableness in the context of article I, section 11 often depends upon "the totality of [the] circumstances," the court proposed not to apply a strict "reasonable suspicion" test, but instead to balance various factors to determine whether the drug tests are permitted by the Indiana Constitution.[83] The court explicitly "adopt[ed] the analytical approach of *Vernonia School District 475 v. Acton*,"[84] an earlier U.S. Supreme Court case that analyzed student drug testing, which required weighing "the nature of the privacy interest upon which the search intrudes, the character of the intrusion that is complained of,

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74. *Id.* at 976.
75. *Id.* (the court provided no further explanation of how the consequences "vary").
76. Linke v. Northwestern Sch. Corp., 734 N.E.2d 252, 254-58 (Ind. Ct. App. 2000).
77. *Id*. at 259.
78. *Id*.
79. *Linke*, 763 N.E.2d at 977.
80. *Id.* at 978.
81. *Id.*
82. *Id.* at 978-79.
83. *Id.* at 978 (quoting Brown v. State, 653 N.E.2d 77, 79-80 (Ind. 1995)).
84. *Id.* at 979 (adopting Vernonia Sch. Dist. 475 v. Acton, 515 U.S. 646 (1995).

and the nature and immediacy of the governmental concern to determine whether the Policy is reasonable under the totality of these circumstances."[85]

The court looked first at the privacy interest, determining that students have a lesser interest than adults because they are minors and the schools stand in a quasi-parental relationship to the students.[86] The court also found that the students' (and their parents') consent vitiated their privacy interest.[87] To reach this conclusion, the court found that the consent was voluntary despite arguments that "it is necessary to participate in extracurricular activities to be successful in today's world."[88] Because the activities triggering the drug tests were voluntary in this case and did not affect students' grades, the court concluded that the consents were essentially voluntary although "at least some adverse consequences may attach to the inability to . . . participate" in the activities.[89] The court also found that the fact that athletics already are a highly regulated activity, and students volunteering for athletics do so knowing that they will be subject to regulation, reduced the privacy interest of athletes subject to the drug testing policy.[90]

Next, the court looked at the character of the intrusion. The court minimized the intrusive aspect of the testing procedure, noting that students are selected randomly, permitted to provide urine samples in private, and their identities are shielded from all participants in the testing process save a few top school administrators.[91] The court also put considerable weight on the manner in which the tests were used. No punitive consequences befell students who tested positive other than exclusion from relevant school activities. Students were neither turned over to police (the court noted that earlier decisions used section 11 to protect Hoosiers only from "unreasonable *police* activity"[92]) nor subjected to school discipline as a result of the tests.[93] The court therefore characterized the tests as "preventative and rehabilitative" rather than "punitive."[94]

Finally, the court looked at the school's interest in drug testing. The court stated that the school's concern stemmed from increased drug usage in the middle and high schools of Northwestern School Corporation in the mid-1990s, when one student died of a drug overdose.[95] The court concluded that "[d]eterring drug abuse by children in school is an important and legitimate

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85. *Id.*

86. *Id.* at 979-80.

87. *Id.* at 980.

88. *Id.* (quoting Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095, 1109 (Colo. 1998)).

89. *Id.*

90. *Id.* at 981.

91. *Id.* at 981-82.

92. *Id.* at 982 (quoting Moran v. State, 644 N.E.2d 536, 540 (Ind. 1994)) (emphasis supplied).

93. *Id.*

94. *Id.*

95. *Id.* at 983.

concern for our schools."[96] It found the school's interest increased by the fact that all activities triggering the drug-testing policy had off-campus components, such as athletic contests, performances, or other competitions.[97] The school legitimately could be concerned about physical injury to students during these off-campus forays, especially athletic events.[98] The court also noted that the school's interest would be increased if the students at issue were role models for other students, but the school did not make that argument.[99]

After reviewing these interests, the court concluded that "[i]n light of the totality of the circumstances, the Policy does not violate Section 11."[100] In support of this conclusion, the court cited students' decreased privacy interest; the schools' "custodial and protective interest"; parental involvement in creating the program; existence of a comprehensive drug interdiction effort at the school, of which drug testing is only one part; and higher-than-average drug use at the school. It approved the program using a balancing approach derived from the federal standard in *Vernonia.*

In a brief discussion, the court then dismissed the argument that the policy violated article I, section 23, Indiana's Equal Privileges and Immunities Clause.[101] Section 23 requires that "privileges or immunities" granted "to any citizen, or class of citizens," must "upon the same terms, . . . equally belong to all citizens."[102] To satisfy this constitutional provision, "the disparate treatment accorded . . . must be reasonably related to inherent characteristics which distinguish the unequally treated classes . . . . [and] the preferential treatment must be uniformly applicable and equally available to all persons similarly situated."[103] The court said that the party attacking the classification must negate every reasonable basis for it, and in this case the Linkes failed to meet that standard because those subject to drug testing represent the school outside normal school hours and away from the campus. Thus, the class of students tested is inherently different from the class not tested.[104]

Justice Boehm dissented in an opinion joined by Justice Rucker. The dissenters first analyzed the majority's decision to adopt the *Vernonia* framework. They concluded that the circumstances relied upon by the U.S. Supreme Court to permit drug testing in *Vernonia*—under the "special needs" doctrine announced in *New Jersey v. T.L.O*[105]—were absent in this case. *Vernonia* analyzed a program of drug testing for athletes under circumstances in

96. *Id.* at 983.
97. *Id.* at 984.
98. *Id.* at 984.
99. *Id.* at 984-85.
100. *Id.* at 985.
101. *Id.* at 985-86.
102. IND. CONST. art I, § 23.
103. Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994).
104. *Linke*, 763 N.E.2d at 986.
105. 469 U.S. 325 (1985).

which a school's drug crisis was instigated by athletes.[106] In *Linke*, in contrast, the school's drug problem was not as severe and had not been linked in any way to the group targeted for testing.[107] Nor were any other circumstances present in this case to justify invoking the "special needs" analysis created by the U.S. Supreme Court.[108]

After rejecting the *Vernonia* approach, the dissenters nevertheless analyzed the factors set forth in that opinion, arriving at a different balance than the *Linke* majority. The dissenters found that students' decreased privacy interest could justify intrusions when matters of discipline or conduct were at issue, but would not justify suspicionless searches conducted as a matter of routine.[109] The dissenters also rejected the notion that the students "consented" to the tests. They found that participation in extracurricular activities (as well as co-curricular activities relating to for-credit classes) are important, and declining to participate in drug testing could have serious consequences relating to grades and college admissions.[110] The dissenters also rejected the "role model" justification for drug testing, arguing that the need to set a good example cannot outweigh interests under article I, section 11.[111]

The dissenters also rejected the notion that the tests were less intrusive because they were performed by school officials rather than police. Both teachers and police officers are agents of the state, and they are equally bound by article I, section 11.[112] They also concluded that the "preventive" or "rehabilitative" purpose of the program found by the majority lacked support.[113] The cases relying on those purposes to justify testing involved much more serious drug problems that interfered with the daily operation of schools[114] and—unlike the program in *Linke*—targeted portions of the student population directly linked to the drug problem.[115] The dissenters argued that the even if the drug problem in *Linke* was serious enough to support testing (a fact they did not concede), the school had failed to show a connection between the drug problem and the students being tested, thus failing to satisfy article I, section 11.[116] The dissenters also noted that not only was suspicion-based testing feasible in this

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106. *Linke*, 763 N.E.2d at 988 (citing Vernonia Sch. Dist. 475 v. Acton, 515 U.S. 646, 663 (1995)).

107. *Id.* at 989.

108. *Id.* (discussing Chandler v. Miller, 520 U.S. 305 (1997) (rejecting "special needs" argument for drug testing political candidates)).

109. *Id.* at 990 (citing *T.L.O.*, 469 U.S. at 336).

110. *Id.* at 991.

111. *Id.* at 992.

112. *Id.* at 992-93. The dissenters stated clearly that the language in the majority opinion should not be read to support stronger article I, section 11 restrictions on police as compared to other government agents.

113. *Id.* at 993.

114. *Id.* at 994.

115. *Id.*

116. *Id.* at 995.

case, but suspicion-based testing was actually a part of the program already in place at the school.[117] The program thus was further undermined both because the school could test based on suspicion and because the group of students tested was not connected to the drug problem.[118]

The dissenters also found that the program failed the test of article I, section 23. The dissenters found that although there were "inherent" differences between the group tested and the group not tested, those differences were not linked to the drug problem because there was no showing that the tested group was more likely to be involved with drugs.[119] Thus, there was no "reasonable relation" between the group's characteristics and the testing program.

Just a few weeks after the Indiana Supreme Court's decision in *Linke*, the U.S. Supreme Court decided *Board of Education of District Number 92 v. Earls*,[120] adopting an analysis almost identical to the majority's analysis in *Linke*. The U.S. Supreme Court examined a "voluntary" random drug testing scheme similar to that in *Linke* and adopted a three-part balancing test similar to *Linke*'s majority test, weighing the privacy interest, the degree of intrusion, and the school's interest.[121] Like the *Linke* majority, the majority in *Earls* upheld the drug testing program against a Fourth Amendment attack. The dissenting opinion, written by Justice Ginsburg and joined by three other justices, included reasoning similar to the *Linke* dissent.[122]

3. Double Jeopardy.—The Indiana Supreme Court also clarified the analysis required by article I, section 14, Indiana's Double Jeopardy Clause, for multiple punishments. Again, the court's decision brought the outcome under the Indiana Constitution closer to that under federal law.

In 1999, in its decision in *Richardson v. State*,[123] the Indiana Supreme Court sought to bring order to the chaos that had existed under the state's double-jeopardy provision. *Richardson* sought to harmonize decades of seemingly inconsistent caselaw, reducing Indiana's double-jeopardy test to a two-pronged inquiry that provided more protection than the Federal Double Jeopardy Clause.[124] The court concluded that Indiana's Double Jeopardy Clause is "intended to prevent the State from being able to proceed against a person twice for the same criminal transgression."[125] The court held that "two or more offenses are the 'same offense' in violation of article I, Section 14 of the Indiana Constitution, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged

117. *Id.*
118. *Id.* at 995-96.
119. *Id.* at 996-97.
120. 122 S. Ct. 2559 (2002).
121. *Id.* at 2565-69.
122. *Id.* at 2571 (Ginsburg, J., dissenting).
123. 717 N.E.2d 32 (Ind. 1999).
124. *Id.* at 49-50.
125. *Id.* at 49.

offense."[126] Thus, a defendant could not be convicted of two crimes if the two crimes had the "same elements" (the same analysis as the federal *Blockburger*[127] test) or if the "same evidence" was used to convict of both crimes.

After applying *Richardson* for a period of time, lower courts remained confused about the "same evidence" prong of the Indiana test. Some defendants claimed that they could not be convicted of two crimes if *any* evidentiary fact was common to the two charges.[128] The State's position, however, was that article I, section 14 did not prevent a conviction so long as there was at least one evidentiary fact supporting each conviction that did not support the other conviction.

In *Spivey v. State*, the Indiana Supreme Court resolved this issue, accepting the view proffered by the State. The court concluded that "the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense."[129]

The specific question in *Spivey* was whether the defendant could be convicted of both felony murder (based on the underlying crime of burglary) and conspiracy to commit a felony.[130] The defendant admitted the conspiracy and the burglary, but he denied any connection to the death that occurred during the burglary.[131] The court analyzed the article I, section 14 question as follows: the evidentiary facts used to establish that the defendant committed conspiracy included proof of the breaking and entering and intent to commit a felony. They did not include evidence of the killing that occurred during the burglary. The evidentiary facts used to establish that the defendant committed felony murder "established that [the victim] was killed in the course of the defendant's commission of burglary."[132] These facts did not include any proof of conspiracy. "Thus, although the evidence proving each offense also proved some elements of a second offense, in neither case did the same evidentiary facts establish all of the essential elements of both offenses."[133] The two convictions therefore did not violate the "same evidence" prong of Indiana's Double Jeopardy Clause.[134]

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126. *Id.* (emphasis in original).

127. Blockburger v. United States, 284 U.S. 299 (1932).

128. Spivey v. State, 761 N.E.2d 831, 832 (Ind. 2002).

129. *Id.* at 833.

130. *Id.* at 833-34.

131. *Id.*

132. *Id.* at 833.

133. *Id.* at 834.

134. *Id.* Justice Rucker dissented in part, with Justice Sullivan joining his opinion. He agreed that the two convictions did not violate Indiana's double jeopardy provision. However, relying on *Pierce v. State*, 761 N.E.2d 826 (Ind. 2002), decided the same day as *Spivey*, he asserted that the conspiracy conviction violated the common law rule that a defendant may not be convicted of conspiracy when "the overt act that constitutes an element of the conspiracy is the same act as another crime for which the defendant has already been convicted." *Spivey*, 761 N.E.2d at 836-37 (Rucker, J., concurring in part and dissenting in part).

This analysis—under which two convictions may stand so long as one evidentiary fact that supports each conviction does not support the other conviction—tends to merge with the "same elements" test under Indiana law and *Blockburger*.[135] Although one can envision situations in which two convictions will pass the "same elements" test but fail the "same evidence" test,[136] such situations are likely to be few and far between. By failing to adopt the more expansive construction of the "same evidence" portion of *Richardson*,[137] the Indiana Supreme Court has brought the outcome under the Indiana Double Jeopardy Clause into near alignment with the outcome under its federal analogue. The analysis is different, but the results will be the same in the great majority of cases.

Although the outcome under the Indiana Constitution now is aligned with the outcome under the Seventh Amendment, Indiana uses non-constitutional statutory and common law principles to limit multiple convictions in a manner that goes beyond federal law.[138] These statutory and common law doctrines will more frequently prohibit multiple punishments in situations where it would be permitted by the Federal Double Jeopardy Clause, but those principles, not the Indiana Constitution, provide the additional protection.

Guyton v. State,[139] decided shortly after *Spivey*, departed from the recent framework governing state double-jeopardy decisions and appeared to indicate that a majority of justices favored an approach different from *Richardson*. Guyton was convicted both of murder and carrying a handgun without a license. He argued on appeal that there was a "reasonable possibility" (*Richardson*'s words) that the jury inferred that Guyton unlawfully possessed a handgun from

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135. *See* discussion *supra* note 127 and accompanying text.

136. A hypothetical passing the "same elements" test but failing "same evidence" is as follows: a perpetrator approaches a victim and says "Stay right where you are or I'll shoot." Without saying more, he takes the victim's wallet. Among the charges that could be brought would be robbery (Indiana Code section 35-42-5-1) and confinement (Indiana Code section 35-42-3-3). To prove robbery, the state would have to show that the perpetrator knowingly took property from another person by threat of force or placing the victim in fear. To prove confinement, the state would have to show that the perpetrator knowingly confined the victim without the victim's consent. These two charges pass the same elements test because each has at least one element that the other does not. Robbery requires proof of taking property and force or placing the victim in fear; confinement requires proof of confinement. But in this scenario, the same fact, the statement "Stay right where you are or I'll shoot" is likely to prove both the threat of force element of robbery and the confinement element of confinement, thereby violating the "same evidence" test under the Indiana Constitution.

137. *See* discussion *supra* note 126 and accompanying text.

138. *E.g.*, Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002) (recognizing that burglary and robbery cannot both be subject to sentencing enhancement based upon the same bodily injury). *See also* Joel Schumm, *The Mounting Confusion Over Double Jeopardy in Indiana*, 46 RES GESTAE 27, 27-28 (Oct. 2002).

139. 771 N.E.2d 1141 (Ind. 2002).

the testimony that he fired the gun at his murder victim.[140] If that were the case, all the facts supporting the weapons conviction would also have been used to support the felony murder conviction requiring vacation of the weapons conviction.

In *Guyton*, the chief justice, writing for himself and Justices Sullivan and Rucker, analyzed the double-jeopardy issue not under the constitutional "same elements" and "same evidence" rubric of *Richardson*, but rather by use of the five categories of forbidden double jeopardy recited by Justice Sullivan in his concurrence in *Richardson*.[141] After listing each of the five categories detailed by Justice Sullivan,[142] the court concluded that "Guyton's claim . . . does not succeed under any of the above" categories, and therefore his convictions did not violate article I, section 14.[143]

Justice Boehm concurred in the result, but wrote separately to criticize *Richardson* (in which he had concurred in result although he disagreed with the analytical approach).[144] He wrote:

> In *Richardson*, a three Justice majority announced an "actual evidence" test for double jeopardy under the Indiana Constitution as applied to multiple convictions in the same trial. *Richardson* formulated the test for Indiana constitutional double jeopardy as whether there is a "reasonable possibility" that the "evidentiary facts" supporting one conviction were used by the jury to support another. In substance, applying this *Richardson* test means opting for (1) psychoanalyzing the

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140. This contention is mostly clearly outlined in Justice Boehm's concurrence. *Id.* at 1152-53 (Boehm, J., concurring).

141. *Id.* at 1143 (citing Richardson v. State, 717 N.E.2d 32, 56-57 (Ind. 1999) (Sullivan, J., concurring)). The thrust of Justice Sullivan's *Richardson* concurrence seemed to be that he understood the multiple punishments prong of Indiana's Double Jeopardy Clause to preclude only the five kinds of multiple convictions that he enumerated, and he understood the majority's opinion to encompass those five situations and no more. He concurred even though the *Richardson* majority reached its conclusion by a different analysis. *Richardson*, 717 N.E.2d at 56-57.

142. Justice Sullivan's concurrence indicated his understanding that the Indiana Double Jeopardy Clause precluded the following: 1) "[c]onviction and punishment for an enhancement of a crime where the enhancement [rests] on the very same behavior or harm as another crime for which the defendant has been convicted and punished"; 2) "[c]onviction and punishment for a crime which is a lesser included offense of another crime for which the defendant has been convicted and punished"; 3) "[c]onviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished"; 4) "[c]onviction and punishment for a crime which is the very same act as an element of another crime for which the defendant has been convicted and punished"; and 5) "[c]onviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished." *Id.* at 56-57.

143. *Guyton*, 771 N.E.2d at 1143.

144. *Richardson*, 717 N.E.2d at 57-73 (Boehm, J., concurring).

> jury based on evidence, argument, instructions and charging instruments and indulging the irrebuttable presumption the jury followed all of these; (2) the "reasonable possibility" standard to determine whether that occurred, and (3) the requirement that "all" not just one of the "evidentiary facts" overlap.[145]

Justice Boehm went on to note the majority's reliance on Justice Sullivan's *Richardson* concurrence, which he said raises the question "how we know when we have two crimes supported by the 'very same act.'"[146] He continued: "I think we owe an explanation of this mystery because I believe today we have in effect abandoned *Richardson*, and should be explicit in doing this so future trial and appellate courts can follow a consistent methodology in reviewing double jeopardy claims."[147]

Justice Boehm stated that *Richardson* had failed in its goal of establishing a single, comprehensive rule for the multiple prosecutions branch of Indiana double-jeopardy law.[148] It had failed, he wrote, to take into account various statutory and common law rules that supplemented the basic constitutional protection.[149] He proposed revising *Richardson* to embody instead a "same facts" test to go along with *Richardson*'s "same elements" test.[150] He criticized both *Richardson*'s "evidentiary facts" terminology and the "very same act" phrasing used by the majority in *Guyton*, arguing that "same facts" is clearer and easier to understand.[151]

After explaining the utility of his "same facts" formulation, Justice Boehm concluded his concurrence by stating his agreement with the majority's view that Guyton's two convictions did not violate the Double Jeopardy Clause.[152] "But I think that it takes some explanation as to why that is true, and what methodology is required to reach that conclusion."[153] Justice Boehm's conclusion was that "the Court today handled this [analysis] the way pre-*Richardson* appellate courts typically did by determining, under a de novo review of whatever is relevant, whether the facts of one crime are such that the 'same fact' fits one of the Sullivan rules [in his *Richardson* concurrence]."[154] The majority looked, Justice Boehm wrote, at the statutes, charging instruments, evidence and arguments of counsel to determine that the facts establishing one offense were not the same as the facts establishing the other and it did so de

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145. *Guyton*, 771 N.E.2d at 1148 (Boehm, J., concurring).

146. *Id.* at 1148-49.

147. *Id.* at 1149.

148. *Id.* at 1149-50.

149. *Id.* at 1149 (citing Pierce v. State, 761 N.E.2d 826 (Ind. 2002) (acknowledging the existence of statutory and common law rules supplementing *Richardson*)).

150. *Id.* at 1150.

151. *Id.* at 1150-51.

152. *Id.* at 1153.

153. *Id.*

154. *Id.* at 1153-54.

novo, without reference to what the jury might reasonably have considered.[155] In Justice Boehm's view, this methodology is what the court should forthrightly acknowledge that it is using.

Justice Dickson wrote a concurrence explaining that Guyton's convictions did not constitute double jeopardy under the majority analysis in *Richardson.*[156] He began his analysis by stating that the majority opinion in *Guyton* does not contain constitutional analysis, but rather only analyzes the claim under statutory and common law. The other four justices appear to disagree with this assertion, as both the majority opinion and Justice Boehm's dissent include constitutional terms.[157] Guyton's conviction did not violate the *Richardson* test, Justice Dickson wrote, because "[i]t is not reasonably possible that the jury ignored this evidence [that Guyton admitted possessing a handgun before the murder] and instead based its finding of guilt solely on the defendant's possession of the weapon at the time he fired it at [his victim]."[158]

Justice Dickson then criticized Justice Boehm's assertion that the *Richardson* analysis should be modified to include a "same facts" analysis.[159] Justice Dickson argued that a "same facts" analysis "significantly lessens the protection provided by the Indiana Double Jeopardy Clause" and he cited several examples in which, in his view, the "same facts" approach would validate convictions that *Richardson* would reverse.[160]

Since *Guyton*, the court has followed the *Spivey* formulation in other cases.[161] The Indiana Court of Appeals, however, followed *Guyton* in one case by using the categories from Justice Sullivan's *Richardson* concurrence rather than the "same evidence" test.[162] Nevertheless, *Guyton* places a cloud over *Richardson*, and it remains to be seen whether the courts will follow *Richardson*, explicitly alter it, or alter it in a piecemeal fashion, as it plainly did in *Spivey*.

4. Free Expression.—The Indiana Court of Appeals expanded free expression rights under article I, section 9 of the Indiana Constitution in *Mishler v. MAC Systems, Inc*.[163] The Mishlers hired MAC to perform construction on buildings they owned. After trouble between the parties and a stop-work order by a building inspector, the Mishlers posted signs on the property prominently

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155. *Id.*

156. *Id.* at 1145-48. Although Justice Dickson's concurrence precedes Justice Boehm's in the reported opinion because of Justice Dickson's seniority, I discuss Justice Dickson's concurrence after Justice Boehm's because its substantial element of response to Justice Boehm makes this order more logical.

157. *Id.* at 1142-43 (majority); *id.* 1148 (Boehm, J., concurring).

158. *Id.* at 1146.

159. *Id.*

160. *Id.*

161. *See, e.g.*, Carrico v. State, 775 N.E.2d 312 (Ind. 2002); Robinson v. State, 775 N.E.2d 316 (Ind. 2002). *See also* Joel Schumm, *Run-of-the-Mill Issues, Predictable Results*, RES GESTAE 26, 26-28 (Dec. 2002) (summarizing decisions under article I, section 14).

162. Oeth v. State, 775 N.E.2d 696, 702-03 (Ind. Ct. App. 2002).

163. 771 N.E.2d 92 (Ind. Ct. App. 2002).

stating that MAC was subject to a stop-work order, listing the code violations found by the building inspector, and concluding that MAC's "contract states quality work to us and many others[.] This is not [quality work.] Claimed to be a member of B[etter] B[usiness] B[ureau.] Not."[164]

The Mishlers sued MAC, and MAC's counterclaims included slander.[165] MAC also sought an injunction against the Mishlers' sign and other negative verbal and written public statements about MAC's work.[166] The trial court granted an injunction requiring the Mishlers to remove the sign and prohibiting other signs criticizing MAC.[167]

The court of appeals analyzed the Mishlers' claim that the injunction was an unconstitutional prior restraint under article I, section 9.[168] Relying on federal precedents, the court of appeals determined that prior restraints are especially damaging because they preclude speech before the courts have had a full opportunity to address the underlying issues on the merits.[169] The court also noted that harm to reputation may be redressed through damages after the fact, and it cited Indiana decisions so holding.[170]

The court then reviewed the language of section 9: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."[171] The court concluded that although section 9 is written as a restriction on the legislature, it "is intended to prohibit Indiana courts, as well as the General Assembly, from abridging the free speech rights of Indiana citizens."[172] The section should be treated as applying to all state action, the court held.[173] The court also held that the so-called "freedom and responsibility" phrasing of the section—creating a broad free expression right, but holding persons accountable for "the abuse of that right"—squares with damages for harm caused by irresponsible expression, not prior restraint.[174]

The court invalidated the injunction against the Mishlers based both on the importance of free expression under the Indiana Constitution and on the preliminariness of the litigation, in which no ruling on the merits of the slander claim had been made.[175] The court did not rule out all injunctions against speech

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164. *Id.* at 94.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 94-95.

169. *Id.* at 95 (citing, *e.g.*, Alexander v. United States, 509 U.S. 544 (1993); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)).

170. *Id.* at 96 (citing St. Margaret Mercy Healthcare Ctrs., Inc. v. Ho, 663 N.E.2d 1220 (Ind. Ct. App. 1996)).

171. IND. CONST. art. I, § 9.

172. *Mishler*, 771 N.E.2d at 97.

173. *Id.*

174. *Id.* at 98 (citing *Ex parte* Tucker, 220 S.W. 75, 76 (Tex. 1920)).

175. *Id.* at 98-99.

or expression, only those made at a preliminary stage of litigation.[176]

5. Jury Trial Rights.—The Indiana Supreme Court decided two cases regarding jury trial rights. In *Songer v. Civitas Bank*,[177] the court reviewed the right to jury trial under article I, section 20 of the Indiana Constitution. The Indiana Constitution preserves the right to jury trial as it existed at common law, so a party is entitled to a jury trial only on legal, not equitable, claims.[178] In this case, Civitas was suing Songer, seeking to collect on a note and mortgage.[179] Because the claim had both legal and equitable features, the court had to determine whether Songer had a right to trial by jury. The applicable principle of law, set forth in the Nineteenth Century but still applicable today, is that "where equity takes jurisdiction of the essential features of a cause, it will determine the whole controversy, though there may be incidental questions of a legal nature."[180]

After quoting this rule, the court noted that "[t]he inverse must also be true. Where equity does not take jurisdiction of the essential features of a cause, a multi-count complaint may be severed, and different issues may be tried before either a jury or the court at the same proceeding."[181] The court summarized the rule as follows: "Where the essential features of a suit sound in equity, such that the equitable relief asked for is not separate and apart from the legal relief sought, the entire action is drawn into equity."[182] The court went on to note that some recent cases appeared to misinterpret the rule by holding that if any claim in a case was essentially equitable, then the entire case was drawn into equity.[183]

The court ruled that Civitas Bank's case against Songer was essentially equitable, and therefore not subject to the jury trial right under the Indiana Constitution, because the core of the action was the bank's desire to establish the amount the bank could collect from its collateral.[184] Although the bank also claimed a money judgment, "the essence of the claim was for a judicial pronouncement that Civitas' possessory lien was perfected and that the collateral could be liquidated."[185] The action was "essentially equitable," so the entire

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176. Judge Robb concurred, asserting that the court need not address the constitutional issue. Rather, she noted, the Mishlers should prevail because MAC could show no more than "mere economic injury" that could be compensated after judgment; therefore, MAC was not entitled to preliminary injunctive relief. *Id.* at 99 (Robb, J., concurring).

177. 771 N.E.2d 61 (Ind. 2002).

178. *Id.* at 63.

179. *Id.* at 62-63.

180. *Id.* at 65 (quoting Field v. Brown, 45 N.E.2 464, 464 (Ind. 1896)).

181. *Id*. at 66.

182. *Id*. at 67.

183. *Id.* at 67-68 (stating that *Baker v. R & R Construction, Inc.*, 662 N.E.2d 661 (Ind. Ct. App. 1996); *Levinson v. Citizens National Bank of Evansville*, 644 N.E.2d 1264 (Ind. Ct. App. 1994); *Weisman v. Hopf-Himsel, Inc.*, 535 N.E.2d 1222 (Ind. Ct. App. 1989); and *Jones v. Marengo State Bank*, 526 N.E.2d 709 (Ind. Ct. App. 1988) incorrectly apply the rule).

184. *Id.* at 69.

185. *Id.*

action was drawn into equity.[186]

The Indiana Supreme Court also ruled in *Jordan v. Deery* that the right to jury trial under article I, section 20 of the Indiana Constitution includes an almost absolute right for the plaintiff to personally be present in the courtroom for trial.[187] *Jordan* presented the tort claim of a child who was severely disabled at birth; the claim was that poor medical care was the cause of the disability.[188] The defendant hospital and physicians prevailed at trial, but only after the trial court judge excluded the seven-year-old plaintiff from the courtroom.[189] The trial court applied *Gage v. Bozarth*,[190] in which the court permitted a plaintiff to be excluded if the defendant could show that the plaintiff's presence was potentially prejudicial to the jury and the plaintiff could not understand the proceedings or meaningfully assist counsel.[191]

The disabled child argued on appeal that she had a right to be present in the courtroom, and the Indiana Supreme Court ruled in a 4-1 decision that her near-absolute right to be present was grounded in article I, section 20.[192] That section states "In all civil cases, the right of trial by jury shall remain inviolate."[193] In addressing section 20, Justice Rucker, writing for the majority, reviewed the standard usually applied to questions of law under the Indiana Constitution. The standard addresses relevant text, history, structure, and purpose of the constitution, and case law interpreting it.[194] The majority then explicitly departed from that standard, stating that "these 'constitutional talismans' or guideposts are not always instructive. Under such circumstances, it becomes appropriate to look elsewhere, including case law from other states interpreting similar provisions in their constitutions."[195]

In its analysis, the majority found little assistance in historical materials or case law. There is little in the debates or other materials relating to the 1850 constitutional convention to illuminate the framers' purposes in enacting section 20, which is very similar to the jury guarantee in the 1816 Indiana Constitution.[196] The majority found that although several cases have interpreted

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186. *Id.*

187. 778 N.E.2d 1264 (Ind. 2002).

188. *Id*. at 1265.

189. *Id.* at 1267.

190. 505 N.E.2d 64 (Ind. Ct. App. 1987) (citing Helminski v. Ayerst Lab., 766 F.2d 208, 218 (6th Cir. 1985)).

191. *Jordan*, 778 N.E.2d at 1266.

192. IND. CONST. art. I, § 20.

193. *Jordan*, 778 N.E.2d at 1269. The Jordans had argued that *Helminski* was abrogated by the federal Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213. The Indiana Supreme Court did not adjudicate that question, and it noted that the question apparently had not been decided by any other court. *Id*. at 1267.

194. *Id*. at 1268 (citing McIntosh v. Melroe, 729 N.E.2d 972, 974 (Ind. 2000)).

195. *Id.* (citations omitted).

196. *Id*. at 1269 (citing 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 226, 352-53 (A.H. Brown ed.,

the section over the years, they merely stand for the principle that the framers intended the 1851 constitutional provision to retain the jury trial right as it existed at common law.[197]

The majority went on to look at decisions from other jurisdictions, including New York, Florida, Connecticut, Oklahoma, Missouri, and South Dakota, all of which have established a broad right for the plaintiff to be present in the court room. These decisions were sometimes based on constitutional language similar to Indiana's jury-trial guarantee or the "open courts" provision in article I, section 12 of the Indiana Constitution.[198] The majority concluded, "we agree with those jurisdictions that have held that the state constitutional right of trial by jury includes the ancillary right to be present in the courtroom during both the liability and damage phase of trial."[199] The majority reasoned, "without the right to be present, the right to trial by jury becomes meaningless."[200] While reversing the trial court and remanding for a new trial during which the disabled child would be present, the majority nevertheless qualified the right by stating that it would not apply if there were "waiver or extreme circumstances."[201]

Justice Boehm dissented, arguing that there is a right to be present at trial, but it is a qualified right that arises not from the guarantee of jury trial, but rather from "the federal right to due process of law and the concept of fundamental fairness."[202] Justice Boehm noted that if the right arises from the constitutional jury trial guarantee, then there would be no right to be present at a bench trial.[203] He argued for a balancing test similar to *Helminski* that would allow the plaintiff to be present when the plaintiff could assist counsel, but would allow exclusion when the plaintiff could not assist and would likely prejudice the jury.[204]

The basis for the due process right to be present, Justice Boehm argued, is that a party who can effectively communicate with and assist counsel is deprived of a right to be heard if she cannot be present in court.[205] On the other hand, when the party cannot assist counsel, her presence is not vital to a fair proceeding and the potential for prejudice may be balanced against the right to be present.[206]

1850); JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 80, 90, 204 (Austin H. Brown ed., 1851) (reprint 1936)).

197. *Id*. at 1270.

198. *Id*. at 1270-71.

199. *Id.* at 1271.

200. *Id*. at 1272. This assertion is problematic. For a person who is comatose or unable to understand the nature of the proceedings (one of the prerequisites to exclusion under *Helminski*), presence during the trial by jury can be of no additional benefit. For such persons, the trial itself, not presence at the trial, provides the benefit guaranteed by the constitutional provision.

201. *Id*. at 1270. One important question not answered by the majority's opinion is whether it conveys an absolute right for a prisoner to be present during a civil trial.

202. *Id*. at 1273 (Boehm, J., dissenting).

203. *Id*.

204. *Id*.

205. *Id*. at 1274.

206. *Id*.

Justice Boehm agreed with the majority that there is little in Indiana's constitutional history that sheds light on any relationship between the jury trial right and a right to be present at trial.[207] He noted that the majority of jurisdictions, including the federal courts, apply the balancing test he advocates.[208] Justice Boehm would have affirmed the trial court's ruling excluding the plaintiff because the trial court found that the plaintiff's presence was likely to prejudice the jury, thus depriving the defendants of their right to a fundamentally fair proceeding.[209]

6. Governmental Demands for "Particular Services".—The Indiana Supreme Court decided one case implicating the portion of article I, section 21 of the Indiana Constitution, stating that "[n]o person's particular services shall be demanded, without just compensation."[210] The issue arose in *Sholes v. Sholes*,[211] in which the main question involved the meaning of Indiana's civil appointment of counsel statute.[212] The court determined that the statute required trial courts to appoint counsel for indigent civil litigants, plaintiffs or defendants, when the trial court determines that the litigant is indigent and also determines that the case is sufficiently complex, or the litigant sufficiently unsophisticated, that counsel is required in the specific circumstances of the case.[213]

The court went on to analyze whether counsel appointed under the statute must be compensated. It concluded that the Particular Services Clause of article I, section 21 requires compensation.[214] The court made clear that lawyers may accept appointments under the statute without compensation, but found support in at least three Nineteenth Century cases for the proposition that lawyers could not be required to represent civil litigants without compensation.[215] The court's brief analysis of the constitutional provision relies almost entirely on the historical fact that lawyers have been compensated for the services they provide.[216] This element satisfies the part of the "particular services" analysis set forth in *Bayh v. Sonnenburg*[217] addressing whether the service in question has been compensated historically. The second element of *Bayh* analysis is whether the services are required of all citizens or only of a specified subset of citizens.[218] Although the court did not provide lengthy analysis on the second element, it apparently concluded that only the services of one particular group of

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207. *Id.* at 1274-75.

208. *Id*.

209. *Id.* at 1276.

210. IND. CONST. art. I, § 21.

211. 760 N.E.2d 156 (Ind. 2001).

212. IND. CODE § 34-10-1-2 (2002).

213. *Sholes*, 760 N.E.2d at 159-61.

214. *Id.* at 162.

215. *Id.* (citing Bd. of Comm'rs v. Pollard, 55 N.E. 87 (1899); Webb v. Baird, 6 Ind. 13 (1854); Blythe v. State, 4 Ind. 525 (1853)).

216. *Id.* at 164.

217. 573 N.E.2d 398, 415 (Ind. 1991).

218. *Id.* at 415-17.

citizens—lawyers—is demanded by Indiana Code section 34-10-1-2. Because both elements were present, the Particular Services Clause mandated compensation.[219]

Justice Dickson dissented from the portion of the opinion applying the Particular Services Clause.[220] He performed historical analysis, uncovering statutes from 1818 and 1843 (enacted before the present constitution) that required uncompensated representation of indigent litigants. Justice Dickson relied on language in *Bayh v. Sonnenburg* stating that when the Particular Services Clause was enacted "the framers did not intend this clause to create new rights to compensation for services provided to the state that had gone historically uncompensated."[221] Because statutes predating the 1851 constitution required uncompensated representation of indigents, Justice Dickson reasoned, the Particular Services Clause does not mandate such compensation.[222] Justice Dickson also asserted that lawyers have a special obligation to provide free services as "an inherent aspect of being a lawyer."[223]

7. Equal Privileges and Immunities.—The Indiana Supreme Court decided one case applying the Equal Privileges and Immunities Clause of article I, section 23 of the Indiana Constitution, but the case broke little new ground. In *Lake County Clerk's Office v. Smith*,[224] the court rejected a challenge to Indiana's bail statutes. Bail agents challenged Indiana's system, under which a defendant may be admitted to bail either by posting a bond provided by an approved bail agent or by posting cash or securities worth ten percent of the bail amount.[225] When a bail bond is provided by a bail agent and the defendant fails to appear, the bail agent must pay a late surrender fee.[226] When the defendant posts the ten percent cash bail and fails to appear, the defendant forfeits bail in most circumstances and is subject to arrest.[227]

The court rejected the argument that these differences violated the Equal Privileges and Immunities Clause because bail agents whose defendants failed to appear were subject to late surrender fees, but defendants posting ten percent cash bond were not subject to such penalties.[228] Applying the test used in *Collins v. Day*,[229] the court easily determined that the disparate treatment of bail agents and defendants posting their own bail was related to inherent characteristics distinguishing the two groups from one another.[230] The court noted first that in

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219. *Sholes*, 760 N.E.2d at 164.
220. *Id.* at 167 (Dickson, J., dissenting).
221. *Id.* at 168 (quoting *Bayh*, 573 N.E.2d at 413).
222. *Id.*
223. *Id.*
224. 766 N.E.2d 707 (Ind. 2002).
225. *Id.* at 709 (citing IND. CODE § 35-33-8-3.2 (2002)).
226. IND. CODE § 27-10-2-12 (2002).
227. *Id.* § 35-33-8-7.
228. *Smith*, 766 N.E.2d at 714.
229. 644 N.E.2d 72, 80 (Ind. 1994).
230. *Smith*, 766 N.E.2d at 714.

fact bail agents were probably treated more favorably under the law because a defendant posting his own bail and failing to appear often lost the entire amount, while bail agents lost only a percentage.[231] The court then concluded that any disparate treatment was properly based on the fact that bail agents act for profit, and they must have financial incentives to ensure the appearance of defendants, while the defendants themselves have other incentives to appear, including both the potential loss of their own money and potential arrest.[232] These differences justified the disparate treatment. This outcome was identical to the result obtained by the court from analysis under the Federal Equal Protection Clause.[233]

II. TRENDS IN INDIANA CONSTITUTIONAL LAW

The individual rights provisions of article I have thus far been a source of few new rights for citizens of Indiana. Analysis of topics such as speech about police, corporate worship, and double jeopardy reveal that citizens of Indiana enjoy slightly greater protections under the state constitution than under the Federal Constitution. But as a general matter, these differences are not substantial. Of course, future developments remain to be seen.

An irony in this development resides in the standard of review prescribed for questions arising under the Indiana Constitution, which points to text, history, structure and function, and case law as guideposts to determine "common understanding of both those who framed it and those who ratified it," a jurisprudence of original intent.[234] Thus, when matters are not resolved based on the language of the Indiana Constitution alone, the analysis is largely historical. The standard looks at the history of the Constitutional Convention, using its transcripts.[235] It also looks at case law interpreting the provision over the years, especially in the time period before provisions of the United States Constitution were incorporated against the states.[236] This approach undergirded the Indiana Supreme Court's initial forays into independent state constitutional jurisprudence, such as *Price v. State*, which relied extensively on the historical context of the times of statehood and the Constitutional Convention to support the importance of speech on issues of public importance.[237]

Gerschoffer, *Linke*, and *Spivey*, however, followed the standard of review less meticulously and reached results more in keeping with the federal standards

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231. *Id.* at 713-14.

232. *Id.* at 714.

233. *Id.* at 712-13.

234. *See supra* note 37.

235. *E.g.*, Ind. Gaming Comm'n v. Moseley, 643 N.E.2d 296, 298 (Ind. 1994).

236. *E.g.*, Richardson v. State, 717 N.E.2d 32 (Ind. 1999); City Chapel Evangelical Free v. City of South Bend, 744 N.E.2d 443 (Ind. 2001).

237. Price v. State, 622 N.E.2d 954 (Ind. 1993). In *Price*, the Indiana Supreme Court majority relied on historical background information, such as the natural law frame of reference and Jacksonianism of the framers of the 1851 Constitution. *Id.* at 958-59.

under the Fourth and Seventh Amendments, respectively.[238] Neither the Search and Seizure Clause nor the Double Jeopardy Clause of the Indiana Constitution is associated with any specific or unique discussion in the debates of the Constitutional Convention. There is no unique Indiana history of these provisions. The Indiana Supreme Court (unlike the court of appeals in *Gerschoffer* and *Linke*) therefore determined not to base its decisions on the general historical background of Jacksonianism and wariness of state authority. Rather, the court looked to other sources, including decisions from the courts of other states and the United States, as primary guidance.[239]

In *Jordan v. Deery*, moreover, the Indiana Supreme Court for the first time explicitly stated that it would depart from its oft-stated standard, disregarding the "'constitutional talismans' or guideposts" when they are not "instructive."[240] In *Jordan*, the supreme court majority relied explicitly on a few other jurisdictions that had interpreted constitutional provisions similar to Indiana's.[241] They did so although most jurisdictions, including the federal courts interpreting nearly identical constitutional language, had adopted a contrary rule.[242] If *Jordan* is the explicit end of the standard of review that the Indiana Supreme Court has applied to new questions of law under the Indiana Constitution since at least 1991,[243] it may be that the standard was implicitly jettisoned in earlier cases such as *Gerschoffer*. As the Indiana Supreme Court has moved away from the standard it used throughout the last decade, its decisions have come to more closely resemble those of other states and the federal system.

The irony in this development is that the standard of review, which because of its historical focus would appear to dictate traditionalist results, in fact led to the more groundbreaking decisions in Indiana constitutional jurisprudence. The Indiana Court of Appeals' attempt to follow that standard in *Gerschoffer* and *Linke* dictated results more restrictive of governmental conduct (based on traditional antipathy by Indiana citizens toward law enforcement discretion) and out of line with federal jurisprudence.

Indiana's courts have had a freer hand to apply the standard of review outside

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238. Linke v. Northwestern Sch. Corp., 763 N.E.2d 972 (Ind. 2002); State v. Gerschoffer, 763 N.E.2d 960 (Ind. 2001); Spivey v. State, 761 N.E.2d 831 (Ind. 2002).

239. *Gerschoffer*, 763 N.E.2d at 966; *Linke*, 736 N.E.2d 972, 976.

240. 778 N.E.2d 1264, 1268 (Ind. 2002).

241. *Id*. at 1270-71.

242. *Id*. at 1273-75 (Boehm, J., dissenting).

243. *See* Bayh v. Sonnenburg, 573 N.E.2d 398, 412 (Ind. 1991) ("'[I]n placing a construction upon a constitution or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy.'") (quoting State v. Gibson, 36 Ind. 389, 391 (1871); *see also* Ind. Gaming Comm'n v. Moseley, 643 N.E.2d 296, 298 (Ind. 1994) ("This Court analyzes questions arising under the Indiana Constitution by examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions."). The most complete statement of the standard is quoted *supra* note 37.

the area of individual rights, which already has been the subject of extensive litigation in the federal arena.[244] These constitutional provisions outside the individual rights area, including Indiana's strict separation of powers provision and other terms governing the operation of state government, have been the primary source of significant developments since the *Second Wind* article.[245]

The greatest impact of the Indiana Constitution on Indiana citizens has actually occurred by decisions applying later articles, particularly articles III through X, provisions governing the operation of government and its branches. Undoubtedly, the most immediately significant case for everyday citizens outside article I is the case now known as *Town of St. John v. Department of Local Government Finance*,[246] litigation that has led to a revolution in Indiana's property tax administration.

The Indiana Supreme Court declared in *Town of St. John* that Indiana's method for measuring property values for taxation purposes, a method that had been used for decades, violated the requirements of uniformity and equality in article X.[247] This decision led to adoption of entirely new rules for assessing property.[248] Those rules are now being applied to revalue all of the three million parcels of real estate subject to property taxation in Indiana, likely leading to significant redistribution of the property tax burden.[249]

Fears about the effects of the application of the new valuation rules led the

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244. The portions of article I that lack federal analogues, including the "open courts" and remedies provisions and article I, section 19, have also not been the source of extensive rights beyond those found in the Federal Constitution. Thus, it may be that the mere fact that there is no analogous federal provision is insufficient in itself to be outcome determinative. Analysis of this question is beyond the scope of this article.

245. *See* Shepard, *supra* note 1.

246. State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657 (Ind. 2001) (limited to question of attorneys' fees); Town of St. John v. State Bd. of Tax Comm'rs, 729 N.E.2d 242 (Ind. Tax Ct. 2000); State Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034; Town of St. John v. State Bd. of Tax Comm'rs, 695 N.E.2d 123 (Ind. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 698 N.E.2d 399 (Ind. Tax Ct. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 691 N.E.2d 1387 (Ind. Tax Ct. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 690 N.E.2d 370 (Ind. Tax Ct. 1997); Boehm v. Town of St. John, 675 N.E.2d 318 (Ind. 1996); Town of St. John v. State Bd. of Tax Comm'rs, 665 N.E.2d 965 (Ind. Tax Ct.. 1996); Bielski v. Zorn, 627 N.E.2d 880 (Ind. Tax Ct. 1994).

247. *Town of St. John*, 702 N.E.2d at 1038-43.

248. *Compare* Ind. Admin. Code tit. 50, art. 4.2 (2001) (repealed rules), *with* Ind. Admin. Code tit. 50, art. 4.3 (2002) (new rules).

249. Editorial, *Tax and Revenue Bills Vital to Indiana*, SOUTH BEND TRIB., Jan. 11, 2002, at A6. The Fair Market Value Study cited by the Indiana Supreme Court showed that different classes of property were valued at vastly different levels in relation to their market values. *Town of St. John*, 702 N.E.2d at 1042 (showing residential property valued at 62% of market; industrial at 72%; agricultural at 54%; and commercial at 81%). Valuing each type of property at the same proportion of market value will redistribute the tax burden significantly.

General Assembly to restructure Indiana's entire tax system in 2002.[250] The resulting system raises less revenue from property taxes and more from the sales tax.[251] Because tax restructuring was, in major part, an outgrowth of the *Town of St. John* decision, the decision and its implications should be considered the most important development in state constitutional law in 2002.

Town of St. John is not the only case dealing with the structure and function of Indiana government that has had major significance for citizens over the past few years. Over the past decade, much important law also has been made under the Indiana Constitution outside the realm of individual rights. The Indiana Supreme Court has decided important cases regarding the scope of legislative power,[252] governmental duties to provide certain services,[253] legislative authority over the judicial branch,[254] and the Indiana Court of Appeals has decided an important case regarding the Governor's authority.[255] In the upcoming months, the Indiana Supreme Court has on its docket other cases concerning the structural provisions of the Indiana Constitution, including cases addressing special laws and the Uniform and Equal Taxation Clause.[256]

CONCLUSION

Contrary to the tone set by the chief justice's article in 1989, the Indiana Constitution has not been the source of significant individual rights protections in the intervening years. Rather, the Indiana Supreme Court has developed some different modes of analysis, but citizens' rights under the Indiana Constitution remain only marginally different than their rights under the Federal Constitution.[257] There remains, of course, significant unexplored territory in

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250. Elizabeth Garvin, *Indiana Lawmakers Restructure, Increase Taxes to Take Heat Off Homeowners*, THE BOND BUYER, June 25, 2002, at 4.

251. Pub. L. No. 192-2002 (Special Session).

252. *See* State v. Hoovler, 668 N.E.2d 1229 (Ind. 1996); Pence v. State, 652 N.E.2d 486 (Ind. 1995) Ind. Gaming Comm'n v. Moseley, 643 N.E.2d 296 (Ind. 1994).

253. Ratliff v. Cohn, 693 N.E.2d 530 (Ind. 1998). *See also* Y.A. by Fleener v. Bayh, 657 N.E.2d 410 (Ind. Ct. App. 1995) (court of appeals decision on similar issue).

254. State v. Monfort, 723 N.E.2d 407 (Ind. 2000).

255. Nass v. State *ex rel.* Unity Team, 718 N.E.2d 757 (Ind. Ct. App. 1999).

256. City of South Bend v. Kimsey, 781 N.E.2d 683 (Ind. 2003); Dep't of Local Gov't Fin. v. Griffin, 748 N.E.2d 448 (Ind. 2003). Discussion of these cases is beyond the scope of this Article because the cases were decided after the Article was drafted, but before it went to press.

257. Although outcomes under article I resemble those under the Federal Constitution, the analytical frameworks to reach those results sometimes differ. In the search and seizure area, for example, Indiana looks only at reasonableness of police conduct while federal courts analyze reasonable expectations of privacy. *Compare* Linke v. Northwestern Sch. Corp., 763 N.E.2d at 978 (examining reasonableness of police conduct), *with* United States v. Knights, 534 U.S. 112, 118-19 (2001) (examining reasonable expectation of privacy). As Chief Justice Shepard has suggested, these alternative analytical frameworks also protect rights. Should either approach erode as case law develops, the other remains as independent protection of the right. *See generally* Randall T.

article I of the Indiana Constitution,[258] and the future of individual rights under article I remains to be seen.

In contrast, Indiana courts have not been reticent to use the constitutional principles governing the functioning of state government to break new and important ground. *Town of St. John* also excellently illustrates the principle that Indiana citizens' daily lives are appreciably affected by decisions applying the Indiana Constitution even when those decisions do not apply the provisions of article I. The taxation sections of article X only regulate governmental conduct, not individual behavior, yet *Town of St. John* had a direct affect on every citizen's daily life, whether as a property taxpayer, sales taxpayer, or consumer of the myriad of services from education to highways that were affected by tax restructuring. Similarly, the other structural cases decided by the courts over the past decade, including the important cases on taxation and legislative power now before the supreme court, have a crucial affect on the daily lives of Indiana's citizens.

Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U. L. REV. 421, 456 (1996).

258. For example, the religion sections and the free expression section remain largely undeveloped.