

INDIANA CONSTITUTIONAL DEVELOPMENTS

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The Indiana Constitution may be conceived as having two parts. First, the structural constitution contains those portions of the document (generally articles III through XV) that describe and regulate the elements of Indiana government.¹ Second, the rights constitution (generally articles I, II and XVI) enumerates the individual rights of Hoosiers.² While a few portions of the structural constitution resemble provisions of the federal constitution, there are many differences and a long history of disparate interpretations.³ Many portions of the rights constitution also parallel federal provisions, and its recent history has been about whether and when the Indiana Constitution would provide rights more expansive than are available under the federal constitution.⁴ The tendency has been toward similar interpretations of federal and state rights.⁵

In the most recent year, the Indiana Supreme Court continued its history of interpreting the structural constitution quite boldly, reaffirming principles of standing to vindicate structural constitutional violations, enforcing limitations on special laws, and clarifying the law on tax uniformity.⁶ The court also continued its recent history of interpreting provisions of the rights constitution largely the same as parallel federal rights, with a few exceptions.⁷ One primary focus of judicial activity relating to the rights constitution was the Equal Privileges and Immunities Clause of article I, section 23, which lacks a direct federal cognate.⁸ In several opinions, the Indiana Supreme Court and Indiana Court of Appeals

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1. Article III describes distribution of powers, and articles IV through VII describe the workings of the branches of government. Article VIII sets up Indiana's educational system, and article IX provides for other types of state institutions. Articles X and XIII describe state and local finance; article XI establishes constitutional provisions to regulate corporations; article XII sets up the state militia; article XIV establishes state boundaries; and article XV contains miscellaneous provisions.

2. Article I is Indiana's bill of rights. Article II establishes provisions for voting and elections. Article 16 describes the constitutional amendment process.

3. For example, article IV, section 19 contains a requirement that each bill passed by the legislature contain a single subject matter, a requirement absent from the federal constitution.

4. *See, e.g., State v. Richardson*, 717 N.E.2d 32 (Ind. 1999) (offering more expansive state interpretation of double jeopardy); *Ind. High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222 (Ind. 1997) ("process due" is identical under state and federal constitutions).

5. Jon Laramore, *Indiana Constitutional Developments: The Wind Shifts*, 36 IND. L. REV. 961, 986-88 (2003).

6. *See infra* Parts I.A-C.

7. *See infra* Parts II.A.3-4, B-D, G.

8. *See infra* Part II.A.

have struggled over the interpretive framework to apply to section 23.⁹

I. THE STRUCTURAL CONSTITUTION

A. Standing

The Indiana Supreme Court revisited an important standing doctrine, affirming that judicial doors are open to address public officials' misconduct in *State ex rel. Cittadine v. Indiana Department of Transportation*.¹⁰ Cittadine sued the Department of Transportation to enforce Indiana's Clear View Statute, which required that railroad grade crossings be maintained in a manner permitting an unobstructed view of the railroad right-of-way for 1500 feet in each direction, subject to certain limitations.¹¹

The court of appeals had directed dismissal for lack of standing, invoking Indiana's general rule that, to have standing, a plaintiff must have more than a general interest in the litigation common to all members of the public.¹² In Indiana, standing has a constitutional dimension.¹³ The Indiana Constitution lacks a case or controversy requirement akin to that in the federal constitution,¹⁴ but the Indiana Supreme Court has said that it applies standing as a prudential doctrine to implement separation of powers principles.¹⁵ Standing doctrine precludes courts from becoming involved in abstract controversies or offering opinions when no one is in danger of harm; to apply standing doctrine otherwise would insert the courts too far into the provinces of the other branches.¹⁶

Cittadine reaffirmed the public standing doctrine's viability as an exception to the general rule that, to have standing, a plaintiff must have some interest greater than that of any other member of the public.¹⁷ In an opinion written by Justice Dickson, the court reviewed the lengthy history of the public standing doctrine, which states that "when a case involves enforcement of a public rather than a private right the plaintiff need not have a special interest in the matter nor be a public official."¹⁸ The doctrine eliminates the requirement that a plaintiff have an interest different than any other member of the general public to have

9. See *infra* Part II.A.

10. 790 N.E.2d 978 (Ind. 2003).

11. *Id.* at 979 (citing IND. CODE § 8-6-7.6-1 (2001)).

12. *Id.* at 979. The court of appeals' opinion is reported at 750 N.E.2d 893 (Ind. Ct. App. 2001).

13. *Cittadine*, 790 N.E.2d at 979 (citing *Ind. Dep't of Env'tl. Mgmt. v. Chemical Waste Mgmt., Inc.*, 643 N.E.2d 331 (Ind. 1994)).

14. *Cf.* IND. CONST. art. VII, with U.S. CONST. art. III, § 2.

15. *E.g.*, *Pence v. State*, 652 N.E.2d 486 (Ind. 1995).

16. *Id.*

17. *Cittadine*, 790 N.E.2d at 980-84.

18. *Id.* at 980 (quoting *Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1206 n.3 (Ind. 1990)).

standing when the object of the litigation is enforcement of a public duty.¹⁹

Justice Dickson's historical discussion of the public standing doctrine began with an 1852 case, *Hamilton v. State ex rel. Bates*,²⁰ and cited dozens of other cases employing the public standing doctrine in Indiana and other states, the most recent Indiana case being *Schloss v. City of Indianapolis*²¹ in 1990.²²

The court ruled that the public standing doctrine was not abolished by *Pence v. State*,²³ a 1995 case frequently cited to support a strict interpretation of standing principles under the Indiana Constitution.²⁴ In *Pence*, citizens sued to invalidate a law, contending that it violated the single subject matter requirement of article IV, section 19; the statute at issue primarily amended various Indiana statutes to bring them in line with the federal Americans with Disabilities Act, but a provision increasing legislative compensation was tacked on the end.²⁵ The Indiana Supreme Court refused to hear the challenge, holding that plaintiffs lacked standing because their interest in the litigation was no greater than that of any other citizen.²⁶ "For a private individual to invoke the exercise of judicial power, such person must ordinarily show that some direct injury has or will immediately be sustained."²⁷

Cittadine ruled that *Pence* did not restrict the public standing doctrine (although the court did not explain why the public standing doctrine did not support standing in *Pence*).²⁸ It cited language in *Pence* allowing for exceptions to strict standing rules and stated that the public standing doctrine was one such exception.²⁹

Although *Cittadine* affirmed the availability of the public standing doctrine "where public rather than private rights are at issue and in cases which involve the enforcement of a public rather than a private right,"³⁰ *Cittadine* himself did not fare as well.³¹ In the three-year period between the time he filed the lawsuit and the Indiana Supreme Court's decision, the Clear View Statute was amended to allow the Department of Transportation to promulgate rules varying the statutory clear view requirements under certain circumstances.³² The department had done so, and the court ruled that the department's actions mooted *Cittadine*'s

19. *Id.*

20. 3 Ind. 452 (1852).

21. 553 N.E.2d 1204 (Ind. 1990).

22. *Cittadine*, 790 N.E.2d at 980-82.

23. 652 N.E.2d 486 (Ind. 1995).

24. *Cittadine*, 790 N.E.2d at 983.

25. *Pence*, 652 N.E.2d at 487.

26. *Id.* at 488.

27. *Id.*

28. *Cittadine*, 790 N.E.2d at 983.

29. *Id.*

30. *Id.*

31. *Id.* at 984.

32. *Id.* (citing IND. CODE § 8-6-7.6-1 as amended by Pub. L. 103-2001, § 1 (2001)).

claim.³³

Cittadine's reaffirmation of the public standing doctrine may signal a new willingness by the Indiana Supreme Court to address issues under the structural constitution and other potential violations of law by public officials. In his dissent in *Pence*, Justice Dickson wrote that "[t]he majority's decision today erects an enormous, if not a prohibitive, obstacle to citizens seeking access to the courts upon claims that the General Assembly has exceeded the limits of its constitutional powers."³⁴ *Cittadine* goes a long way toward addressing that obstacle, giving plaintiffs a method to seek relief for claims that public officials are failing to carry out their statutory duties or are violating their constitutional responsibilities. The court was willing to address the public standing doctrine despite the acknowledged mootness of the plaintiff's underlying claim, indicating the court's view of the issue's importance.

B. Special Laws

Perhaps the Indiana Supreme Court's most noticed constitutional case of the year was *City of South Bend v. Kimsey*,³⁵ which invalidated an annexation statute as an impermissible "special law." The Indiana Supreme Court had not invalidated a statute under these portions of the Indiana Constitution since 1974,³⁶ although recent cases plainly laid the analytical groundwork for *Kimsey*.³⁷

The lawsuit challenged a provision of Indiana's annexation law permitting a referendum to defeat annexation.³⁸ The law generally required a vote of sixty-five percent of the residents of an area sought to be annexed to defeat annexation. But the law contained a special provision applying only to St. Joseph County (as described in the statute, a county with population between 200,000 and 300,000), which permitted annexation to be defeated in that county by a vote of only fifty percent of the residents in the area to be annexed.³⁹ The lawsuit arose when South Bend sought to annex a subdivision and sued to invalidate the special referendum provisions.⁴⁰ The city lost in the trial court and the court of appeals.⁴¹ The trial court held that the annexation provision was a general law under article IV, sections 22 and 23, and the court of appeals affirmed.⁴²

The supreme court's majority opinion, authored by Justice Boehm, reviewed the reasons for restrictions on special laws, that is, laws that apply in only one or

33. *Cittadine*, 790 N.E.2d at 984.

34. *Pence*, 652 N.E.2d at 489.

35. 781 N.E.2d 683 (Ind. 2003).

36. See *State Election Bd. v. Behnke*, 307 N.E.2d 56 (Ind. 1974).

37. The recent cases include *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996) and *Indiana Gaming Commission v. Moseley*, 643 N.E.2d 296 (Ind. 1994).

38. *Kimsey*, 781 N.E.2d at 684.

39. IND. CODE § 36-4-3-13 (2002).

40. 781 N.E.2d at 685.

41. *Id.*

42. *Id.*

a small number of locations rather than generally to all parts of the State.⁴³ First, special laws provoke “logrolling” among legislators, in which one legislator votes for a bill applying only to another legislator’s district in return for reciprocal consideration.⁴⁴ “Logrolling” is frowned upon because it causes legislators to vote based on parochial, rather than general, interests.⁴⁵ Second, the framers of the 1851 Indiana Constitution were concerned that consideration of special laws took up too much legislative time.⁴⁶ Before limits on special legislation were enacted in the 1851 Constitution, most bills passed by the General Assembly were special, rather than general, laws.⁴⁷

Indiana’s answer to this problem is contained in article IV, sections 22 and 23. Section 22 prohibits special laws in sixteen categories, including special laws providing for punishment of crimes (that is, criminal laws that apply only in some locations); granting divorces; vacating roads, town plats, streets, alleys, and public squares; summoning and empaneling juries; “[p]roviding for the assessment and collection of taxes for State, county, township, or road purposes”; “[r]egulating county and township business”; and others.⁴⁸ Section 23 states: “In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.”⁴⁹ Thus, special laws are prohibited in all the section 22 categories and are limited in other instances only to circumstances where a general law cannot be made applicable.⁵⁰

The court reviewed the historic application of these sections, which included some periods of time in which the court declined to consider whether statutes violated special law prohibitions on the theory that the constitution lacked sufficiently specific standards to be applied by the judicial branch.⁵¹ For more than half a century, however, the courts have applied sections 22 and 23, in a few cases invalidating special laws.⁵²

Importantly, for a significant period of time the court determined that statutes that effectively applied only to one locale were general, not special, if the designation of the location was made by population category rather than by

43. *Id.* at 685-87.

44. *Id.* at 685-86.

45. *Id.*

46. *Id.* at 686-87.

47. *Ind. Gaming Comm’n v. Moseley*, 643 N.E.2d 296, 299 (Ind. 1994) (citing Frank E. Horak & Matthew E. Welsh, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 109, 115-16 (1936)).

48. IND. CONST. art. IV, § 22.

49. IND. CONST. art. IV, § 23.

50. Jon Laramore, *Dispelling Myths Generated by Kimsey*, RES GESTAE 35, 37-38 (May 2003).

51. *Kimsey*, 781 N.E.2d at 687-89 (citing *Gentile v. State*, 29 Ind. 409 (1868) (claims under special laws provisions present no justiciable claim)).

52. *See, e.g., Groves v. Bd. of Comm’rs*, 199 N.E. 137 (Ind. 1936) (finding justiciable claim under special laws provisions).

name.⁵³ That is, if a statute applied to any county, city, or town of a certain population, it was considered to be a valid general law even if, in practice, it applied only to one county, city, or town.⁵⁴ The theory behind this approach was that other counties, cities, or towns could move into the population category as their populations increased or decreased.⁵⁵ Some cases decided during this period also required that there be a reasonable relationship between the object of the legislation and the population classification.⁵⁶

More recent cases rejected this approach in favor of a more literal application of the constitutional provisions.⁵⁷ As Justice Boehm wrote for the *Kimsey* majority,

[t]he terms “general law” and “special law” have widely understood meanings. A statute is “general” if it applies “to all persons or places of a specified class throughout the state.” A statute is “special” if it “pertains to and affects a particular case, person, place, or thing, as opposed to the general public.”⁵⁸

Two recent Indiana Supreme Court cases, *Indiana Gaming Commission v. Moseley*⁵⁹ and *State v. Hoovler*,⁶⁰ made it clear that the courts would examine the actual effect of a statute to determine whether it was general or special. The subterfuge of population classifications would no longer preclude analysis of the

53. See, e.g., *N. Twp. Advisory Bd. v. Mamala*, 490 N.E.2d 725 (Ind. 1986).

54. *Id.*

55. *Id.* The Indiana Supreme Court, however, apparently understood by the time of *Kimsey* that this distinction existed only in theory, not in practice. The rules for applying population restrictions in statutes state that the population of a county, city, or other political subdivision is determined once every decade by official census figures. IND. CODE § 1-1-3.5-1 to -6 (2001). Thus, a population restriction in a statute determines for a ten-year period what location is designated (for example, in the 1990s South Bend was the only city in Indiana with a population between 200,000 and 300,000). But the General Assembly historically did not permit new locales to enter population categories. Every tenth year, the General Assembly passed a law changing population categories to correspond with new census data so that new locations could not move into the population categories associated with and defining any given special law and the targeted location would remain the only location in the category. See, e.g., P.L. 170-2002. Colloquy in the *Kimsey* oral argument indicated that the supreme court was generally aware of this practice, which undermined the original rationale for holding that a law with population restrictions was “general” rather than “special.” Streaming video of the oral argument may be found at www.in.gov/judiciary/webcast/archive/oao2002.html.

56. See, e.g., *Evansville-Vanderburgh Levee Auth. Dist. v. Kamp*, 168 N.E.2d 208 (Ind. 1960).

57. See, e.g., *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996); *Ind. Gaming Comm’n v. Moseley*, 643 N.E.2d 296 (Ind. 1994).

58. *City of South Bend v. Kimsey*, 781 N.E.2d 683, 689 (Ind. 2003) (citations omitted).

59. 643 N.E.2d at 296.

60. 668 N.E.2d at 1229.

true impact of a statute.⁶¹ Justice Boehm wrote that the statutes approved in *Moseley* and *Hoovler* “would have been permissible under Article IV if they had identified the affected counties by name,” not by population, and encouraged the General Assembly to use names to identify affected locations in future special legislation to assist in analysis.⁶²

In describing *Moseley* and *Hoovler*, the majority noted that the justification for a special law may be independent of the population category.⁶³ That is, whether a statute was a valid special law did not depend on whether it was somehow appropriate to the population category designating the location where it applied, but rather on how the special law operated in practice.⁶⁴ *Hoovler* approved a special tax to address a Superfund liability in Tippecanoe County, and it did so not because Tippecanoe County was of a certain population (although the statute was written to apply only to a county in a certain population category), but rather because the county proved special circumstances justifying its special treatment under a special law.⁶⁵ *Moseley* blessed a riverboat gaming statute that permitted special referendum provisions in Lake County not because of the county’s population, but because only in Lake County, and no other county affected by the law, was the entire relevant coastline comprised of incorporated cities and towns.⁶⁶ In each of these cases, the General Assembly used a population category to designate the affected locality, but the court approved the statute because of special circumstances justifying the special law in each locality although those circumstances were independent of population.

Kimsey invoked only section 23, not section 22, because there was no contention that the law in *Kimsey* implicated any of the categories of special law prohibited by section 22.⁶⁷ The Indiana Supreme Court first determined—contrary to the holdings of the trial court and court of appeals—that the use of population categories in the annexation statute did not make the law general.⁶⁸ The court analyzed the operation of the statute, determining that it applied only in one county, St. Joseph, and that the circumstances of its enactment indicated that it was intended to apply only to St. Joseph County currently and for the

61. *Kimsey*, 781 N.E.2d at 690.

62. *Id.* at 691.

63. *Id.* The classification may also relate to the population category. For instance, the “Unigov” legislation unifying the governments of Indianapolis and Marion County relates to population because it is a governmental system designed for the largest counties in the state. Similarly, Indiana courts have upheld special laws creating superior courts in various counties. *E.g.*, *Williams v. State*, 724 N.E.2d 1070, 1084-87 (Ind. 2000). Presumably these statutes, which designate the counties by name, distribute courts in rough accord with need and therefore are related to population.

64. *Kimsey*, 781 N.E.2d at 690-91.

65. 668 N.E.2d at 1233-36.

66. 643 N.E.2d at 298-301.

67. 781 N.E.2d at 685 (raising only section 23 claim).

68. *Id.* at 693.

foreseeable future.⁶⁹

The majority then addressed the validity of the special provision.⁷⁰ The court stated that the party challenging the law must negate every conceivable basis that could support the classification, either by presenting evidence or pointing to facts of which the court could take judicial notice showing that the location lacked special characteristics justifying a special law.⁷¹

Classifications under article IV, section 23 withstand scrutiny only when they are based on inherent characteristics that separate the locations within the classification from those outside it.⁷² “In other words, for a special law to be imposed, it must be reasonably related to inherent characteristics of the territory in which it is applied, and apply equally to those [territories that] share those characteristics.”⁷³

The court addressed the proper analytical approach under section 23 at greater length in *Kimsey* than it had done before.⁷⁴ First, “[a] statute general in form ‘can be made applicable’ only if it does not violate Article I, Section 23 [the Equal Privileges and Immunities Clause]. Thus, if population classifications are arbitrary or unrelated to the characteristics that define the class, a statute general in form is nevertheless unconstitutional as a violation of Article I.”⁷⁵ The analysis under article IV is not identical to article I analysis, however. Under article IV, “[a] second consideration in whether a general law ‘can be made applicable’ is whether in fact it is meaningful in a variety of places or whether relevant traits of the affected area are distinctive such that the law’s application elsewhere has no effect.”⁷⁶ To be valid, not only must a special law be related to special characteristics of the location where it applies, but the location where it applies must be the only location possessing those special characteristics.⁷⁷

The majority determined that the proper standard under article IV, section 23 was similar to the analysis mandated under article I, section 23 by *Collins v. Day*.⁷⁸ This approach is sensible because both provisions were aimed at precluding unreasonable classifications.⁷⁹ Article 1, section 23 is designed to preclude statutes that give privileges or immunities to some, while withholding the same privileges or immunities from others similarly situated. Article 4, section 23 is designed to preclude statutes that give special treatment to certain

69. *Id.*

70. *Id.* at 694.

71. *Id.*

72. *Id.* at 692-93.

73. *Id.* at 689.

74. *Id.* at 688-89, 692-93.

75. *Id.* at 692.

76. *Id.*

77. *Id.* at 692-93. The court also noted that, historically, special laws containing population categories were upheld based on a reasonableness standard, but the majority rejected that approach as too simple.

78. *Id.* (citing *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994)).

79. *Id.* at 692-93.

locations, while withholding the same treatment to similarly situated locations.⁸⁰

In *Kimsey*, those defending the law offered several justifications for the special treatment of counties in the relevant population category.⁸¹ “But these reasons were all couched in terms of characteristics of St. Joseph County, not necessarily those possessed by a county of this population size.”⁸² These reasons included the need to preserve rural land around South Bend and the need to keep South Bend and neighboring Mishawaka from competing over annexation.⁸³ The court concluded, however, that none of these factors was unique to counties with populations between 200,000 and 300,000 or to St. Joseph County itself.⁸⁴ The majority concluded: “we are directed to nothing in the record and no relevant facts susceptible of judicial notice that are unique to St. Joseph County. Accordingly, this legislation is unconstitutional special legislation.”⁸⁵

Only Justice Sullivan dissented.⁸⁶ He argued that the history of judicial review under the special laws sections exhibited great deference to legislative judgment, in contrast to the *Kimsey* majority’s approach.⁸⁷ He expressed skepticism about invalidating legislative decisions when they do not infringe upon an enumerated individual right, restrict the political process or affect a discrete and insular minority.⁸⁸ The legislation at issue in *Kimsey* was the product of a political struggle between suburban and urban interests in which the suburban interests prevailed, Justice Sullivan wrote, and the courts should tread very carefully in this political arena.⁸⁹ He criticized the majority for giving little guidance to the legislative branch as to which of the many statutes limited in their applicability by population restrictions remain valid after *Kimsey* and what criteria the General Assembly could use to ensure that its future efforts will pass constitutional muster.⁹⁰

Kimsey did not break new analytical ground.⁹¹ It applied the framework set forth in *Moseley* and *Hoovler*, but took a different course than those two cases by invalidating a special law, finding no special circumstances to justify its application in a single location. *Kimsey* is notable not for methodological novelty, but for calling public and legislative attention to the limitations on

80. Compare *Collins*, 644 N.E.2d at 78-81 (article I, section 23), with *State v. Hoovler*, 668 N.E.2d 1229, 1233-36 (Ind. 1996) (article IV, section 23).

81. 781 N.E.2d at 694.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 697.

87. *Id.* at 698.

88. *Id.*

89. *Id.*

90. *Id.* at 698-99. Justice Sullivan did not himself posit any framework for determining whether a law violated the special law limitations. The majority suggested that Justice Sullivan’s position would provide for no judicial review under article IV, sections 22 and 23. *Id.* at 695-96.

91. Laramore, *supra* note 50, at 35.

special laws and enforcing the constitutional limits according to thoroughly articulated principles.

C. Uniform and Equal Taxation

At the height of public furor over the property reassessment mandated by *Department of Local Government Finance v. Town of St. John*,⁹² the Indiana Supreme Court brought additional predictability to the principles governing property taxation—and perhaps foreshadowed approval of various methods of reducing the burden on certain taxpayers.⁹³ It did so in two cases, *Department of Local Government Finance v. Griffin*⁹⁴ and *State Board of Tax Commissioners v. Inland Container Corp.*⁹⁵

Griffin challenged the method for calculating the Health Care for the Indigent (HCI) tax, a levy designed to support emergency health care for those unable to pay for it.⁹⁶ HCI began as a county program, supported by a property tax levy, under which county governments paid the cost of emergency medical care.⁹⁷ In the 1990s, the program was centralized at the state level, relieving counties of the burdens of administering the program and creating a centralized fund to attract federal Medicaid money to augment the property tax levy as a source of payment for indigent health care.⁹⁸ When the program became centrally administered, property tax rates for the HCI program were set by a statutory formula based on each county's historic cost of providing indigent health care, increased annually by a statewide growth factor.⁹⁹ By the time the lawsuit was filed, the statutory formula dictated seventy-two different tax rates in Indiana's ninety-two counties.¹⁰⁰

The heart of *Griffin*'s complaint was that HCI had become a State program, so it should be supported by a property tax applied at a uniform rate across the

92. *State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E.2d 657 (Ind. 2001) (limited to question of attorneys' fees); *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998); *Town of St. John v. State Bd. of Tax Comm'rs*, 695 N.E.2d 123 (Ind. 1998); *Boehm v. Town of St. John*, 675 N.E.2d 318 (Ind. 1996); *Town of St. John v. State Bd. of Tax Comm'rs*, 729 N.E.2d 242 (Ind. Tax Ct. 2000); *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); *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).

93. *E.g.*, Mary Beth Schneider, *Hoosiers Call for Tax Bill Relief*, INDIANAPOLIS STAR, July 28, 2003; Steve Walsh, *Tax Bill Sticker Shock Likely*, GARY POST-TRIB., Aug. 7, 2003.

94. 784 N.E.2d 448 (Ind. 2003).

95. 785 N.E.2d 227 (Ind. 2003).

96. 784 N.E.2d at 450-51.

97. *Id.* at 454.

98. *Id.*

99. *Id.* at 451.

100. *Id.* at 455.

State rather than the dozens of rates established by the statutory formula based on historic costs.¹⁰¹ He argued that the uniform rate was mandated by article X, section 1's requirement that all property in the State be assessed and taxed at a uniform and equal rate.¹⁰² As a resident of Lake County, Griffin paid at a higher rate than most other counties.¹⁰³

In addressing Griffin's claim, the Indiana Supreme Court noted the General Assembly's broad power in the area of taxation, fettered only by the Indiana Constitution.¹⁰⁴ It reiterated the well-known principle of property taxation that "[u]niformity in rate, as required by the Constitution, means that the same rate shall apply alike to all in any given taxing district."¹⁰⁵ The court continued that "as a general proposition, article 10 requires that a tax for a state purpose must be uniform and equal throughout the State, a tax for a county purpose must be uniform and equal throughout the county, and so forth."¹⁰⁶

The court also stated that the restrictions of article X have largely been aimed at assessments, indicating skepticism about applying the clause to rates.¹⁰⁷ The history of the adoption of article X and many cases applying it have emphasized that the uniformity and equality requirement was meant to ensure that all property was assessed on the same basis, so that everyone's tax bill was calculated from a common foundation.¹⁰⁸ Although the court did not discuss the *Town of St. John* case in *Griffin*, *Town of St. John* illustrated this principle through its requirement that all property be assessed based on objective indicia of value that are subject to measurement to ensure that all property is valued on a comparable basis.¹⁰⁹

The court next examined the nature of the HCI program, determining that it was neither a wholly State nor wholly county program.¹¹⁰

The nature of a tax is determined by its operation and incidence rather than by legislative title or designation. On this basis, the HCI tax cannot be simply classified as a "local" or "state" tax because the facts surrounding the tax and its operation demonstrate that it is part of a combined effort by local, state, and federal governments.¹¹¹

Paying for indigent health care was historically an entirely local responsibility, but management of the program was later taken over by the State in a manner

101. *Id.* at 450-51.

102. *Id.*

103. *Griffin v. Dep't of Local Gov't Fin.*, 765 N.E.2d 716, 724 (Ind. Tax Ct. 2002).

104. *Griffin*, 784 N.E.2d at 452.

105. *Id.*

106. *Id.* at 452-53.

107. *Id.* at 453-54.

108. *Id.*

109. *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034, 1040-41 (Ind. 1998).

110. *Griffin*, 784 N.E.2d. at 454-55.

111. *Id.* at 454 (internal citation omitted).

designed to attract additional federal money to the program.¹¹² Because of the joint nature of the program, the court declined to label it “state” or “local.”¹¹³

The court then noted that each county’s tax rate was based on that county’s individual historical cost for administering HCI, inflated by a statewide growth factor.¹¹⁴ This method for setting the HCI tax rate did not differ in concept, the court wrote, from the way in which most other property tax rates are set in Indiana.¹¹⁵ Each unit of government—county, city, town, township, school district, library district, solid waste district, and a variety of others—has its own tax rate based on its individual costs as expressed in budgets set by publicly accountable officials.¹¹⁶ Any individual’s tax rate is the sum of the rates set by the county, township, school district, city or town, and other political subdivisions in which that individual lives. In this context, the court wrote, “we are hard pressed to see the constitutional evil in a program involving money from three levels of government that sets the rate of local contribution so that it varies in harmony with expenses for indigent health care in the local area.”¹¹⁷ Especially because the payment for indigent health care costs was historically a local responsibility, the court approved the statutory formula basing each county’s tax rate on its historical experience.¹¹⁸

The court ended its opinion with further explanation that the net result of the HCI system as currently operated is to generate more dollars to pay health care costs without increasing property taxes.¹¹⁹ Because the HCI program attracts matching federal Medicaid money, localities such as Lake County with historically high HCI costs now must raise far less through their property tax levies than they would have had to raise if the centralized system attracting Medicaid had not been instituted.¹²⁰ The court noted that Lake County had historically received far more HCI service than any other county.¹²¹ The court provided figures to show that, even with its high HCI rate, Lake County health care providers still receive more from the program than its taxpayers pay in.¹²² Given these facts, the court ruled that the General Assembly acted within its broad discretion in the taxing area in designing the HCI system.¹²³ Justice Dickson dissented without opinion.¹²⁴

112. *Id.*

113. *Id.* at 455.

114. *Id.*

115. *Id.* at 455-56.

116. *See generally* IND. CODE § 6-1.1-17, -18 (1998). Rates may be found at www.in.gov/dlgf/taxrates.

117. *Griffin*, 784 N.E.2d at 456.

118. *Id.* at 457.

119. *Id.* at 457-59.

120. *Id.*

121. *Id.* at 459.

122. *Id.* at 458 n.14.

123. *Id.* at 459.

124. *Id.*

The court further explained the requirements of article X, section 1 in *Inland Container Corp. v. State Board of Tax Commissioners*,¹²⁵ a case addressing legislative authority in the area of property tax credits, deductions, abatements and other “tax policy” tools. Inland Container applied for and was granted a Resource Recovery System property tax deduction for its mill in Vermillion County, which disposed of recycled paper.¹²⁶ Before it could take the deduction, however, the General Assembly repealed the deduction for taxpayers such as Inland, which had not yet been able to take advantage of it.¹²⁷ For other taxpayers that already had been able to use the deduction, in contrast, the General Assembly phased out the deduction over a period of years.¹²⁸ Thus, in some years in which Inland Container was not permitted the deduction, other taxpayers could use the deduction solely because they had applied for it before Inland Container was able to do so.¹²⁹

The tax court invalidated the legislative enactment as violating the uniformity and equality requirements of article X, stating that the legislative classification “allowed some taxpayers with comparable properties to obtain the RRS deduction on a phased out basis for the 1994 to 1997 assessment years, while other taxpayers, such as Inland, were altogether denied the RRS deduction [in the same years].”¹³⁰ The State argued that the tax court erred because deductions such as the one at issue in this case are not “property assessment and taxation,” which is the subject of article X, section 1, and therefore deductions do not have to meet the uniformity and equality requirements.¹³¹

The Indiana Supreme Court approved the legislation.¹³² Justice Dickson wrote for a unanimous court that “[m]ost, if not all, legislative changes in tax policy arguably create interim temporal disparities. Article 10 contemplates legislative modifications of tax policies and is not automatically violated whenever tax policies change.”¹³³ Article 10 is not violated just because one property receives a deduction in a given year and, because of statutory changes, a comparable property does not.¹³⁴ “[T]here is no constitutional violation simply because tax policies applicable in one year are different from those applicable in another year, or because tax legislation may employ a transitional or graduated elimination of prior tax policies or implementation of new ones.”¹³⁵

In these decisions, the court provided significant new interpretations of the

125. 785 N.E.2d 227 (Ind. 2003).

126. *Id.* at 228.

127. *Id.* (citing Pub. L. 25-1995, § 104(b) (amending IND. CODE § 6-1.1-12-28.5 (2003))).

128. *Id.*

129. *Id.*

130. *Inland Container Corp. v. State Bd. of Tax Comm’rs*, 756 N.E.2d 1109, 1119 (Ind. Tax Ct. 2001).

131. *Inland Container*, 785 N.E.2d at 229.

132. *Id.* at 229-30.

133. *Id.* at 229.

134. *Id.* at 229-30.

135. *Id.* at 230.

uniformity and equality requirements of article X, section 1. *Town of St. John* held that article X, section 1 requires a uniform, objectively verifiable basis for property tax assessments.¹³⁶ *Griffin* goes further, allowing disparities in tax rates, even for a statewide program. *Griffin* shows substantial deference to the Indiana General Assembly in applying historical and practical considerations in creating a taxing scheme.¹³⁷ *Inland Container* is perhaps even more important in the current environment, giving wide berth to legislative judgments about tax policy and declining to apply strict uniformity requirements to tax policy devices such as deductions.¹³⁸

As the Indiana General Assembly addresses the effects of the 2002 reassessment (effective in tax bills received in 2003 and 2004), these decisions give the General Assembly room to employ various devices, including tax credits and deductions, to blunt undesirable effects of reassessment and to achieve other policy objectives.¹³⁹

D. Distribution of Powers

It is appropriate to end this discussion of decisions under the structural constitution with *Peterson v. Borst*,¹⁴⁰ a decision not explicitly constitutional in content but that clearly displays the Indiana Supreme Court's view of its role in the constitutional system. The case addressed the redistricting of City-County Council districts in Marion County mandated by the 2000 census.¹⁴¹ The City-County Council adopted a redistricting plan, voting strictly along party lines.¹⁴² The mayor vetoed the redistricting ordinance, and no override vote was taken.¹⁴³

By statute, when no redistricting ordinance is adopted, any person may "petition the superior court of the county to hear and determine the matter," and the superior court is required to address the matter *en banc*.¹⁴⁴ In this case, the City-County Council President petitioned the superior court to adopt the plan that had been passed by the council's majority; the minority leader of the council joined the litigation and sought appointment of a special master to draw districts.¹⁴⁵ After holding a "trial" *en banc*, the superior court voted—again

136. State Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034, 1040-41 (Ind. 1998).

137. Griffin v. Dep't of Local Gov't Fin., 784 N.E.2d 448, 452, 456-59 (Ind. 2003).

138. 785 N.E.2d at 229-30.

139. Article 10, section 1, which mandates uniform and equal taxation, is the subject of a proposed constitutional amendment that will be presented to voters in November 2004. The amendment would expand the kinds of property that the legislature could exempt from taxation to include residences and all tangible personal property except that which is held for investment. Pub. L. 278-2003.

140. 786 N.E.2d 668 (Ind. 2003).

141. *Id.* at 669-71.

142. *Id.* at 670.

143. *Id.*

144. *Id.* (quoting IND. CODE § 36-3-4-3 (1998)).

145. *Id.* at 671.

along party lines (superior court judges in Marion County are elected on a partisan ballot)¹⁴⁶—to adopt the plan that originally had been adopted by the council’s majority.¹⁴⁷ The council minority appealed, and the supreme court accepted the case on an expedited basis under its emergency authority.¹⁴⁸

In a unanimous *per curiam* decision,¹⁴⁹ the court held that the superior court violated its duty of independence and neutrality when it adopted one political party’s redistricting map.¹⁵⁰ The court noted that this duty is embodied in Indiana’s Code of Judicial Conduct and has been expressed by federal courts in similar situations.¹⁵¹ “Based on the unchallenged principle of judicial independence and neutrality, we hold that in resolving partisan redistricting disputes, Indiana judges must consider only the factors required by applicable federal and State law.”¹⁵² In other words, judges are forbidden from considering the partisan political consequences of redistricting because neither the constitution nor statutes permit them to do so. The court concluded that the superior court’s approval of the council majority’s plan unavoidably introduced at least the appearance of political considerations into the judicial process, requiring that district boundaries be redrawn.¹⁵³

When a court is assigned to draw up districts, it must do so in a neutral manner, looking only at the districting requirements in the statute (here, compactness subject to natural boundaries; equal populations; and adherence to existing precinct boundaries).¹⁵⁴ The court indicated that in rare circumstances, a reviewing court could adopt a plan submitted by one of the parties to redistricting litigation, but “we remain convinced that when faced with a politically polarized redistricting dispute like the one in this case, a court’s

146. IND. CODE § 33-5.1-2-8 (1998).

147. *Peterson*, 786 N.E.2d at 671.

148. *Id.* See IND. APP. R. 56(A).

149. The court explained that it handled the case in an unusual way because of the need for a speedy decision before the primary election date. Aside from speeding up the entire briefing and argument process,

[o]ur own decision-making has been treated as a matter of urgency, in which we have dispensed with certain customs. Once it became apparent that there was not a majority to affirm the Superior Court’s judgment, we have concentrated on fashioning a remedy. As is sometimes the case in appellate courts, today’s *per curiam* does not necessarily reflect the initial position of each of the members. In light of the press of time, we have joined in today’s decision without taking the time required to iron out or explicate those differences.

Peterson, 786 N.E.2d at 671. This statement indicates that the court dispensed with the analysis that would otherwise have been necessary to fully explain its decision, perhaps including separate opinions.

150. *Id.* at 673-74.

151. *Id.* at 672-74 (citing Ind. Jud. Conduct Canons 1(A), 2(A), 2(B), 3(b)(2)).

152. *Id.* at 672.

153. *Id.* at 673, 676.

154. *Id.* at 677 (citing IND. CODE § 36-3-4-3 (1998)).

adoption of a plan that represents one political party's idea of how district boundaries should be drawn does not conform to the principle of judicial independence and neutrality."¹⁵⁵

The court expressed confidence that the superior court could, on remand, adopt a redistricting plan conforming to neutral principles, but the court found that the time pressure of the upcoming primary precluded remand.¹⁵⁶ The day after hearing argument, therefore, the court required the parties to submit in digital form all of the information used to draw city-county council districts—but with every bit of information indicating the political consequences deleted.¹⁵⁷ With this information, the court itself used a redistricting computer program to draw new city-county council districts.¹⁵⁸ In doing so, the court stated, it gave “primary consideration” to the statutory factors and obviously acted without reference to electoral consequences, since the court had no information on the political affiliations of voters in the new districts.¹⁵⁹ The court attached maps of the new districts to its opinion and posted the maps on its Internet site.¹⁶⁰ The court also extended the statutory deadlines for candidates to indicate which districts they intended to run in, or whether they intended to run at large, so that they could adjust their conduct to the new maps.¹⁶¹

In issuing its opinion, the court noted that its decision was not necessarily the end of the dispute.¹⁶² The parties still had time—if the council and the mayor could agree—to adopt a new map before the primary election.¹⁶³ If the council and mayor could overcome political differences to agree on a redistricting plan, that plan would supercede the map drawn by the court.¹⁶⁴ The political actors did not attempt this approach, however.

This opinion shows the Indiana Supreme Court's view of itself in the governmental system established by articles III through VII of the Indiana Constitution. First, the court views itself as scrupulously nonpolitical. Although it must make decisions with highly charged political consequences, it strives to do so in a neutral manner in accordance with the nonpolitical judicial role.¹⁶⁵

155. *Id.* at 675-76.

156. *Id.* at 676.

157. *Id.* at 676-77. The Court's order stated that the data “shall not include individual or collective information about voting histories, political party affiliations, incumbency information, voting projections, or political data of that nature. This information is not relevant to the court's review.” *Id.* at 677.

158. *Id.*

159. *Id.*

160. *Id.* at 692-94.

161. *Id.* at 679.

162. *Id.* at 678.

163. *Id.*

164. *Id.*

165. *E.g., id.* at 676-78. *D & M Healthcare v. Kernan*, 800 N.E.2d 898 (Ind. 2003), a case decided after the time period covered by this Article, well illustrates this principle. In it, the court concluded that the Governor's method of returning vetoes was valid under article IV, section 14.

Second, the court views itself as supreme within the Judicial Branch. The statute at issue in this case did not explicitly give the supreme court authority to draw legislative districts.¹⁶⁶ But because the matter was committed to the Judicial Branch for resolution, the court believed that it had both the competence and the authority to give the matter plenary consideration.¹⁶⁷ The court opined that it could have remanded the matter to the Marion Superior Court for resolution, but declined to do so because of temporal exigencies and instead constructed the remedy itself from scratch.¹⁶⁸ Third, the court is able to address complex matters on tight deadlines. Here, the case proceeded from notice of appeal on February 14, 2003, through expedited briefing and argument, submission of digital information on districting, to release of an opinion and remedy constructed by use of the latest technology on March 19, 2003—a total time of only forty-seven days.¹⁶⁹

II. THE RIGHTS CONSTITUTION

Two provisions of Indiana's Bill of Rights, the Open Courts Clause of article I, section 12 and the Equal Privileges and Immunities Clause of article I, section 23, continue to be sources of dispute, and the law remains unsettled on some important aspects of these provisions. Cases applying these provisions in the most recent year addressed, but did not settle, significant analytical issues.

A. *Equal Privileges and Immunities Clause*

Article I, section 23 addresses the limits placed upon legislative classifications—asking when the legislature may treat two classes in differing manners. A central question in this analysis, arising first in *McIntosh v. Melroe Co.*¹⁷⁰ and still unanswered in a manner satisfactory to all justices of the Indiana Supreme Court, is how to define the classes being compared in section 23 analysis.

When the Indiana Supreme Court first set the standard for reviewing claims under the Equal Privileges and Immunities Clause, it clarified that the standard differed from federal equal protection analysis.¹⁷¹ The federal standard has long featured differing levels of scrutiny depending on the kind of classification or rights involved, and the Indiana Supreme Court rejected the idea of levels of scrutiny in section 23 analysis. “The protections assured by section 23 apply fully, equally, and without diminution to prohibit any and all improper grants of unequal privileges or immunities, including not only those grants involving

It did so even though the effect of its decision was to deny a pay raise to legislators and judges.

166. *Id.* at 676 (council majority leader argued that supreme court lacked authority to draw districts).

167. *Id.* at 676-77.

168. *Id.* at 676.

169. *Id.* at 671 (notice of appeal), 668 (date of issuance of opinion).

170. 729 N.E.2d 972 (Ind. 2000).

171. *Collins v. Day*, 644 N.E.2d 72, 74-75 (Ind. 1994).

suspect classes or impinging upon fundamental rights but other such grants as well.”¹⁷² Law students long have been taught that the trick to winning or losing an equal protection case was to get into the right level of scrutiny, because showing that a “suspect class” or “fundamental right” was at issue would require application of “strict scrutiny” and almost guarantees that the classification will be invalidated.¹⁷³ The Indiana Supreme Court avoided that analytical pitfall, but ironically created a new one involving how to define the classes to be compared. Several cases decided in the most recent year illustrate this problem.

1. *Zoning*.—In *Dvorak v. City of Bloomington*,¹⁷⁴ the Indiana Supreme Court rejected an Equal Privileges Clause challenge to zoning restrictions that apply to unrelated individuals. A Bloomington ordinance restricted property in certain zones from being occupied by more than four adults unrelated by blood, marriage or adoption.¹⁷⁵ In these “family residential” zones, families of any size and non-families consisting of fewer than four unrelated adults were permitted.¹⁷⁶ Landlords challenged this ordinance, claiming that it violated the equal privileges of unrelated persons because the ordinance did not preclude more than four related adults from living together.¹⁷⁷

Plaintiffs claimed that there was no valid basis for the ordinance because the impact on traffic, parking, utilities, trash, noise and the like was the same from any household containing more than four adults, whether those persons were related or unrelated.¹⁷⁸ Under *Collins*’s framework, they argued, there were no inherent differences between groups of more than four unrelated persons and groups of more than four related persons justifying the different treatment.¹⁷⁹

The court made two points regarding analysis under section 23.¹⁸⁰ First, because the landlords were challenging the ordinance, it was up to them to negate any conceivable basis for it; the city had no burden of proof to show valid reasons for the classification.¹⁸¹ Second, the Equal Privileges Clause focuses only on different legislative treatment.¹⁸² Contrary to the thrust of the landlords’ argument, the *treatment* of different classes, not the *purposes* of the legislation, must be reasonably related to inherent characteristics of the differently treated groups.¹⁸³

The court unanimously approved the classification, holding that “considering

172. *Id.* at 80.

173. *E.g.*, RONALD D. ROTUNDA & JOHN E. NOVAK, TREATISE ON CONSTITUTIONAL LAW § 18.3, at 213-20 (3d ed. 1999) (emphasizing standards of review).

174. 796 N.E.2d 236 (Ind. 2003).

175. *Id.* at 237 (citing Bloomington Municipal Code 20.02.01.00).

176. *Id.*

177. *Id.*

178. *Id.* at 238.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 238-39.

183. *Id.* at 239.

whether groups are or are not families is obviously related to determining whether to exclude them from districts zoned for family residential use.”¹⁸⁴ The court ruled that “limiting multiple-adult households in single family residential zones to families, and excluding non-families, is reasonably related to the difference between families and non-families.”¹⁸⁵

In *Dvorak*, the court reiterated and applied settled analytical methods, and there was no dispute (either between the parties or among the court) as to the classifications to be compared. The makeup of the classifications was not disputed, only whether the classifications related to the subject matter of the ordinance. The court affirmed the appropriateness of categorizing families differently from unrelated persons and rejected the plaintiffs’ reliance on the purpose of the law rather than the treatment of affected classifications.

2. *Medicaid Payment for Abortions.*—The court’s decision in *Humphreys v. Clinic for Women, Inc.*¹⁸⁶ displayed the uncertainty around how to determine which categories to compare for section 23 purposes.

The plaintiffs in *Humphreys* attacked the provisions of Indiana’s Medicaid program that restricted Medicaid reimbursement for certain abortions.¹⁸⁷ Indiana Code section 12-15-5-1(17) restricts Medicaid payments for abortions to cases in which the mother’s life is in danger or when the pregnancy was caused by rape or incest. Outside the abortion area, in contrast, Medicaid pays for “virtually all non-experimental, medically necessary health care, including some services for which federal reimbursement is not available.”¹⁸⁸ The plaintiffs complained that pregnant women were treated unconstitutionally by Indiana’s Medicaid program because they could receive Medicaid payment for all “medically necessary” procedures except abortions, which were covered more selectively.¹⁸⁹

Indiana’s statutory restriction on Medicaid payment for abortions mirrored federal law.¹⁹⁰ The U.S. Supreme Court determined in 1980 that the federal “Hyde Amendment”—stating that federal Medicaid funds could only be used for abortions when the mother’s life is in danger or when the pregnancy was caused by rape or incest—did not violate the Federal Constitution.¹⁹¹

184. *Id.* at 239-40. The U.S. Supreme Court has recognized a fundamental constitutional right for persons related to one another to live under the same roof. *Moore v. City of E. Cleveland*, 431 U.S. 494, 537-38 (1977). Under *Moore*, Bloomington likely could not have restricted its definition of “family” to four or fewer related adults.

185. *Dvorak*, 796 N.E.2d at 239.

186. 796 N.E.2d 247 (Ind. 2003).

187. Medicaid pays for medical care for eligible low-income persons. It is a joint federal-state program governed by a complex and lengthy series of federal and state statutes and rules. Participating states must comply with federal statutes and rules. Medicaid pays claims submitted by health care providers; it does not directly pay eligible low-income persons. *Id.* at 249-50.

188. *Id.* at 250.

189. *Id.* at 254.

190. *Id.* at 249-50.

191. *Id.* at 250 (citing *Harris v. McRae*, 448 U.S. 297 (1980)).

Medicaid payments comprise both State and federal funds.¹⁹² For most covered medical procedures, the federal government matches State expenditures at a rate of approximately two to one.¹⁹³ For abortions prohibited by the Hyde Amendment, however, no federal funds are available.¹⁹⁴ Thus, if states choose (or are constitutionally required) to cover those procedures, they must pay for the abortions with state funds only.¹⁹⁵ Under section 23, the court applies a two-step analysis: “First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.”¹⁹⁶ Courts are to be deferential to legislative discretion in applying this standard.¹⁹⁷ The *Humphreys* trial court had concluded that the statutory limitation on Medicaid payment for abortions facially violated the Equal Privileges and Immunities Clause because the Medicaid benefit was not provided equally to all.¹⁹⁸ That is, certain Medicaid-eligible women could not receive Medicaid reimbursement for a “medically necessary” abortion (it was undisputed that some abortions are medically necessary but neither threaten the mother’s life nor are caused by rape or incest) although all other eligible men and women would receive reimbursement for other “medically necessary” treatments.¹⁹⁹

In analyzing the plaintiffs’ claims, the court first had to determine how to define the legislative categories at issue in the case:

The parties here define the relevant classification differently. The plaintiffs contend (and the trial court agreed) that the legislative classification at issue places (1) “indigent men and indigent women who need treatment (other than abortion) which is medically necessary to preserve their health” into a class for which the necessary treatment is provided, and (2) “indigent pregnant women needing to terminate their pregnancy to preserve and protect their health” into a class for which the necessary treatment is not provided. The State argues that the relevant classification is between (1) “medically necessary services and supplies” for which federal Medicaid reimbursement at some level is available (a class that includes abortions to save a woman’s life and where pregnancy resulted from rape or incest) and (2) medically necessary services and supplies for which it is not (a class that includes all other medically

192. *Id.* at 249.

193. *Id.* at 249-50. In 2000, the federal rate was 61.7%. Indiana Medicaid Program, *FY 2000 Annual Report*, www.in.gov/fssa/servicedisabl/mcicaid/2000report.pdf.

194. *Humphreys*, 796 N.E.2d at 249-50, 255.

195. *Id.* at 255.

196. *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994).

197. *Id.*

198. *Humphreys*, 796 N.E.2d at 252.

199. *Id.*

necessary abortions).²⁰⁰

Justice Sullivan, who authored the majority opinion, began his analysis of which classification scheme was appropriate by quoting another key section 23 opinion, *McIntosh v. Melroe Co.*: “It is the claim, not any innate characteristic of the person [i.e. plaintiff], that defines the class.”²⁰¹ In *McIntosh*, where each side also asserted a different definition of the relevant classifications, the majority opinion held that the relevant characteristics for section 23 purposes were not necessarily innate in the plaintiffs.²⁰² Rather, courts should look to the outlines of the legal claim to determine the relevant categories for section 23 purposes.²⁰³

With little additional analysis, the *Humphreys* majority stated that “[w]e think the claim here, reduced to its essentials, is that some Medicaid-eligible pregnant women in Indiana are entitled to Medicaid-financed medically necessary abortions and others are not. We think this ‘claim . . . defines the class’”²⁰⁴ Justice Sullivan noted that although the majority’s definition “differs somewhat from those advanced by the parties,” the classes were sufficiently similar to both parties’ submissions as to preserve all the arguments the parties advanced.²⁰⁵

The majority went on to address the merits of the plaintiffs’ claim that the Medicaid statute facially violated the Equal Privileges and Immunities Clause, looking first at whether inherent differences between the classes justified different treatment.²⁰⁶ He quoted the plaintiffs’ claim that the class ineligible for Medicaid payment for medically necessary abortions is “inherently the same in ways that relate directly to the subject matter of the Medicaid legislation” as the class that gets payment for other medically necessary medical treatment: both groups are eligible for Medicaid and seek “medical care for which they have a medical need.”²⁰⁷ The only difference between the two groups is that one group seeks abortion while the other seeks other treatment, and that difference does not

200. *Id.* at 253-54 (citations omitted).

201. *Id.* at 254 (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 981 (Ind. 2000)).

202. *McIntosh*, 729 N.E.2d at 981.

203. *Id.* Justices Dickson and Rucker dissented in *McIntosh*, arguing that classifications for section 23 purposes must focus upon the “unequally treated class of *people*. When a statute is challenged as violating Section 23, we must evaluate the disparate treatment afforded to the benefited or burdened class.” 729 N.E.2d at 992 (emphasis in original). *McIntosh* analyzed a products liability statute of repose. The majority focused on the difference between older and newer products, finding inherent differences permitting different treatment of older products. The dissenters focused on persons injured by products, finding no inherent differences between persons injured by older products and persons injured by newer products.

204. *Humphreys*, 796 N.E.2d at 254.

205. *Id.*

206. *Id.* at 254-57.

207. *Id.* at 255.

relate to the subject matter of Medicaid, they argued.²⁰⁸

The State advanced three justifications for its statute.²⁰⁹ First, because federal funds are not available for the abortions at issue, it would not be fiscally prudent or administratively convenient to cover those abortions.²¹⁰ Second, the State has a compelling interest in protecting fetal life.²¹¹ Third, the State advanced other reasons of fiscal and administrative efficiency to justify the statute, arguing that State officials should be able to control fiscal policy.²¹²

The court determined that the section 23 analysis involved balancing the State's justifications against the problem identified by the plaintiffs, a characterization that departs from the traditional focus in article I, section 23 cases on whether "inherent difference" in the classes reasonably relate to their different treatment.²¹³ In undertaking the balancing, the court described the plaintiffs' uncontroverted evidence that women confront serious health risks in pregnancy that may be alleviated by abortions that are not covered by Indiana's Medicaid program.²¹⁴ In light of this evidence, the court reformulated the issue in the case as

whether the Legislature may prohibit the State from paying for an abortion for a Medicaid-eligible pregnant woman facing any of these health risks while at the same time it authorizes the State to pay for an abortion to preserve the life of a Medicaid-eligible pregnant woman or where the pregnancy was caused by rape or incest.²¹⁵

The majority on this issue, made up of Justices Sullivan and Dickson and Chief Justice Shepard, concluded that the State's interests in protecting fetal life and the State's fisc and advancing administrative efficiency outweighed the plaintiffs' interests.²¹⁶ While acknowledging the negative consequences for low-income women, the majority concluded that the State's justifications were not arbitrary or manifestly unreasonable, and therefore withstood analysis under the first prong of *Collins*.²¹⁷

The majority also concluded that the statute satisfied the second *Collins* prong, whether the treatment accorded the class is provided to all who share the inherent characteristics that justify the class.²¹⁸ The majority found that

because the plaintiffs "challenge not the provision of Medicaid benefits

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 256.

214. *Id.*

215. *Id.* at 256-57.

216. *Id.* at 257.

217. *Id.*

218. *Id.*

to indigent people generally, but rather the deprivation of Medicaid benefits to some who seek abortions, it is clearer to frame the issue as whether that deprivation is uniformly applicable to all who share the inherent characteristics that justify the classification.”²¹⁹

Because Indiana Medicaid pays for abortions for all those who require it to preserve their lives or whose pregnancies resulted from rape or incest, the second prong was met.²²⁰

The court then went on to address the plaintiffs’ as-applied challenge to the statute, and the three-justice majority shifted.²²¹ The majority in the as-applied portion of the case consisted of Justices Sullivan, Boehm and Rucker.²²² The as-applied claim related not to all pregnant women, but only those with pregnancies that “create serious risk of substantial and irreversible impairment of a major bodily function.”²²³ The majority did not draw this classification from thin air, but rather from other abortion-related statutes on the books in Indiana.²²⁴ The General Assembly identified this group as meriting special treatment in Indiana’s abortion-control law.²²⁵ Women with pregnancy-related conditions that create serious risks of substantial and irreversible impairment of a major bodily function are exempted from the usual eighteen-hour waiting period other women must undergo before having abortions.²²⁶ Thus, the General Assembly concluded that these women already are entitled to special treatment because of their health conditions.²²⁷

The majority then concluded that “the characteristics that distinguish Medicaid-eligible pregnant women whose pregnancies create serious risk of substantial and irreversible impairment of a major bodily function [are] virtually indistinguishable from the characteristics of women for whose abortions the State does pay.”²²⁸ They found no inherent characteristics justifying different treatment of women whose pregnancies create serious risks of substantial or irreversible impairment of a major bodily function as compared to women whose pregnancies placed their lives in danger.²²⁹

The State argued that its different treatment of abortions where the mother’s

219. *Id.* (quoting Brief of Appellants at 23).

220. *Id.*

221. *Id.* at 257-59.

222. *Id.* at 260.

223. *Id.* at 257.

224. *Id.* (quoting IND. CODE § 16-18-2-223.5 (1998)).

225. *Id.* at 259.

226. *Id.* (citing IND. CODE §§ 16-18-2-223.5 and 16-34-2-1.1).

227. *Id.* at 259. This “medical emergency” exception to abortion waiting period statutes is constitutionally required. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *A Woman’s Choice—E. Side Women’s Clinic v. Newman*, 671 N.E.2d 104, 107-10 (Ind. 1996) (construing Indiana law in response to certified question).

228. *Humphreys*, 796 N.E.2d at 258.

229. *Id.*

life is at stake or the pregnancy was caused by rape or incest was justified by “medical, moral, social, and ethical concerns.”²³⁰ The majority rejected this assertion, stating that risk to the woman’s life clearly related to medical, moral and ethical concerns that might justify different treatment, but the State’s inclusion of pregnancies caused by rape or incest did not rise to the same life-threatening level.²³¹ The majority wrote:

[I]f the “medical, moral, social, and ethical concerns” that justify Medicaid-funded abortions do not *require* that the life of the pregnant woman be at stake, what are the inherent characteristics that distinguish the abortions permitted by the “preserve the life, rape, or incest” classification from cases where the pregnant woman faces substantial and irreversible impairment of a major bodily function?²³²

The majority could find no dividing line, and it concluded that the State’s different treatment of women facing potential substantial and irreversible impairment of a major bodily function as compared to those whose life was at risk could not be justified, especially given that both groups were treated identically for purposes of the abortion-control law.²³³ The court therefore held the statute unconstitutional as applied, requiring the Medicaid program to pay for abortions for women facing substantial and irreversible impairment of a major bodily function as well as those whose lives were at risk and whose pregnancies resulted from rape or incest.²³⁴

Three justices wrote separately.²³⁵ Chief Justice Shepard, who was in the majority on the facial challenge, but not the as-applied portion of the opinion, wrote briefly to state his view that the legislatively drawn lines at issue in the case are not “so arbitrary and unreasonable that they are unconstitutional.”²³⁶

Justice Dickson, also in the majority on the facial challenge but not the as-applied portion, wrote at greater length about section 23 analysis.²³⁷ Justice Dickson wrote *Collins*, the opinion that set the standard applied in *Humphreys* and other section 23 cases.²³⁸

Justice Dickson first addressed the facial challenge, stating his preference to address the specific classifications that were identified by the plaintiffs-appellees and trial court as receiving *unequal* treatment: (1) indigent men and women who need treatment (other than abortion) which is medically necessary to preserve their health, and (2) indigent

230. *Id.* (quoting Brief of Appellants at 18).

231. *Id.* at 258-59.

232. *Id.* at 258 (emphasis in original).

233. *Id.* at 258-59.

234. *Id.* at 259-60.

235. *Id.* at 260.

236. *Id.*

237. *Id.* at 260-64.

238. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

pregnant women needing to terminate their pregnancy to preserve and protect their health but whose pregnancies do not threaten their lives and were not the result of rape or incest.²³⁹

Justice Dickson stated that these classifications compare the treatment received by the two groups, and “[t]his disparate treatment is clearly related to the inherent characteristic that distinguishes the unequally treated classes: namely, the medical treatment in the second classification, abortion, requires the termination of fetal life.”²⁴⁰ This difference is inherent and legitimate, Justice Dickson wrote, and justifies the different treatment.²⁴¹

Justice Dickson went on to criticize the majority’s as-applied analysis.²⁴² He criticized the majority for comparing the group of women whose pregnancies present a serious risk of substantial and irreversible impairment of a major bodily function with “a single classification [of] both those abortions needed to preserve the life of a pregnant woman and those abortions for pregnancies resulting from rape and incest.”²⁴³ Rather, he suggested, two comparisons are necessary. First, the group of women whose pregnancies present a serious, but not life-threatening, health risk should be compared to those whose pregnancies threaten their lives.²⁴⁴ Second, the group of women with serious, but not life-threatening health conditions should be separately compared to women whose pregnancies resulted from rape or incest.²⁴⁵ Failure to make these separate comparisons, Justice Dickson stated, caused the majority in the as-applied portion to come to the wrong conclusion by conflating two separate legislative purposes.²⁴⁶

When the separate comparisons are made, Justice Dickson wrote, it is easier to see legislative motives and determine that the law does not violate section 23.²⁴⁷ In the first comparison, the General Assembly could legitimately allow Medicaid assistance for those whose pregnancies threaten their lives, differentiating those pregnancies with substantial, but not life-threatening, risk to promote the legitimate goal of preserving fetal life.²⁴⁸ In the second comparison, the General Assembly could single out for Medicaid assistance those abortions caused by “criminal conduct,” an element not related to the mother’s health at all.²⁴⁹

Justice Dickson concluded that the majority’s failure to perform these separate comparisons failed to give sufficient deference to legislative line-

239. *Humphreys*, 796 N.E.2d at 260-61 (Dickson, J., dissenting) (emphasis added).

240. *Id.* at 261 (Dickson, J., dissenting).

241. *Id.*

242. *Id.* at 261-64 (Dickson, J., dissenting).

243. *Id.* at 261.

244. *Id.* at 261-62.

245. *Id.*

246. *Id.* at 262.

247. *Id.*

248. *Id.*

249. *Id.*

drawing, contrary to *Collins*'s command.²⁵⁰ Also, Justice Dickson wrote, importing the definition of "serious risk of substantial and irreversible impairment of a major bodily function" from the abortion-control law, the majority failed to take account of the fact that the General Assembly could have different motives relating to spending Medicaid funds (governed by the Medicaid statute) than for requiring information to be provided to pregnant women considering abortion (the purpose of the abortion-control law).²⁵¹ He concluded that although plaintiffs' facial challenge failed, the majority's conclusion regarding the as-applied challenge "has the effect of granting almost all the relief sought by the plaintiffs in this case."²⁵²

Justice Boehm, joined by Justice Rucker, dissented on the facial challenge.²⁵³ He began by noting that twelve of the seventeen states that had addressed similar state constitutional challenges to Medicaid funding restrictions on abortion had invalidated the restrictions.²⁵⁴

Justice Boehm described the plaintiffs' complaint as advancing "a constitutionally impermissible distinction arising from Medicaid's refusal to fund medically necessary abortions for certain indigent women while providing benefits for all other indigents in need of medical treatment. The plaintiffs are entitled to frame their own complaint, so this different treatment is the issue presented in this case."²⁵⁵ Plaintiffs did not base their challenge on funding for pregnancies arising from rape or incest, only on the failure to pay for "medically necessary" abortions as Medicaid pays for other medically necessary procedures.²⁵⁶

Justice Boehm stated that although the *Collins* test generally is described as having two prongs, "it really breaks down into three components because the first 'prong' establishes two requirements: 1) the classification must be based on 'characteristics' that 'rationally distinguish the unequally treated class,' and 2) the 'disparate treatment' must be 'reasonably related' to the characteristics that define the class."²⁵⁷ These two elements are combined with "a third test: everyone who is in fact in the class (i.e., everyone who shares the defining characteristic) must be treated alike, and everyone who is not in the class must be treated alike."²⁵⁸

Justice Boehm postulated that the relevant characteristics in this case are entitlement to Medicaid and the desire for medically necessary treatment.²⁵⁹ He found that some indigent women with these characteristics—those who have a

250. *Id.*

251. *Id.*

252. *Id.* at 264.

253. *Id.* at 264-71 (Boehm, J., dissenting).

254. *Id.* at 264.

255. *Id.* at 265.

256. *Id.*

257. *Id.*

258. *Id.* at 266.

259. *Id.*

medical need for abortion but will not die if they do not get it—are treated differently from all others who seek medically necessary treatment.²⁶⁰

Accepting the majority's view that "the reasonableness of the relationship between the classification and the legislative objective turns on a balancing test," Justice Boehm concluded that the majority balanced the interests incorrectly.²⁶¹ He reviewed the history of the 1851 Constitution, noting that "the Indiana Constitution is rife with provisions asserting the primacy of individual rights," reflecting the populism motivating many provisions of the constitution.²⁶² "In the same vein, the Indiana Equal Privileges Clause elevates individual rights by requiring more than some mere recognized governmental interest to justify legislation that overrides the interests of the individual."²⁶³ Applying that standard in this case, Justice Boehm concluded that the individual woman's interest in a medically necessary abortion outweighed the governmental interest in protecting fetal life.²⁶⁴ He wrote that the case presented a conflict between individual rights and the State's desire, expressed by placing a financial penalty on the woman's ability to exercise her constitutional right to choose abortion.²⁶⁵

[T]he State seeks to prioritize the interest it advances over the woman's right to choose. Whether the State seeks to advance its interest by criminalizing abortions, as it no longer can do, or by creating legislation that penalizes the exercise of that right, either is, as a matter of constitutional priorities, an unreasonable balance. As such, this legislation imposes an unreasonable classification and is invalid under *Collins*.²⁶⁶

Justice Boehm contrasted this state constitutional analysis with federal equal protection analysis, explaining why the state constitutional question should be decided differently than the supreme court decided the equal protection question in *Harris*.²⁶⁷ The federal standard is lower, he wrote.²⁶⁸ Because the restriction on Medicaid funding of abortions involves neither a fundamental right nor a suspect classification, the United States only had to show that its restriction on Medicaid funding of abortions bore a rational relationship to a legitimate governmental purpose.²⁶⁹ Under Indiana's Equal Privileges and Immunities Clause, however, there are no levels of scrutiny.²⁷⁰ Rather, every classification is analyzed under *Collins*'s two-part (or, as Justice Boehm sees it, three-part) test

260. *Id.*

261. *Id.* at 270.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 266-70.

268. *Id.* at 269.

269. *Id.*

270. *Id.*

analyzing whether the classification is reasonably related to inherent differences between the groups.²⁷¹

The majority and dissenters on the facial challenge adopted essentially the same classifications for section 23 purposes but analyzed them quite differently.²⁷² Both groups compared Medicaid recipients eligible for medically necessary services to Medicaid recipients who could obtain medically necessary Medicaid-paid abortions only under strict statutory limits.²⁷³ The majority found an inherent difference between the two groups based on the State's fiscal concerns and its interest in preserving fetal life.²⁷⁴ The dissenters essentially accepted the categories but rejected the majority's balancing.²⁷⁵ Relying on the populist, individual rights-favoring background of the 1851 Constitution, the dissenters asserted that the plaintiffs' individual right to access to abortion outweighed the State's interests.²⁷⁶

No justice accepted the State's categorization relating to the facial challenge, which turned on the availability of federal funding for the procedures at issue.²⁷⁷ While rejecting the classification, however, the majority's refutation of the facial challenge hinged in part on the unavailability of federal funds as a legitimate reason for different treatment of one class.²⁷⁸

In the as-applied analysis, the majority and dissenters differed substantially on how to define the classes.²⁷⁹ The majority drew its classification (pregnancies that "create serious risk of substantial and irreversible impairment of a major bodily function") from the abortion-control statute.²⁸⁰ Justice Dickson took issue with this approach, noting that the abortion-control law had an entirely different purpose.²⁸¹ He posited that two comparisons were necessary: first, women with health risks from abortion should be compared to women likely to die from abortions; second, women with health risks from abortion should be compared to women whose pregnancies arose from "criminal conduct," rape or incest.²⁸² In his view, inherent differences justifying different treatment would be obvious from these separate comparisons.²⁸³

271. *Id.*

272. Justice Dickson, concurring with the majority on the facial challenge, nevertheless disagreed with the majority's version of the categories to be compared. He advocated accepting the categories as advanced by the plaintiffs without even the minor rephrasing engaged in by the majority.

273. *Humphreys*, 796 N.E.2d at 254, 265.

274. *Id.* at 257.

275. *Id.* at 270.

276. *Id.*

277. *Id.* at 253-54.

278. *Id.* at 257.

279. *Id.*

280. *Id.* at 258-59.

281. *Id.* at 261.

282. *Id.* at 262.

283. *Id.*

These different approaches illustrate that the court has not yet settled on a method for classification in section 23 claims.

3. *Employment Benefits for Unrelated Persons.*—In *Cornell v. Hamilton*,²⁸⁴ the Indiana Court of Appeals addressed a state employee's claim that she should be able to have the same funeral leave to attend her lesbian partner's parent's funeral as she would receive to attend her spouse's parent's funeral if she were married.²⁸⁵ Cornell argued that the state policy violated the Equal Privileges and Immunities Clause because her classification, state employees not given leave for the funeral of a partner's parent, was not inherently different from the category of State employees who could obtain leave for a spouse's parent's funeral, yet the two categories were treated differently.²⁸⁶

The court of appeals concluded that "the State's personnel paid leave policy does create a classification because it extends the privilege only to married employees, creating the classes of married and unmarried employees."²⁸⁷ The State's justifications for the classifications included promoting marriage, encouraging procreation, and eliminating the administrative problems of determining who would qualify for benefits as a "domestic partner."²⁸⁸ The court of appeals rejected these justifications, noting that many universities and private employers had overcome them in offering a variety of domestic partner benefits.²⁸⁹

The court of appeals also stated that "the policy exists to strengthen family relationships, and families are different today than they once were."²⁹⁰ Cornell had conceded in this case, however, that the classification was rationally related to marriage.²⁹¹ Based on "Cornell's framing of the issue, [the court was] not faced with the close question of whether, in this age of changing family relationships, the policy's distinction based on marital status is rational, but whether the privilege is equally available to all persons similarly situated."²⁹²

Cornell argued that the policy was unconstitutional as applied to her because she could never bring herself within its scope—she was prohibited by statute from marrying her lesbian partner.²⁹³ She argued that, like the plaintiff in *Martin v. Richey* who was unable to discover her injury from medical malpractice during the applicable limitations period, she could never bring herself within the favored class.²⁹⁴ But the court of appeals applied a different analysis. It reasoned that *Martin* was a case about a burden, where the analytical focus is on the disfavored

284. 791 N.E.2d 214 (Ind. Ct. App. 2003).

285. *Id.* at 215.

286. *Id.* at 215-16.

287. *Id.* at 219.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 219-20.

294. *Id.* at 220 (citing *Martin v. Richey*, 711 N.E.2d 1273, 1279-82 (Ind. 1999)).

group (that is, the group that was barred by the statute of limitations).²⁹⁵ Cornell's claim, in contrast, was about a privilege or benefit, and courts in those cases should follow *Collins*'s lead by focusing on distribution of the privilege within the privileged class.²⁹⁶

The court of appeals concluded that because all members of the favored class (married persons) were treated the same, there was no violation of the Equal Privileges and Immunities Clause.²⁹⁷ Because Cornell conceded that the classification was rationally related to marriage, she effectively conceded that she was not similarly situated to those in the class receiving the benefit, and her claim could not succeed.²⁹⁸

The court of appeals deduced the different treatment of "benefited" versus "burdened" classes from previous case law, but no Indiana Supreme Court opinion has explicitly drawn this distinction. Time will tell whether the Indiana Supreme Court will adopt this approach.

B. Open Courts and Equal Privileges

In *AlliedSignal, Inc. v. Ott*,²⁹⁹ the Indiana Supreme Court analyzed Indiana's statutes pertaining to lawsuits over products containing asbestos. Indiana's statute of repose governing products liability cases generally requires that actions for defective products be filed within two years after the cause of action accrues and within ten years of delivery of the product to the initial user or consumer.³⁰⁰ The provisions for defendants who "mined and sold commercial asbestos" and certain funds created in bankruptcies to pay asbestos-related personal injury and property damage claims are different, however.³⁰¹ When a product liability action is based on personal injury, disability, disease or death resulting from exposure to asbestos, there is no ten-year statute of repose. "Accrual" of the claim is deemed to be the time when the injured person knows that he or she has an asbestos-related disease or injury.³⁰²

Before addressing constitutional issues, the court first tackled statutory interpretation.³⁰³ The court defined "commercial asbestos" to mean raw or processed asbestos before it is incorporated into other products, significantly limiting the scope of the more forgiving limitations period by restricting it to those selling raw or processed asbestos.³⁰⁴ The court also interpreted the statute literally to limit the reach of the exception to entities that both mined *and* sold

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. 785 N.E.2d 1068 (Ind. 2003).

300. IND. CODE § 34-20-3-1 (2003).

301. IND. CODE § 34-20-3-2 (2003); *AlliedSignal*, 785 N.E.2d at 1070.

302. IND. CODE § 34-20-3-2.

303. *AlliedSignal*, 785 N.E.2d at 1071-73.

304. *Id.*

commercial asbestos, not those that merely sold it after it was mined by others.³⁰⁵

The court then examined whether the statute, so interpreted, complied with relevant constitutional provisions.³⁰⁶ The court looked first at article I, section 12, which provides that “All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.”³⁰⁷ Borrowing from the court of appeals’ opinion in a related case, the court determined that section 12 could apply in three different ways:

First, is the statute constitutional as applied to a plaintiff who is exposed to asbestos from and injured by a product more than ten years after that product’s initial delivery? Second, is the statute constitutional as applied to a plaintiff who is injured by a product within ten years of its initial delivery, but who has neither knowledge of nor any ability to know of that injury until more than ten years have passed? Third, in the absence of evidence of the length of time between a product’s initial delivery and an injury . . . can the statute constitutionally be applied to a plaintiff who was injured by a product before [the statute of repose’s] passage?³⁰⁸

The court concluded that if the plaintiff’s first exposure to asbestos occurred more than ten years after its delivery, the defendants would be protected by the statute of repose and no constitutional problem would be present. In the court’s view, the legislature simply had defined the cause of action to include only those injuries that occurred before ten years had passed since the delivery of the product to its initial user, the same approach it approved as to the general products liability statute of repose in *McIntosh v. Melroe Co.*³⁰⁹

As to the second question, the court relied on *Martin v. Richey*,³¹⁰ which held that section 12 was violated as applied when a plaintiff was injured within the limitations period but, without fault, was unable to discover the injury until after the limitations period had passed.³¹¹ In such cases, statutes of limitation cannot be applied consistently with section 12 because the plaintiff possesses a cause of action but is unable to obtain access to the courts through innocent lack of knowledge.³¹²

Through statutory interpretation, however, the court significantly limited the number of times this issue would arise: “We hold that, with respect to asbestos claims under [the statute of repose], a cause of action accrues at that point at which a physician who is reasonably experienced at making such diagnoses could

305. *Id.*

306. *Id.* at 1073-77.

307. IND. CONST. art. I, § 12.

308. *AlliedSignal*, 785 N.E.2d at 1074 (quoting *Jurich v. Garlock, Inc.*, 759 N.E.2d 1066, 1071 (Ind. Ct. App. 2001)).

309. *Id.* at 1074 (citing *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000)).

310. 711 N.E.2d 1273 (Ind. 1999).

311. *AlliedSignal*, 785 N.E.2d at 1074-75.

312. *Id.*

have diagnosed the individual with an asbestos-related illness or disease.”³¹³ The court therefore set the relevant time of accrual of the injury for limitations purposes at the point of discovery by an experienced physician.³¹⁴ “In our view, it is only when the disease has actually manifested itself (and therefore could be diagnosed by a reasonably experienced physician) that the cause of action accrues.”³¹⁵ The plaintiff can proceed only if a reasonably experienced physician could have diagnosed the asbestos-related condition during the limitations period.³¹⁶ The plaintiff’s claim would not be time-barred under the theory of *Martin v. Richey* only if the plaintiff had no reason to know of the condition until after the ten-year limitations period had expired, although an experienced physician could have diagnosed it during the limitations period.³¹⁷ The court directed the trial court to determine the facts relevant to this theory on remand.³¹⁸

The court then examined the third question, whether the ten-year statute of repose can constitutionally be applied to claims that accrue before it was enacted.³¹⁹ The court of appeals had ruled that such a plaintiff would have a vested right in his common law claim that could not be taken away retroactively by the statute of repose (which was enacted in 1978).³²⁰ The court did not definitively answer this question. It noted that the condition would have had to be diagnosable by an experienced physician before 1978 to fall within the theory, and it stated that “a plaintiff’s right to pursue such a claim may in some circumstances be subject to changes in common law or statute.”³²¹ The court also noted that a plaintiff would have a right to sue the miner and seller of the asbestos and certain asbestos bankruptcy funds without regard to the statute of repose and could exercise his rights under the Open Courts Clause of section 12 in that manner.³²² This discussion implied that the rights available against some defendants not subject to the statute of repose might be sufficient to satisfy the Open Courts Clause.

The court then rejected a challenge to the special asbestos limitations periods raised under article I, section 23.³²³ The court agreed with plaintiff’s contention that the statute created a special classification for plaintiffs harmed by asbestos.³²⁴ But the court declined to apply the common *Collins v. Day*³²⁵ test to the classification, reasoning that the classification ran in the plaintiff’s favor, so

313. *Id.* at 1075.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 1075-76.

321. *Id.* at 1076.

322. *Id.*

323. *Id.* at 1076-77.

324. *Id.* at 1077.

325. 644 N.E.2d 72, 80 (Ind. 1994).

the plaintiff was helped rather than harmed by it and therefore could show no damage arising from the special limitations period.³²⁶

Justice Dickson dissented, joined by Justice Rucker.³²⁷ He disagreed with the majority's construction of the statutory language, concluding that the legislature intended to include asbestos incorporated into products intended for commerce as "commercial asbestos" and that it intended "persons who mined and sold" to mean "persons who mined and persons who sold" asbestos.³²⁸

On the constitutional claims, Justice Dickson would have held that the ten-year statute of repose violated section 12's Right to Remedy Clause because the latency period for asbestos-related illnesses is so long that they would usually be discovered after the statute of repose had run.³²⁹ "This is precisely the circumstance that led this Court in *Martin v. Richey* to find that application of the medical malpractice two-year statute of limitations to the facts of that case violated Article 1, Section 12. . . ."³³⁰ He also criticized the majority's statutory construction of the definition of when a claim accrues, finding it contrary to legislative intent.³³¹

Justice Dickson also would have held that the statute violated article I, section 23, again challenging the majority's description of the relevant classification.³³² He disputed the majority's description of the relevant classifications being (1) asbestos victims and (2) other victims under the product liability law.³³³ Rather, Justice Dickson asserted, the proper comparison is between (1) persons who contract asbestos-related diseases from exposure to raw asbestos (and therefore are not subject to the statute of repose) and (2) persons who contract asbestos-related diseases from exposure to asbestos-containing products.³³⁴ Finding no inherent differences between the two groups of asbestos victims, Justice Dickson would have invalidated the statute of repose under section 23 because it treats the two groups differently.³³⁵

The difference between the classifications defined by the majority and dissent in *AlliedSignal* echo those in *McIntosh*, showing that the analytical problem first arising in *McIntosh* has not yet been resolved. The question is whether to analyze the claims in terms of the claimants themselves, as Justice Dickson has advocated (e.g. plaintiffs hurt by products more than ten years old compared to plaintiffs hurt by products less than ten years old) or more along the lines drawn by the statutes themselves (e.g. products more than ten years old compared to products less than ten years old).

326. *AlliedSignal*, 785 N.E.2d at 1077.

327. *Id.* at 1078-84.

328. *Id.* at 1078-81.

329. *Id.* at 1081-83.

330. *Id.* at 1081.

331. *Id.* at 1082.

332. *Id.* at 1083; see also *supra* discussion Part II.A.2.

333. *AlliedSignal*, 785 N.E.2d at 1083.

334. *Id.*

335. *Id.*

Humphreys, *AlliedSignal*, and to some extent *Cornell*, show that the court has not finalized its interpretive framework for section 23 claims. Parties fashion classifications for analysis under section 23 that would support either outcome, validating or nullifying a statute. As shown by the very small number of statutes that have been invalidated under the *Collins* standard,³³⁶ it is almost always possible to create classifications that withstand section 23 scrutiny. Although the court has continued to use its “claim defines the class” approach, that form of words does not yet sufficiently explain how classes are to be defined, as shown by frequent, strong dissents in section 23 cases.

The court has several alternatives in framing a section 23 standard. First, it could take Justice Dickson’s approach in *Humphreys* and accept the plaintiff’s classifications exactly as argued.³³⁷ This approach might be insufficiently deferential to the legislature’s determination, contrary to *Collins*. Second, on the opposite end of the spectrum, the court could always adopt the classifications suggested by the entity defending the statute. This approach is most deferential to the legislature, but it may fail to give sufficient weight to those harmed by the law at issue. This approach may be implicit when the court recites that a classification opponent must “negate all possible bases” for the classification and most resembles rational basis review under the Equal Protection Clause. A third approach would accept the classifications of the statute’s defenders except in cases involving individual rights or core values under the Indiana Constitution.³³⁸ In those cases, the court might entertain the plaintiff’s version of classifications or at least treat more skeptically the classifications advanced by the statute’s defenders. This mode of analysis, of course, is akin to the equal protection levels of scrutiny the court rejected in *Collins*, but that rejection has led directly to the classification conundrum now bedeviling the court.

C. Open Courts and Privacy

*Doe v. O’Connor*³³⁹ examined Indiana’s sex offender registry, raising due course of law issues under article I, section 12 and privacy concerns under article I, section 1. The sex offender registry required posting on the Internet, for an indefinite period of time, photographs and home addresses of persons who had been convicted of certain specified sex offenses.³⁴⁰ Doe, the plaintiff, claimed a right to a hearing to determine his future dangerousness before his name could

336. No reported cases have found a statute to be facially unconstitutional under the *Collins* standard. In both *Martin v. Richey* and *Humphreys*, a statute has been found unconstitutional as applied to one subgroup it affects.

337. *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 260-61 (Ind. 2003) (Dickson, J., concurring and dissenting).

338. *See, e.g., City Chapel v. City of South Bend*, 744 N.E.2d 443, 446 (Ind. 2001) (describing core values).

339. 790 N.E.2d 985 (Ind. 2003).

340. IND. CODE § 5-2-12-1 to -14 (2003). The program as required by federal law as a condition of receiving certain federal criminal justice grants. 42 U.S.C. § 14071 (2003).

be posted.³⁴¹

The Indiana Supreme Court rejected Doe's argument that he was entitled to a pre-posting hearing under article I, section 12.³⁴² Doe argued that section 12's requirement of a "remedy by due course of law" for any "injury done to him in his . . . reputation" required the hearing on whether posting his identity on the Internet was justified by his future dangerousness.³⁴³ Not so, said the court, because what Doe sought to establish, that he would not be dangerous in the future, had no legal relevance to whether his name would be posted.³⁴⁴ The relevant statute required that his name be posted merely because of his past conviction, without reference to future dangerousness.³⁴⁵ Because future dangerousness was not a relevant question under applicable law, Doe was not entitled to a hearing.³⁴⁶ This holding followed the United States Supreme Court's reasoning on the same question under the Due Process Clause in *Connecticut Department of Public Safety v. Doe*,³⁴⁷ and the Court reiterated that it uses the same analysis under section 12 for allegations of denial of procedural due process as the federal courts use under the Due Process Clause.³⁴⁸

Doe also argued that the law violated his right to privacy under article I, section 1.³⁴⁹ Section 1 states that "all people are . . . endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness"³⁵⁰ The court analyzed Doe's claim that section 1 gave him a privacy right primarily by looking at the construction of similar constitutional language by other states' courts.³⁵¹ The court concluded that "[o]ther states also have construed constitutional provisions similar in wording to Art. I, Sec. 1 of the Indiana Constitution not to provide a *sole basis* for challenging legislation since the language is not so complete as to provide courts with a standard that could be routinely and uniformly applied."³⁵² The court further held that Doe's section 1 claim was essentially identical to his section 12 claim, again positing the right to a hearing before information about him could be posted.³⁵³ Because his section 1 argument presented no different substantive claim, the court rejected it as well.³⁵⁴

341. *Doe*, 790 N.E.2d at 987.

342. *Id.* at 989.

343. *Id.* at 988.

344. *Id.* at 989.

345. *Id.* at 986-87.

346. *Id.* at 989.

347. 538 U.S. 1 (2003).

348. 790 N.E.2d at 988-89.

349. *Id.* at 989-90.

350. IND. CONST. art. I, § 1.

351. *Doe*, 790 N.E.2d at 990-91.

352. *Id.* at 991 (emphasis added).

353. *Id.* at 991-92.

354. *Id.*

D. Government Support of Religious Institutions

In *Embry v. O'Bannon*,³⁵⁵ the court analyzed a claim that a program supplying public school teachers to teach certain courses at private religious schools violated article I, section 6, which states that “[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution.”³⁵⁶ The program at issue assisted children in private schools by giving them instruction, yet it also helped public schools because they were able to count the private school’s students for purposes of the formula awarding them State financial assistance.³⁵⁷

The court found that taxpayers had standing to challenge the program under the public standing doctrine.³⁵⁸ On the standing issue, Justice Sullivan, joined by Chief Justice Shepard, wrote separately to discuss limitations on the public standing doctrine.³⁵⁹ They noted that the doctrine, in their view, was prudential and should be applied cautiously.³⁶⁰ They stated that the public standing doctrine should allow taxpayer standing only when the taxpayer asserts a specific and relatively clear constitutional limitation on the governmental action at issue.³⁶¹ Requiring a clear, explicit limit on governmental power as a prerequisite to standing assures that the courts will not exceed their proper role and retains standing principles as a bar against judicial overreaching into the domains of the other branches.³⁶²

In his opinion for the court on the merits of the section 6 question, Justice Dickson wrote that the framers’ intent was to preclude the use of tax money to support any ministry or worship. Justice Dickson wrote that the framers did not clearly indicate their intention to prohibit support of sectarian schools.³⁶³ To support this conclusion, Justice Dickson relied on contemporaneous dictionary definitions of “ministry” as well as constitutional language from neighboring states that prohibited state aid to religious schools more explicitly than the Indiana Constitution.³⁶⁴ He discussed at length the early history of education in Indiana and anti-Catholic sentiment driving establishment of public schools in some states, though perhaps not Indiana.³⁶⁵ Because the court was able to resolve the case on other grounds, however, Justice Dickson did not have to reach a firm

355. 798 N.E.2d 157 (Ind. 2003).

356. IND. CONST. art. I, § 6.

357. 798 N.E.2d at 158-59.

358. *Id.* at 160; *see also* discussion of State *ex rel.* Cittadine v. Ind. Dep’t of Transp., 790 N.E.2d 978 (Ind. 2003), *supra* Part I.A.

359. *Embry*, 798 N.E.2d 167-69.

360. *Id.* at 169 (quoting *Cittadine*, 790 N.E.2d at 983).

361. *Id.* at 168.

362. *Id.* (quoting *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995) (noting that “standing is a key component in maintaining our state constitutional scheme of separation of powers”)).

363. *Id.* at 161-64.

364. *Id.*

365. *Id.* at 162-63.

conclusion as to whether the expenditure limitations in section 6 apply to religious schools.³⁶⁶

The court concluded that the program did not violate section 6 because it did not provide “substantial benefits” to the participating religious schools. Justice Dickson admitted that the text and history of section 6 did not suggest that the “substantial benefit” standard was appropriate, but case law applying section 6 sanctioned the standard.³⁶⁷ Again following recent trends, the court looked to other states’ interpretations of similar constitutional language, noting that Wisconsin and Michigan also applied a “substantial benefit” standard.³⁶⁸

The court noted the plaintiffs’ argument that the parochial schools received direct benefits from the program because they did not have to hire or pay teachers to provide the classes covered by the program.³⁶⁹ The court rejected this perspective, finding that the programs provided significant educational benefits to parochial school students and helped the State attain its goal of encouraging education.³⁷⁰ “[W]e find [that] any alleged ‘savings’ to parochial schools and their resulting opportunities for curriculum expansion would be, at best, relatively minor and incidental benefits of the dual-enrollment programs.”³⁷¹ Because the program did not convey “substantial benefits” to any religious institution or directly fund religious activities, the court held that it did not violate section 6.³⁷²

Justice Boehm, joined by Justice Sullivan, concurred separately to express the view that the funding prohibition in section 6 applies to religious schools, a question the majority did not decide.³⁷³ “[I]t seems quite a stretch to conclude that a parochial school is not a ‘religious institution’ within the meaning of [section 6]” especially because each school involved in the case teaches religious doctrine as part of its curriculum.³⁷⁴ Justice Boehm questioned the majority’s historical and linguistic analysis, concluding that the reference to religious institutions in section 6 encompasses religious schools.³⁷⁵ Justice Boehm agreed

366. *Id.* at 164.

367. *Id.* at 164-67 (citing *State ex rel. Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940) (permitting public school takeover of religious school system in Vincennes, using parochial school staff and buildings and providing no religious instruction) and *Center Twp. v. Coe*, 572 N.E.2d 1350 (Ind. Ct. App. 1991) (invalidating state payment to religious institutions to provide poor relief, where relief was conditioned on beneficiaries’ attendance at religious services but finding no per se violation of section 6 because religious institutions received payments for services)).

368. *Id.* at 165-66; see Laramore, *supra* note 5, at 987 (discussing growing reliance on interpretations by other states’ courts of similar constitutional language and citing, inter alia, *Jordan v. Deery*, 778 N.E.2d 1264, 1268 (Ind. 2002)).

369. *Embry*, 798 N.E.2d at 166-67.

370. *Id.* at 167.

371. *Id.*

372. *Id.*

373. *Id.* at 169-70 (Boehm, J., concurring).

374. *Id.* at 169.

375. *Id.* at 169-70.

with the majority, however, that the crucial legal question is whether the program benefits the schools more than incidentally, and agreed with the majority's conclusion that it does not.³⁷⁶

E. Right to Counsel

In *Malinski v. State*,³⁷⁷ the Indiana Supreme Court continued the state's history of interpreting the right to counsel clause of article I, section 13 more broadly than the comparable federal provision (the Indiana Supreme Court famously held that the Indiana Constitution required appointed counsel for indigent criminal defendants almost a century before the U.S. Supreme Court so held.³⁷⁸) Interestingly, *Malinski* found a right to counsel under section 13 even though the Indiana Supreme Court declined to find such a right under the self-incrimination clause of section 14 in almost identical factual circumstances just four years before.³⁷⁹

Malinski was prosecuted for the kidnapping, sexual assault and murder of a co-worker.³⁸⁰ Substantial physical evidence linked Malinski to the crime and he was arrested and questioned after *Miranda* warnings were administered.³⁸¹ While he was being questioned, family members hired an attorney to represent Malinski. The attorney went to the jail and asked to see Malinski.³⁸² Because Malinski had not requested counsel, however, the attorney was not permitted to see Malinski.³⁸³ Malinski confessed and that confession was used to convict him at trial.³⁸⁴

The court began its discussion by noting that the Fifth and Fourteenth Amendments convey to a person being held for questioning no federal right to be informed that an attorney is present to represent the person.³⁸⁵ The court also recognized that in 1999 it had held, in *Ajabu v. State*, that a suspect being questioned in very similar circumstances had no right under the self-incrimination clause of article I, section 14, to be informed of an attorney who had been hired to represent him.³⁸⁶ Following federal precedent, *Ajabu* held that

376. *Id.* at 170.

377. 794 N.E.2d 1071 (Ind. 2003).

378. See also Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 578 (1989). Compare Webb v. Baird, 6 Ind. 13 (1854), with Gideon v. Wainwright, 372 U.S. 335 (1963).

379. Compare *Malinski*, 794 N.E.2d at 1079, with *Ajabu v. State*, 693 N.E.2d 921, 933-35 (Ind. 1998).

380. *Malinski*, 794 N.E.2d at 1073-74.

381. *Id.* at 1074-76.

382. *Id.* at 1075.

383. *Id.*

384. *Id.* at 1074-75.

385. *Id.* at 1076-77 (citing, e.g., *Moran v. Burbine*, 475 U.S. 412 (1986)).

386. 693 N.E.2d 921, 933-35 (Ind. 1998). *Ajabu*'s attorney was not physically present at the jail, but only telephoned. *Malinski*'s attorney, on the other hand, was physically present at the jail.

the privilege against self-incrimination was not violated when a suspect being questioned was not informed that an attorney had told police he had been retained to represent the suspect.³⁸⁷ The *Ajabu* court held that withholding that information did not make the suspect's confession involuntary, and article I, section 14 prohibits only involuntary confessions.³⁸⁸

The court began its analysis of Malinski's section 13 claim by describing Indiana's right to counsel as "expansive,"³⁸⁹ affording "Indiana's citizens greater protection than its federal counterpart."³⁹⁰ Following its recent practice in individual rights cases, the court also reviewed case law from other jurisdictions,³⁹¹ a number of which "recognized an affirmative duty to inform" a suspect of an attorney present at the jail to represent him.³⁹² The court then held that "an incarcerated suspect has a right under section 13 to be informed that an attorney hired by his family to represent him is present at the [police] station and wishes to speak to him."³⁹³ The court reasoned that, although such a right is not necessary to preserve the suspect's rights against self-incrimination, it is necessary to assure that the suspect's choice not to request counsel is knowing and intelligent.³⁹⁴

The court adopted a "totality of circumstances" test to determine whether to exclude any confession given by a suspect who was not informed that a lawyer was present to represent him or her, again looking to other states' examples of how to address the question.³⁹⁵ The court found this approach consistent with other rules for evaluating waivers, and it directed that the circumstances to be evaluated include, but are not limited to, the extent to which the police knew of the attorney's presence, the suspect's conduct, the nature of the attorney's request, and the suspect's relationship with the attorney.³⁹⁶ Under this test, the court concluded that Malinski's confession was knowing and voluntary, and its admission did not require reversal of the conviction.³⁹⁷

F. Juries

In the most recent year, the court made two decisions regarding juries. In *Holden v. State*,³⁹⁸ the court resolved a recent controversy over the meaning of

387. *Id.* at 934-35.

388. *Id.* at 933.

389. *Malinski*, 794 N.E.2d at 1079.

390. *Id.* at 1078.

391. *Id.* at 1077-79.

392. *Id.* at 1077.

393. *Id.* at 1079.

394. *Id.*

395. *Id.* at 1079-80.

396. *Id.*

397. *Id.* at 1080.

398. 788 N.E.2d 1253 (Ind. 2003), *reh. granted*, 799 N.E.2d 538 (Ind. 2003) (summarily

article I, section 19's statement that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts."³⁹⁹ Earlier cases had held that this provision does not permit the jury to ignore applicable law and that the jury may be instructed that the judge's instructions are the best source of determining what the law is.⁴⁰⁰ (In practice, of course, a jury's decision to acquit even if a defendant has been proved guilty beyond a reasonable doubt is unreviewable).⁴⁰¹

These principles were called into question by Justice Rucker's 1999 law review article asserting that the case law had turned section 19 into "a nullity."⁴⁰² Based on the history of the provision and the anti-government, Jacksonian origin of Indiana's 1851 Constitution, Justice Rucker's article concluded that the framers intended the provision to mean that jurors were not required to apply the law strictly when their consciences dictated otherwise. Allowing juries to acquit when their consciences required it was another check on governmental authority and vindictive prosecutions.⁴⁰³ "[A]n instruction telling the jury that the constitution intentionally allows them latitude to 'refuse to enforce the law's harshness when justice so requires' would be consistent with the intent of the framers and give life to what is now a dead letter provision."⁴⁰⁴

In *Holden*, however, the court rejected just the kind of instruction suggested by Justice Rucker's article, and it did so in a unanimous opinion written by Justice Rucker.⁴⁰⁵ The opinion briefly reviewed the history of jury nullification, defined as the jury's "right to return a verdict of not guilty despite the law and the evidence where a strict application of the law would result in injustice and violate the moral conscience of the community."⁴⁰⁶ The court stated that

early case authority in this state stood for the proposition that the jury's law determining function meant that the jury could "disregard" the instructions of the trial court. However, on closer examination it appears that the right to disregard the trial court's instructions has never been equated as a right to disregard "the law."⁴⁰⁷

affirming Indiana Court of Appeals as to all issues not addressed in earlier opinion).

399. IND. CONST. art. I, § 19.

400. *E.g.*, *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994).

401. *Fong Foo v. United States*, 369 U.S. 141 (1962).

402. Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449, 470 (1999).

403. *Id.* at 477.

404. *Id.* at 481.

405. 788 N.E.2d at 1253-55.

406. *Id.* at 1254 (citing JEFFREY ABRAMSON, WE, THE JURY 57 (1994)). Jury nullification generally does not encompass a guilty verdict even when the evidence does not justify it. The system includes many safeguards against such conduct, including the trial court's ability to reject such a verdict and an appellate court's responsibility to determine the sufficiency of evidence supporting a conviction.

407. *Id.* Under the liberal provisions for admission to the bar contained in the original 1851

That is, the jury is permitted to construe the law in a manner different than the judge, but not to ignore it altogether.⁴⁰⁸ The court concluded:

Although there may be some value in instructing Indiana jurors that they have a right to “refuse to enforce the law’s harshness when justice so requires,” the source of that right cannot be found in Article I, Section 19 of the Indiana Constitution. This Court’s latest pronouncement on the subject is correct: “[I]t is improper for a court to instruct a jury that they have a right to disregard the law. Notwithstanding Article I, Section 19 of the Indiana Constitution, a jury has no more right to ignore the law than it has to ignore the facts of a case.”⁴⁰⁹

The court affirmed the trial court’s decision not to permit the instruction suggested by Justice Rucker’s article.⁴¹⁰

The court’s other jury decision was *Sims v. United States Fidelity & Guaranty Co.*,⁴¹¹ in which the plaintiff argued that his claim that a worker’s compensation insurer had acted in bad faith in denying him compensation and medical treatment must be tried to a jury. The worker’s compensation statute required the claim to be asserted administratively before the Worker’s Compensation Board.⁴¹² The statutory requirement to seek an administrative remedy was enacted after the court’s decision in *Stump v. Commercial Union Insurance Co.*,⁴¹³ which held that claims that a worker’s compensation carrier had committed an independent tort could be asserted in court rather than before the Worker’s Compensation Board. The court held that the statutory amendment after *Stump* “likely represented a legislative response” to *Stump* and meant that *Stump* no longer controlled whether bad faith claims against worker’s compensation insurers could be taken directly to court.⁴¹⁴ The court of appeals had ruled that this statutory requirement violated the “open courts” provision of article I, section 12.⁴¹⁵

Constitution, it was entirely possible that the trial judge would be little more learned in the law than the jurors themselves. Originally, the 1851 Constitution stated that “[e]very person of good moral character, being a voter, shall be entitled to admission to practice law in all Courts of Justice.” Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 2073 (art. VII, § 21) (Ind. Hist. Soc. Reprint 1935).

408. *Holden*, 788 N.E.2d at 1254. This line of reasoning raises significant issues under the Due Process Clause. If two juries are allowed to apply the law differently in two identical factual circumstances, the defendants are not being judged consistently, a potential due process violation. Rucker, *supra* note 402, at 472.

409. *Holden*, 788 N.E.2d at 1255 (quoting *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994)).

410. *Id.*

411. 782 N.E.2d 345 (Ind. 2003).

412. IND. CODE § 22-3-4-12.1 (2003).

413. 601 N.E.2d 327 (Ind. 1992).

414. *Sims*, 782 N.E.2d at 350.

415. *Sims v. U.S. Fid. & Guar. Co.*, 730 N.E.2d 232, 235 (Ind. Ct. App. 2000) (quoting IND.

The Indiana Supreme Court's majority first found that the statutory requirement that the claim be presented to the Worker's Compensation Board did not violate the Open Courts Clause.⁴¹⁶ The court ruled that because Sims could present his claim for judicial review after determination by the Worker's Compensation Board, he was not entirely denied access to the courts and the statutory scheme therefore did not violate article I, section 12.⁴¹⁷ Citing *Martin v. Richey*,⁴¹⁸ the court stated that the Open Courts Clause is violated only when a statute makes it impossible for a claimant to present his claim to a court, not when presentation of the claim is first made contingent on exhausting an administrative procedure.⁴¹⁹

The court then addressed Sims's claim that the statute violated his right to trial by jury.⁴²⁰ Article 1, section 20, states that "[i]n all civil cases, the right of trial by jury shall remain inviolate," and the clause preserves the right to trial by jury of all claims triable by jury at common law.⁴²¹ The court held that, although most bad faith claims were triable by jury at common law, a claim against a worker's compensation insurer existed only because of the statutory creation of the worker's compensation system.⁴²² Quoting Judge Baker's court of appeals' dissent, the court noted that "'but for the [Worker's Compensation] Act there would be no insurance carrier against whom to bring the action.'"⁴²³ The bad faith claim, in other words, is part of a statutory proceeding and not a "civil case" under section 20.⁴²⁴

The worker's compensation scheme removed workplace injuries from "the harshness of the common law" and placed them in a system in which the worker trades limited compensation for a near-strict liability system guaranteeing compensation for workplace injuries.⁴²⁵ The worker's compensation statutes abolished the common law relationship between employers and employees and with it, "all attendant rights."⁴²⁶ Creation of a new legal relationship between employers and employees is within the legislature's province, and requiring administrative presentation of claims against worker's compensation insurers

CONST. art. I, § 12) ("All courts shall be open; and every person; for injury done to him in his person, property, or reputation, shall have remedy by due course of law.").

416. *Sims*, 782 N.E.2d at 349-51.

417. *Id.* at 351.

418. *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999).

419. *Sims*, 782 N.E.2d at 350-51.

420. *Id.* at 351-52.

421. *Id.* at 351 (citing, *e.g.*, *Wright v. Fultz*, 38 N.E. 175 (Ind. 1894) (quoting IND. CONST. art. I, § 20)).

422. *Id.* at 351-52.

423. *Id.* at 351 (quoting *Sims v. U.S. Fid. & Guar. Co.*, 730 N.E.2d 232, 237-38 (Ind. Ct. App. 2000) (Baker, J., dissenting)).

424. *Id.* at 352.

425. *Id.* at 351-52.

426. *Id.* at 352.

therefore does not eviscerate any common law right.⁴²⁷

The court also concluded that the statute confining Sims's claim to the Worker's Compensation Board did not violate the Equal Privileges and Immunities Clause.⁴²⁸ Sims argued that the treatment of a classification consisting of worker's compensation insurers was unconstitutionally different from its treatment of a classification consisting of all other insurers.⁴²⁹ The court rejected this claim on the basis that the policy underlying the worker's compensation system justified this different treatment.⁴³⁰ The sure and expeditious remedy provided in the worker's compensation system, as compared to the doubtful and prolonged process of litigation, justified the different treatment.⁴³¹ Moreover, the worker's compensation system treats insurers differently in many ways than the law treats other insurance companies, further illustrating that there are inherent differences between the two groups that support different treatment.⁴³²

Justice Dickson dissented on the open courts claim.⁴³³ His view was that the amendment requiring presentation of the claim to the Worker's Compensation Board did not abolish the common law cause of action against the worker's compensation insurer recognized in *Stump*, and that the statutory requirement that the claim be presented administratively was therefore unconstitutional.⁴³⁴ Because the cause of action remained intact, in Justice Dickson's view the legislature could not require it to be presented to an administrative adjudicator rather than a jury.⁴³⁵ The statute therefore violated section 12 and, in Justice Dickson's view, Sims was entitled to a jury trial under section 20.⁴³⁶

G. Particular Services

In *Cheatham v. Poole*,⁴³⁷ a case about punitive damages, the Indiana Supreme Court looked at the Particular Services Clause of article I, section 21. The case addressed the statute requiring that seventy-five percent of all punitive damages be paid to the state's Victim Compensation Fund, with only twenty-five percent going to the plaintiff.⁴³⁸ In this case, Cheatham won a \$100,000 punitive damage award on top of an identical amount of compensatory damages.⁴³⁹

427. *Id.*

428. *Id.* at 353-54.

429. *Id.* at 353.

430. *Id.* at 353-54.

431. *Id.*

432. *Id.* at 354.

433. *Id.* at 354-55.

434. *Id.* at 354.

435. *Id.*

436. *Id.* at 355.

437. 789 N.E.2d 467 (Ind. 2003).

438. IND. CODE § 34-51-3-6 (1999).

439. *Cheatham*, 789 N.E.2d at 470.

In addressing the claim that the statute worked a taking on Cheatham, the court, in a 4-1 opinion by Justice Boehm, first probed the nature of punitive damages under Indiana law.⁴⁴⁰ Punitive damages are designed to punish and deter wrongful activity, and under federal law states have great freedom to limit punitive damages.⁴⁴¹ Punitive damages are a creature of the common law, which may be altered or abolished by the legislature.⁴⁴² Because of the nature of punitive damages, no plaintiff has a right to receive them.⁴⁴³

Like the Takings Clause of the Fifth Amendment, article I, section 21 provides for damages only when “property” is taken.⁴⁴⁴ While a cause of action may itself be property, no Indiana plaintiff has a right to punitive damages.⁴⁴⁵ Punitive damages therefore are not “property” for section 21 purposes, and the statute limiting the percentage of punitive damages a plaintiff may retain does not accomplish a taking under section 21.⁴⁴⁶ For the same reason, the court rejected Cheatham’s claim that the statute violated the requirement of uniform and equal taxation in article X, section 1: that provision only applies to property, and the punitive damage award was not property.⁴⁴⁷

The court next addressed Cheatham’s claim that the statute unconstitutionally demanded her attorney’s particular services.⁴⁴⁸ Unlike the federal Takings Clause, section 21 applies not only to property, but also states that “[n]o person’s particular services shall be demanded, without just compensation.”⁴⁴⁹ Cheatham claimed that the statute demanded her attorney’s particular services without compensation since there was no provision to compensate the attorney for the work he did to obtain the seventy-five percent of the punitive damages going to the Victim Compensation Fund.⁴⁵⁰

The court agreed that the services of the attorney constituted “particular services” under section 21 because the services were “(1) historically compensated, and (2) something required of a party as an individual, as opposed to something required generally of all citizens.”⁴⁵¹ But Cheatham’s claim failed because the services were not “demanded.”⁴⁵²

Cheatham engaged her attorney and the attorney agreed to represent her, all with no state intervention of any kind. In order for there to be a state

440. *Id.* at 471-72.

441. *Id.* at 471 (citing, *e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)).

442. *Id.*

443. *Id.* at 472.

444. *Id.* at 473.

445. *Id.*

446. *Id.*

447. *Id.* at 476.

448. *Id.* at 476-77.

449. IND. CONST. art. I, § 21.

450. *Cheatham*, 789 N.E.2d at 476.

451. *Id.* (quoting *Bayh v. Sonnenburg*, 573 N.E.2d 398, 415-16 (Ind. 1991)).

452. *Id.*

demand on a person's particular services, there must be the threatened use of physical force or legal process that leads that person to believe that they have no choice but to submit to the will of the State.⁴⁵³

Because the State did not require the lawyer to provide the service, there was no demand and the services are not compensable.⁴⁵⁴

Justice Dickson dissented based on the method by which the statute transferred the three-quarters' share to the Victim Compensation Fund.⁴⁵⁵ The law provided that when judgment was entered, the punitive damages are paid to the court clerk, who is required to pay the appropriate share to the fund.⁴⁵⁶ Justice Dickson reasoned that when judgment was entered, the entire amount became the plaintiff's property.⁴⁵⁷ A portion of that property was taken when the clerk transferred it to the Victim Compensation Fund, and that act constituted an uncompensated taking.⁴⁵⁸

CONCLUSION

In the most recent year, Indiana courts' approach to the Indiana Constitution generally followed recent practice. The court displayed some boldness in its actions under the structural constitution, but generally interpreted the rights constitution no more broadly than cognate federal provisions. On the analytical side, the Indiana Supreme Court continued its recent trend of looking frequently to other state courts' construction of similar constitutional provisions as a guidepost.⁴⁵⁹

Peterson v. Borst characterized the Indiana Supreme Court's approach under the structural constitution, as the court acted in a bold but nonpartisan manner to settle a key public dispute over redistricting. In *Cittadine*, the court reached out to reaffirm the public standing doctrine, ending speculation that the doctrine had fallen in *Pence v. State* and announcing that the courts remain open to vindicate public rights. In *Kimsey*, the court broke no analytical ground but again spoke unflinchingly on a public issue, invalidating a statute under the special law provisions of the Indiana Constitution for the first time in nearly three decades. Having required statewide property reassessment under new standards in *Town of St. John* in 1998, the court took a flexible approach in two cases under the Property Tax Uniformity Clause, allowing state officials to approach issues of tax policy in a practical manner so long as the underlying assessment apparatus projected uniformity.

In several cases, the court applied the rights constitution in a manner

453. *Id.* (citing *Bayh*, 573 N.E.2d at 417).

454. *Id.*

455. *Id.* at 477-78.

456. IND. CODE § 34-51-3-6 (2003).

457. *Cheatham*, 789 N.E.2d at 478.

458. *Id.*

459. *E.g.*, *Embry v. O'Bannon*, 798 N.E.2d 157, 165-66 (Ind. 2003); *Malinski v. State*, 794 N.E.2d 1071, 1077-80 (Ind. 2003).

consistent with cognate federal rights. In cases about zoning,⁴⁶⁰ the statute of repose,⁴⁶¹ domestic partner rights,⁴⁶² the sex offender registry,⁴⁶³ public school teachers in religious schools,⁴⁶⁴ jury trial rights,⁴⁶⁵ and punitive damages,⁴⁶⁶ the Indiana Supreme Court and Indiana Court of Appeals applied Indiana constitutional provisions in a manner leading to outcomes identical to federal court applications of the U.S. Constitution. The Indiana Supreme Court interpreted the Indiana Constitution in a more expansive manner in just two cases. One addressed right to counsel, where Indiana has a long history of more expansive rights.⁴⁶⁷ In the other case, Indiana joined a majority of states that have addressed the issue by determining that the state constitution requires broader Medicaid coverage for abortions than the federal constitution mandates.⁴⁶⁸ Future decisions by Indiana courts on claims under the Indiana Constitution will determine whether this pattern continues.

460. *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 239-40 (Ind. 2003).

461. *AlliedSignal v. Ott*, 785 N.E.2d 1068, 1076-77 (Ind. 2003).

462. *Cornell v. Hamilton*, 791 N.E.2d 214, 221 (Ind. Ct. App. 2003).

463. *Doe v. O'Connor*, 790 N.E.2d 985, 988-89 (Ind. 2003).

464. *Embry v. O'Bannon*, 798 N.E.2d 157, 164-67 (Ind. 2003).

465. *Sims v. U.S. Fid. & Guar. Co.*, 782 N.E.2d 345, 351-52 (Ind. 2003).

466. *Cheatham v. Poole*, 789 N.E.2d 467, 473-76 (Ind. 2003).

467. *Malinski v. State*, 794 N.E.2d 1071, 1077-79 (Ind. 2003).

468. *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 259-60 (Ind. 2003).