INDIANA CONSTITUTIONAL DEVELOPMENTS: VITALITY FOR THE EX POST FACTO CLAUSE, BUT NOT THE EDUCATION CLAUSE

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I. DECISIONS RELATING TO INDIVIDUAL RIGHTS

During the survey period, Indiana's appellate courts decided numerous cases applying provisions of the Indiana Constitution that govern individual rights. Several of these cases applied the ex post facto clause and involved restrictions on sex offenders.[1] Although federal and state ex post facto provisions are identical, Indiana's courts interpreted the ex post facto provision in the state constitution as more protective of individual rights than the federal standard.[2] In a case applying article 8, the Indiana Supreme Court held that the Indiana Constitution provides no standard of quality that must be met by Indiana's constitutionally mandated system of common schools, dismissing a challenge to the state's school funding formula.[3] The Indiana Court of Appeals rejected a challenge to a statutory ban on switchblade knives, finding that the ban did not violate the right to bear arms in the Indiana Constitution.[4] Indiana's courts also continued to refine unique Indiana constitutional analyses applying to "multiple punishments" double jeopardy and to search and seizure.[5]

A. Ex Post Facto Clause—Article 1, Section 24

The Indiana Supreme Court and Indiana Court of Appeals decided several cases involving the ex post facto clause in article 1, section 24 and the Sex and Violent Offender Registry (the "Registry"). Changes to the Registry and restrictions on those listed on the Registry applied to persons convicted before the State enacted the changes, implicating the ex post facto clause.

Although the Indiana Supreme Court applied state constitutional language nearly identical to the words of the U.S. Constitution, its analysis and outcome differed. The restrictions the Indiana Supreme Court found to violate the Indiana Constitution are the type that have been held by the U.S. Supreme Court not to violate the Federal Constitution.[6] These decisions represent another area in

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1. *See infra* Part I.A.
2. *See infra* text accompanying notes 6-7.
3. *See infra* Part I.B.
4. *See infra* Part I.D.
5. *See infra* Part I.H.
6. *Compare* Wallace v. State, 905 N.E.2d 371, 378, 384 (Ind. 2009) (holding a sex offender registry violated the ex post facto clause of the Indiana Constitution as applied to a convicted child molester), *reh'g denied*, No. 49S02-0803-CR-138, 2009 Ind. LEIS (Ind. Aug. 20, 2009), *with* Smith v. Doe, 538 U.S. 84, 105 (2003) (holding that a similar Alaska statute did not violate the Ex

which Indiana provides broader constitutional protections than the Federal Constitution. The Indiana Supreme Court decided two of these cases on the same day, *Wallace v. State*[7] and *Jensen v. State*.[8]

The defendant in *Wallace* pled guilty to child molestation as a Class C felony in 1989 and received a suspended five-year sentence.[9] He completed his probation in 1992, two years before the legislature passed the Sex Offender Registration Act (the "Act").[10] In 2001, the legislature amended the Act to require all offenders ever convicted of certain acts to register as sex offenders regardless of the date of their conviction.[11] Wallace refused to register, and he was charged with and convicted of failing to register as a sex offender, a Class D felony.[12]

As first enacted in 1994, the Registry required both registration and notification.[13] Persons convicted of certain sex offenses were required to notify law enforcement of their whereabouts and that information was disseminated to the public.[14] As initially enacted, persons convicted of eight enumerated crimes were required to register, and the Registry was produced in paper form twice annually.[15] Since its initial enactment, the legislature amended the Act several times to add crimes requiring registration (including violent offenses such as murder and criminal confinement); to increase the periods of time names appear on the Registry; to increase the amount of information that offenders must provide to local law enforcement as part of registration (including email addresses and certain website user names); to require those on the Registry to consent to random searches of their personal computers; and to place information about those on the Registry on the Internet.[16] Another amendment makes it a felony for certain persons who are required to register to live within 1000 feet of a school, youth program center, or public park.[17] Wallace's ex post facto claim was straightforward—he committed his crime, was convicted, and completed his sentence before the Act became law, so the Act's application to him was unconstitutional.[18]

As the Indiana Supreme Court held in *Wallace*, it had never decided whether analysis under the ex post facto clause of the Indiana Constitution was the same

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Post Facto Clause of the U.S. Constitution).

7. 905 N.E.2d 371 (Ind. 2009).

8. 905 N.E.2d 384 (Ind. 2009).

9. *Wallace*, 905 N.E.2d at 373.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 374-75.

14. Pub. L. No. 11-1994, § 7 (codified at IND. CODE §§ 5-2-12-1 to -13 (2005)), *repealed by* Pub. L. No. 140-2006, § 41 and Pub. L. No. 173-2006, § 55.

15. *Wallace*, 905 N.E.2d at 375.

16. *Id.* at 375-76.

17. IND. CODE § 35-42-4-11(c)(1)(A)-(C) (2008).

18. *Wallace*, 905 N.E.2d at 377.

as analysis of the same clause in the U.S. Constitution.[19] The court also stated that its analysis of Indiana's constitutional provisions has frequently departed from federal constitutional analysis even when the state and federal provisions are similarly worded.[20]

Without extensive analysis, however, the court announced that it would apply the Indiana Constitution's ex post facto clause by using the "intent-effects" test in *Smith v. Doe*,[21] a U.S. Supreme Court case.[22] Under the intent-effects test "a court first determines whether the legislature meant the statute to establish civil proceedings. If the intention of the legislature was to impose punishment, then that ends the inquiry . . . ."[23] Describing the "effects" prong of the test, the court stated, "[i]f, however the court concludes that the legislature intended a non-punitive regulatory scheme, then the court must further examine whether the statutory scheme is so punitive in effect as to negate that intention thereby transforming what had been intended as a civil regulatory scheme into a criminal penalty."[24]

In *Wallace*, however, the court skipped the "intent" prong of the test, noting that its determination that the Registry was unconstitutional under the "effects" prong as applied to Wallace made analysis of the "intent" prong unnecessary.[25] The court recited the seven-factor test for determining "effects" under *Smith*:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.[26]

The court then analyzed each factor as it applied to Wallace.[27] As to the first factor, the court reasoned that the Registry "imposes significant affirmative obligations and a severe stigma on every person to whom it applies,"[28] including requirements that those on the Registry always carry personal identification, that they permit random in-home visits, and that they give notice of their whereabouts to law enforcement, often for their entire lifetimes.[29] As to the second factor, the

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19. *Id.* (citation omitted).
20. *Id.* at 377-78 (citing State v. Gerschoffer, 763 N.E.2d 960, 965 (Ind. 2002)).
21. 538 U.S. 84 (2003).
22. *Wallace*, 905 N.E.2d at 378.
23. *Id.* (citing *Smith*, 538 U.S. at 105-06).
24. *Id.*
25. *Id.* at 379.
26. *Id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).
27. *Id.*
28. *Id.*
29. *Id.* at 379-80.

court likened registration to "the punishment of shaming" and to the conditions of supervised probation or parole.[30] As to the third factor, the court concluded that most offenses requiring registration had a scienter element.[31]

Under the fourth factor, the court concluded that the Registry has a substantial deterrent effect and promotes community condemnation of the offender, both "traditional aims of punishment."[32] As to the fifth factor, the court concluded that only a conviction—not any other finding that the charged conduct occurred or that the offender is a potential recidivist—triggers registration.[33] As to the sixth factor, the court reinterpreted the question to be "whether the Act advances a legitimate, regulatory purpose" and answered the question affirmatively because the legislature designed the Act in part to notify the community about sex offenders to allow citizens to protect themselves.[34]

The court spent the most time analyzing the seventh factor, "whether [the Act] appears excessive in relation to the alternative purpose assigned," and noted that some courts assign this factor the greatest weight.[35] The court noted that the Registry is a means to protect the public from sex offenders, but it also noted that being on the Registry is not tied to any finding of dangerousness.[36] The court found it "significant" that no method exists for offenders to show a lack of dangerousness and be removed from the Registry, "even on the clearest proof of rehabilitation."[37] The court found, on balance, that this factor tilted in favor of treating the Registry as punitive.[38]

The court summarized that only one of the seven factors pointed clearly in favor of viewing the Registry as non-punitive, while the remaining factors all pointed the other direction.[39] The court concluded that the Registry is punitive in effect under the *Smith* test, and thus could not constitutionally be applied to Wallace, who had completed his sentence before the Registry was established.[40] Thus, the Registry violated the ex post facto clause as applied to Wallace.[41]

In *Jensen*, by contrast, the court's analysis led to the opposite conclusion because Jensen had committed his offense after the legislature created the Registry.[42] He challenged only the expansion of the Registry that required him to register for the rest of his life rather than just for ten years after his term of

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30. *Id.* at 380 (citing Doe v. State, 189 P.3d 999, 1012 (Alaska 2008).
31. *Id.* at 381.
32. *Id.* at 381-82.
33. *Id.* at 382.
34. *Id.* at 383.
35. *Id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963)).
36. *Id.*
37. *Id.* at 384.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. Jensen v. State, 905 N.E.2d 384, 391-92 (Ind. 2009).

probation expired.[43] The court split 3-2 in Jensen's case.[44]

Jensen pled guilty in 2000 of vicarious sexual gratification and child molesting and the court sentenced him to three years in prison and three more on probation.[45] He was released from probation in 2004, but the Registry statute in effect when he committed his crime required him to continue to register for ten years.[46] In 2006, the legislature amended the Registry law to require a person convicted of the offenses Jensen committed to register for the person's entire lifetime.[47] Relying in part on the ex post facto clause, Jensen sought relief from lifetime registration in a trial court, but the trial court held that he was required to register for his lifetime.[48]

The Indiana Supreme Court analyzed the same seven factors from *Smith v. Doe* to determine whether the application of the Registry to Jensen violated the ex post facto clause, but the court looked only at the additional burden created by lifetime, as opposed to ten-year, registration.[49] As to the first factor, the court concluded that the Registry imposed significant affirmative obligations and a severe stigma, but that the additional burden of lifetime registration produced only slight additional negative impact.[50] As to the second factor, the additional period of registration – including a new requirement that Jensen's photo appear on the Internet with a large label "Sex Predator"—the court deemed punitive.[51] As to the third factor, the court found it to fall slightly on the side of punitive.[52]

As to the fourth, fifth, and sixth factors, the court concluded that the effect of lifetime registration was no different from the effect of ten-year registration; so, the court deemed each of these factors non-punitive as applied to Jensen.[53] Regarding the seventh factor, the court also determined that the additional years of registration had little additional effect on Jensen: "The 'broad and sweeping' disclosure requirements were in place and applied to Jensen at the time of his guilty plea in January 2000. Nothing in that regard was changed by the 2006 amendments."[54]

The court concluded that, taken together, the seven factors did not show that the 2006 amendments were punitive as applied to Jensen, so there was no ex post facto clause violation.[55] The court also rejected a separate argument that Jensen's guilty plea could not have been knowing and voluntary because he could

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43. *Id.* at 389-90.
44. *Id.* at 396.
45. *Id.* at 388-89.
46. *Id.* at 389.
47. *Id.*
48. *Id.*
49. *Id.* at 391-92.
50. *Id.*
51. *Id.* at 392.
52. *Id.* at 392-93.
53. *Id.* at 393.
54. *Id.* at 394.
55. *Id.*

not be aware of the full consequences of his plea (because some of those consequences did not exist until six years later, when the Registry law was amended).[56] The court found that this claim required factual inquiry best provided through post-conviction proceedings.[57]

Justice Sullivan concurred in the result, reasoning that Jensen's challenge was premature.[58] Because Jensen was still covered by the ten-year registration requirement that existed when he committed his crime, and the Registry statute was subject to additional amendments (which could include repeal of the provisions he was challenging), Justice Sullivan suggested that Jensen's challenge would not be ripe until the initial ten-year registration period had expired.[59]

Justice Boehm dissented, joined by Justice Dickson.[60] He concluded that "the enhanced registration requirements enacted in 2006 constitute an additional punishment that violates the Ex Post Facto Clause as applied to Jensen."[61] He noted that *Wallace* concluded that the registration requirement is punitive in effect, and "if the registration requirement is punitive, extending its period is no less additional punishment than extending a period of incarceration."[62] He also criticized the majority's evaluation of several of the *Smith* factors.[63]

The Indiana Supreme Court also applied the ex post facto clause in *State v. Pollard*,[64] finding other aspects of the Registry violated the clause. Pollard was convicted of a sex-related offense in 1997.[65] In 2006, the legislature amended the Registry law to forbid persons convicted of certain sex-related crimes from knowingly or intentionally residing within 1000 feet of school property, a youth program center, or a public park.[66] In 2007, Pollard was charged with violating this new provision because he did not move from the residence he owned and had lived in for many years, which was within 1000 feet of school property, a youth program center, or a public park.[67]

As in *Wallace*, the court could not determine whether the legislative intent of the residency restriction was to punish; so, it analyzed the effect of the provision under the seven-factor test in *Smith*.[68] On the first factor, the court found that the residency restriction created a significant and direct disability—requiring Pollard to move from the house he owned and had

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56. *Id.* at 395.
57. *Id.*
58. *Id.*
59. *Id.* at 396 (Sullivan, J., concurring).
60. *Id.*
61. *Id.* at 396-97 (Boehm, J., dissenting).
62. *Id.* at 397.
63. *Id.* at 397-98.
64. 908 N.E.2d 1145 (Ind. 2009).
65. *Id.* at 1147.
66. *Id.*; IND. CODE § 35-42-4-11 (2008).
67. *Pollard*, 908 N.E.2d at 1148.
68. *Id.* at 1149.

previously lived in and possibly requiring him to move continuously as schools and parks were built.[69] On the second factor, the court found that the residency restriction was akin to a condition of probation and therefore punitive.[70] On the third factor, the court was unable to determine the role of scienter in Pollard's case because the record did not name his offense but found the statute's effects non punitive absent evidence to the contrary.[71] As to the fourth factor, the court found the residency restriction punitive because the legislature designed it to be a direct deterrent.[72] On the fifth factor, the court found the statute punitive because it attaches only to acts that are otherwise criminal.[73] On the sixth factor, the court found the statute non-punitive because it promotes public safety and is not designed solely to punish.[74] Finally, on the seventh factor, the court found that many offenses triggered the statutory restriction on residency with no consideration for the seriousness of the crime, the relation between victim and offender, or the risk of re-offending.[75] Therefore, the statute was excessive in relation to its non-punitive purpose of protecting children.[76]

On balance, the court found that most of the *Smith* factors required a determination that the residency restriction was punitive and therefore violated the ex post facto clause as to Pollard.[77] The decision was unanimous except for a one-sentence reservation by Justice Boehm regarding the majority's treatment of the third *Smith* factor.[78]

The Indiana Court of Appeals applied the ex post facto clause in two cases. In *Dowdell v. City of Jeffersonville*,[79] the court analyzed that city's ordinance prohibiting those on the Registry from entering public parks in the city. Dowdell committed, was convicted of, and finished his sentence for sexual battery before the ordinance was enacted.[80] He wanted to enter Jeffersonville parks to see his son play little league baseball.[81] He tried to use the ordinance's waiver provision, which permits exceptions for a "legitimate reason,"[82] but his requests were denied.[83] At the time of his request, no waivers ever had been granted under the

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69. *Id.* at 1150.

70. *Id.* at 1151.

71. *Id.* at 1151-52.

72. *Id.* at 1152.

73. *Id.*

74. *Id.* at 1152-53.

75. *Id.* at 1153.

76. *Id.* at 1153.

77. *Id.* at 1153-54.

78. *Id.* at 1154 (Boehm, J., concurring) (stating his belief that "the absence of a scienter element for certain forms of child molesting is not significant in evaluating the punitive character of this statute").

79. 907 N.E.2d 559 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009).

80. *Id.* at 563.

81. *Id.* at 564.

82. *Id.* at 567.

83. *Id.*

ordinance.[84]

The court analyzed Dowdell's as-applied challenge using the *Wallace* standard.[85] Dowdell conceded that the ordinance had a non-punitive purpose, so the court went directly to the "effects" prong of the test.[86] The court found the first factor tilted in favor of punishment because the prohibition against entering parks was a "significant restraint," with violation punishable by prosecution.[87] Interestingly, the court also found that the waiver provision was itself a significant burden because of its detailed requirements and lack of meaningful standards.[88] As to the second factor, the court found that the banishment and shaming aspects of the ordinance were traditionally considered punishments.[89] On the third factor, the scienter requirement tilted toward punishment.[90]

Regarding the fourth factor, the court found that deterrence and retribution were goals of the ordinance, and those are traditional aims of punishment.[91] The fifth factor also tipped toward punishment because the park ban applied only to acts that were already criminal.[92] On the sixth factor, the ordinance had the non-punitive purpose of public protection.[93] As to the seventh factor, the court found that the restriction was excessive in relation to its non-punitive purpose because the state already had determined that Dowdell no longer had to register as a sex offender; thus, these additional restrictions were unnecessary to protect public safety.[94] Because the greatest number of factors led to the conclusion that the effect of the ordinance was punitive, the court concluded that the ordinance violated the ex post facto clause as applied to Dowdell.[95]

Judge Crone dissented.[96] He weighed several of the factors differently than the majority, including the first, second, fourth, and seventh.[97] He also concluded that the waiver provision in the ordinance gave some potential relief from the ordinance's restrictions.[98] His analysis of the factors led him to conclude that the

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84. *Id.* at 567.

85. *Id.* at 565.

86. *Id.* at 565-66.

87. *Id.* at 566-68.

88. *Id.* at 567.

89. *Id.* at 568-69.

90. *Id.* at 569.

91. *Id.* at 569-70.

92. *Id.* at 570.

93. *Id.*

94. *Id.* at 570-71.

95. *Id.* at 571.

96. *Id.*

97. *Id.* at 572-73 (Crone, J., dissenting) (arguing that the ordinance is not an affirmative disability or restraint because it does not require any action by the offender or create severe stigma; that it is not akin to banishment because it precludes access only to a subset of the community; that its deterrent effect does not necessarily make it promote traditional aims of punishment; and that it is not excessive because its effect is not as sweeping as the restriction in *Wallace*).

98. *Id.* at 573.

effect of the ordinance was not punitive under the *Wallace* analysis.[99]

In *Upton v. State*,[100] the Indiana Court of Appeals analyzed a more traditional ex post facto problem. The case regarded a statute enacted after Upton committed his crime that required those convicted of certain offenses to earn credit time ("good time") at a slower rate than under the law in effect when Upton committed his crime.[101] After Upton was arrested and charged with child molesting, the Indiana General Assembly enacted a new statute providing that persons convicted of certain offenses—including child molesting—after June 30, 2008 could only earn credit time at the rate of one day for every six days of imprisonment.[102] After Upton was convicted, the sentencing judge applied this newly enacted provision to him,[103] with the effect that he would have to serve more time in incarceration than if the statute had not been enacted (providing that his behavior was good).[104]

The court concluded that applying the new statute to Upton violated the ex post facto clause because it increased his punishment after he committed his crime.[105] When Upton committed his offense, he was eligible to earn credit time at the rate of one day for every day of incarceration.[106] After the new law took effect, he could earn credit time only at the rate of one day for every six days of incarceration.[107] The State conceded that this statute, as applied to Upton, violated the ex post facto clause.[108] The Indiana Court of Appeals agreed, reversing the sentence and remanding for resentencing.[109]

B. Right to Education—Article 8

The Indiana Supreme Court held that the Indiana Constitution conveys no judicially enforceable standard of educational quality or individual right to pursue a public education in *Bonner ex rel. Bonner v. Daniels*.[110] This decision vacated an Indiana Court of Appeals decision concluding that the Indiana Constitution did mandate certain educational quality standards, a decision discussed in this Article last year.[111] Many other states have entertained this type

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99. *Id.* at 574.

100. 904 N.E.2d 700 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).

101. *Id.* at 704-05.

102. *Id.* at 705.

103. *Id.*

104. *Id.* at 702.

105. *Id.* at 706.

106. *Id.* at 705-06.

107. *Id.*

108. *Id.* at 706.

109. *Id.*

110. 907 N.E.2d 516 (Ind. 2009).

111. Jon Laramore, *Indiana Constitutional Developments: Evolution on Individual Rights*, 42 IND. L. REV. 909, 911 (2009) (discussing Bonner *ex rel.* Bonner v. Daniels, 885 N.E.2d 673 (Ind. Ct. App. 2008)).

of litigation, which in some states has resulted in significant changes in school funding.[112]

The *Bonner* plaintiffs sought a declaratory judgment that the current school funding formula violated article 8, section 1 and other constitutional provisions by failing to provide an education of sufficient quality to equip students for responsible citizenship and economic productivity.[113] The trial court dismissed, finding that the constitutional provisions conveyed no judicially enforceable duty.[114] The plaintiffs insisted that they sought only a declaration that current school funding laws did not meet the constitutional standard, not any judicial determination that any specific standard was required.[115] The plaintiffs asserted that if the court deemed the funding formula unconstitutional, it was reasonable to assume that the General Assembly would attempt to correct the problem.[116]

Article 8, section 1 states:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.[117]

The court held that this language simply required the General Assembly to create a general and uniform system of common schools, not that those schools attain any particular standard.[118] The court concluded that the language about the importance of education for "a free government," and the encouragement of "moral, intellectual, scientific, and agricultural improvement" was merely "general and aspirational" and did not create any enforceable rights.[119] "The Clause says nothing whatsoever about educational quality," the court held.[120]

The court also gleaned from its earlier decision in *Nagy v. Evansville-Vanderburgh School Corp.*[121] that the General Assembly had complete authority to determine what should be included in Indiana's educational program.[122] In that case, parents complained that they were being required to pay fees for portions

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112. *See* The National Access Network, Litigation, http://www.schoolfunding.info/litigation/litigation.php3.

113. *Bonner*, 907 N.E.2d at 518-19.

114. *Id.* at 518.

115. *Id.* at 519.

116. Brief of Appellees at 45, Bonner *ex rel.* Bonner v. Daniels, 885 N.E.2d 673 (Ind. Ct. App. 2008) (49A02-0702-CV-00188).

117. IND. CONST. art. 8, § 1.

118. *Bonner*, 907 N.E.2d at 521.

119. *Id.* at 520.

120. *Id.* at 521.

121. 844 N.E.2d 481 (Ind. 2006).

122. *Bonner*, 907 N.E.2d at 521 (citing and quoting *Nagy*, 844 N.E.2d at 491).

of the educational program that should be "without charge" under article 8.[123] The court concluded that the General Assembly had authority to prescribe the educational program, which had to be provided "without charge" unless the legislature expressly stated that fees could be charged.[124] *Bonner* concluded that article 8 gave the General Assembly discretion to determine what constituted adequate education, so the courts had no role in enforcing any quality standards.[125]

The court also rejected the other claims in *Bonner*.[126] It rejected the claim that the Indiana Constitution creates any individual right to education, concluding that it only mandated that the General Assembly create a system of common schools.[127]

Justice Boehm concurred in a separate opinion.[128] He agreed that the Indiana Constitution "imposes no particular level of quality on the educational product of our schools," but concluded that the courts could enforce the constitutional requirements that schools be available "generally throughout the state" and be "uniform."[129]

Justice Rucker dissented.[130] "[T]he relief plaintiffs seek is simply a declaration that the education being provided to them and the system for funding that education fall short of the constitutional mandate to provide for a general and uniform system of open common schools."[131] He concluded that the courts were capable of determining the validity of this claim and, therefore, the court should not have dismissed the complaint.[132]

C. Rights of the Accused—Article 1, Section 13

Both the Indiana Supreme Court and the Indiana Court of Appeals addressed instances in which persons accused of crimes claimed rights under the Indiana Constitution exceeding their rights under the U.S. Constitution.

In *Bassett v. State*,[133] the defendant was convicted of murder.[134] On appeal, he challenged the admissibility of recorded statements he made to his attorney on the prison telephone system.[135] The telephone system produced an oral

123. *Nagy*, 844 N.E.2d at 483.
124. *Id.* at 491-92.
125. *Bonner*, 907 N.E.2d at 522.
126. *Id.*
127. *Id.*
128. *Id.* at 523.
129. *Id.* at 523-24 (Boehm, J. concurring).
130. *Id.* at 523.
131. *Id.* at 525 (Rucker, J. dissenting).
132. *Id.*
133. 895 N.E.2d 1201 (Ind. 2008), *cert. denied*, 129 S. Ct. 1920 (2009).
134. *Id.* at 1204.
135. *Id.* at 1205.

warning at the beginning of each call that calls were subject to being recorded.[136] In rejecting Bassett's argument under article 1, section 13, the Indiana Supreme Court affirmed the importance of lawyer-client privilege by concluding that their in-person communications during the attorney's visits to the jail were confidential.[137] But the recorded telephone conversations were not protected by privilege because "Bassett failed to safeguard the confidentiality of communications with his attorney" by having those conversations on a line he knew was subject to recording.[138] The court did not exclude the recorded telephone conversations, finding no section 13 violation.[139]

The Indiana Supreme Court also addressed a section 13 issue in *Edwards v. State*.[140] The court received the case on remand from the U.S. Supreme Court, which decided that just because a defendant was mentally competent to stand trial that defendant may not be sufficiently competent to represent himself at trial.[141] On remand, the Indiana Supreme Court concluded that the record contained sufficient evidence for it to determine that Edwards was competent to stand trial but (under the U.S. Supreme Court's newly announced standard) not competent to represent himself.[142]

The court then addressed a separate state constitutional claim that the Indiana Constitution conveys a broader right to self-representation than the U.S. Constitution.[143] The court noted that "[s]ection 13 does provide broader rights than the Sixth Amendment. But each of these expanded rights dealt with the right to counsel, and none addressed the right of self-representation."[144] The court also acknowledged textual differences in the Indiana Constitution, which guarantees the accused the right "to be heard by himself" and places a unique value on the accused's right to speak out personally in the courtroom.[145] But the court concluded, despite these differences, that the section 13 right to self-representation is no broader than that in the Sixth Amendment.[146]

The Indiana Court of Appeals addressed two situations in which witnesses did not appear for trial, leading to claims by defendants that they were deprived of their state constitutional right to cross-examine witnesses against them. In *Morgan v. State*,[147] a subpoenaed witness came to court but fled before he could testify; law enforcement officers were unable to locate him.[148] Several jurors

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136. *Id.* at 1207.
137. *Id.* at 1206-07.
138. *Id.* at 1207.
139. *Id.* at 1207-08.
140. 902 N.E.2d 821 (Ind. 2009).
141. Indiana v. Edwards, 128 S. Ct. 2379, 2387-88 (2008).
142. *Edwards*, 902 N.E.2d at 825-28.
143. *Id.* at 828.
144. *Id.*
145. *Id.* at 829.
146. *Id.*
147. 903 N.E.2d 1010 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 993 (Ind. 2009).
148. *Id.* at 1014.

indicated that they had heard "something through the media or relatives about [the witness]'s disappearance."[149] The Indiana Court of Appeals first ruled that the trial court correctly deemed the witness unavailable because the state was unable to procure his attendance, and it was therefore proper to read his discovery deposition into evidence.[150] The court also rejected Morgan's argument that there should have been a mistrial because jurors heard rumors about the witness's disappearance.[151] The court concluded that Morgan's right to an impartial jury under article 1, section 13 was not violated because the jurors who heard rumors testified that they could disregard the rumors "and base their decision solely upon the evidence presented at trial."[152]

In *Tiller v. State*,[153] a subpoenaed witness did not appear for trial, apparently because he left town out of fear about testifying.[154] The trial court found that the State had made adequate efforts to secure the witness's testimony, and then allowed his discovery deposition to be used as evidence.[155] Tiller complained that he was denied his state constitutional right "to meet the witnesses face to face."[156] The Indiana Court of Appeals concluded that the trial court's action was proper.[157] Although the Indiana Constitution emphasizes the "face to face" confrontation right, if the State makes "a good faith effort" to obtain live testimony but cannot do so, it is proper to use prior, preserved testimony as long as the defendant had the right to cross-examine the witness on that prior occasion.[158]

D. Right to Bear Arms—Article 1, Section 32

In a case of first impression, the Indiana Court of Appeals looked at the constitutionality of a statute making possession of a type of weapon entirely unlawful in *Lacy v. State*.[159] The weapon was a switchblade knife, possession of which is a crime.[160] Lacy argued that this total ban violated section 32, which states that the "people shall have [a] right to bear arms, for defense of themselves and the State."[161] The court concluded that the statute is an exercise of the State's police power, exercise of which violates the Indiana Constitution only

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149. *Id.*

150. *Id.* at 1017.

151. *Id.* at 1019-20.

152. *Id.* at 1019.

153. 896 N.E.2d 537 (Ind. Ct. App. 2008), *reh'g denied*, No. 45A03-08-02-CR-78, 2009 Ind. App. LEXIS 8 (Ind. Ct. App. Jan. 6, 2009).

154. *Id.* at 543-44.

155. *Id.* at 544.

156. *Id.* (citing IND. CONST., art 1, § 13).

157. *Id.* at 546-47.

158. *Id.* at 545-46.

159. 903 N.E.2d 486, 488 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 991 (Ind. 2009).

160. *Id.*; IND. CODE § 35-47-5-2 (2008).

161. *Lacy*, 903 N.E.2d at 489 (quoting IND. CONST. art. 1, § 32).

when it creates a "material burden" on a "core value" embodied in the constitution.[162] The court determined that the State's exercise of its police power was valid because switchblade knives are dangerous and easily concealed, making them more useful in criminal operations than other knives.[163] The court then concluded that this valid exercise of police power did not materially burden a core value because Lacy retained her right to possess weapons, including knives not outlawed by Indiana Code section 35-47-5-2, just not the specific type of weapon at issue in this case.[164]

E. Double Jeopardy—Article 1, Section 14

Indiana's appellate courts continued to apply Indiana's constitutional analysis for "multiple punishments" double jeopardy, which differs from the federal analysis.[165] Under this analysis, two acts are the same offense, and therefore can be punished only once, if (1) the statutory elements of one offense establish the statutory elements of the second charged offense ("same elements" test); or (2) the evidence proving the first offense is the same as the evidence proving the second offense ("same evidence" or "actual evidence" test).[166]

In *Newgent v. State*,[167] the Indiana Court of Appeals vacated two convictions as double jeopardy violations.[168] Newgent was convicted of criminal confinement (count I), assisting a criminal (count II), and murder (count III).[169] The evidence showed that Newgent provided the murderer with the tools he used to kill, including a hammer and duct tape, and that Newgent supervised the victim while he was being confined, held the victim while he was being bludgeoned to death, and later moved the body.[170]

Newgent challenged his convictions for criminal confinement and assisting a criminal.[171] The court found that the State pointed to all the same evidence it relied on to convict Newgent of murder in urging the jury to convict Newgent of murder.[172] The State could have separated the evidence, using some in support of one offense and some in support of the other, but it did not.[173] Because there was a reasonable chance that the jury used the same evidence to convict of both

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162. *Id.* at 490.

163. *Id.* at 490-92.

164. *Id.* The court specifically rejected the contrary holding in *State v. Delgado*, 692 P.2d 610 (Ore. 1984), in which the Oregon Supreme Court applied identical language to invalidate a ban on switchblade knives.

165. Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1992) (describing the separate test).

166. *Id.*

167. 897 N.E.2d 520 (Ind. 2008).

168. *Id.* at 529-30.

169. *Id.* at 524.

170. *Id.* at 527.

171. *Id.* at 521-22.

172. *Id.* at 527.

173. *Id.*

offenses, the court found a double jeopardy violation and vacated the lesser offense.[174] The court also supported this conclusion by reference to Justice Sullivan's concurrence in *Richardson v. State*,[175] which, in its more mechanical analysis of double jeopardy, forbids "Conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished."[176] The *Newgent* court found that the conduct alleged to meet the elements of the assisting a criminal charge were "the very same" as the acts alleged to satisfy the elements of the murder charge, verifying the double jeopardy violation.[177]

In *Graham v. State*,[178] the Indiana Court of Appeals found a double jeopardy violation when the trial court enhanced a sentence based on the same prior offense used to prove that the offender was a habitual offender.[179] Lengthening a sentence in two different ways because of the same prior act generally violates the Double Jeopardy Clause,[180] and the court remanded the case for resentencing.[181] Similarly in *Owens v. State*,[182] the court found that a conviction for robbery had been enhanced from a Class C to Class A felony for the same conduct that formed the basis for Owens' conviction for murder, violating double jeopardy principles.[183] The court vacated the enhancement.[184]

F. Criminal Jury as the Judge of the Facts—Article 1, Section 19

The Indiana Supreme Court revisited article 1, section 19, which states that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts,"[185] in *Walden v. State*,[186] an appeal challenging the determination that Walden was a habitual offender. Walden sought a jury instruction stating "[e]ven where the jury finds the facts of the prerequisite prior felony convictions to be uncontroverted, the jury still has the unquestioned right

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174. *Id.* at 527-28.

175. 717 N.E.2d 32 (Ind. 1999).

176. *Newgent*, 897 N.E.2d at 528 (quoting *Richardson*, 717 N.E.2d at 55-56) (Sullivan, J. concurring)).

177. The court also vacated the conviction for assisting a criminal for similar reasons. *Id.* at 529-30.

178. 903 N.E.2d 538 (Ind. Ct. App. 2009).

179. *Id.* at 541.

180. Mills v. State, 868 N.E.2d 446, 451-52 (Ind. 2007) (holding that "absent explicit direction" double enhancements violate double jeopardy).

181. *Id.* at 541-42.

182. 897 N.E.2d 537 (2008), *appeal after new sentencing*, 916 N.E.2d 913 (Ind. Ct. App. 2009).

183. *Id.* at 539.

184. *Id.* at 540.

185. IND. CONST. art. 1, § 19.

186. 895 N.E.2d 1182 (Ind. 2008).

to refuse to find the Defendant to be a habitual offender at law."[187] The trial court denied the instruction.[188] The Indiana Supreme Court found that Walden's proffered instruction correctly stated the law,[189] but affirmed the trial court's giving an instruction that simply repeated the constitutional language.[190] The court held that "the trial court is certainly not obligated to issue an invitation to the jury to disregard prior convictions in addition to informing the jury of its ability to determine the law and the facts."[191]

Justices Dickson and Rucker each dissented separately.[192] Justice Rucker noted that "although Indiana juries have no right to disregard the law, under the clear wording of the [c]onstitution they still have the right to determine the law."[193] He did not advocate jury nullification, but indicated his view that the instruction the majority approved was not "sufficient to advise the jury of its statutory authority in the habitual offender phase of trial. . . . Simply advising the jury that it has the right to determine the law and the facts falls woefully short of explaining how this right may be exercised."[194] Justice Dickson also agreed that the more explicit instruction Walden proffered did a better job of informing the jury than the instruction the majority approved:

> Innocuous, generic, non-specific jury instructions are not an adequate substitute for plain-language advisements that meaningfully explain to jurors the reality of their rights and permissible function under the law. In my view, the resulting obfuscation and secrecy [from the instruction the majority approved] is inconsistent with the Rule of Law.[195]

G. Sentencing

The Indiana Court of Appeals rejected two claims under article 1, section 16, which requires that penalties be proportioned to the nature of the offense. In *Mann v. State*,[196] the court held that it was proper to punish Class B aggravated battery more severely than Class C battery because the former required an enhanced mental state—knowing or intentional infliction of injury—although both offenses involved the same type of injury.[197] In *Micheau v. State*,[198] the court held that a sentence for an *attempted* methamphetamine dealing conviction

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187. *Id.* at 1184 (citing IND. CONST. art. 1, § 19).
188. *Id.* at 1186.
189. *Id.*
190. *Id.* at 1186-87.
191. *Id.* at 1186.
192. *Id.* at 1187.
193. *Id.* (Rucker, J., dissenting).
194. *Id.* at 1188.
195. *Id.* at 1190 (Dickson, J., dissenting) (footnote omitted).
196. 895 N.E.2d 119 (Ind. Ct. App. 2008).
197. *Id.* at 124.
198. 893 N.E.2d 1053 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 977 (Ind. 2009).

and for an actual methamphetamine dealing conviction was permissible because the amount of methamphetamine involved in the attempt conviction was larger than the amount involved in the actual dealing conviction.[199]

H. Search and Seizure—Article 1, Section 11

During the survey period, Indiana's courts continued to apply Indiana's unique search and seizure principles, which determine reasonableness based on the totality of circumstances, balancing the degree of suspicion that lawbreaking has occurred against the degree of intrusion the search method imposes on the citizen's ordinary activities.[200]

In *State v. Washington*,[201] the Indiana Supreme Court approved a consent search in connection with a traffic stop.[202] Police stopped Washington, who was riding a moped without a helmet, erroneously believing that he was younger than eighteen and therefore subject to a helmet requirement.[203] Because Washington seemed nervous, the officer asked him if he had any contraband, and Washington replied that he had marijuana.[204] The officer received permission from Washington to remove the bags of marijuana from Washington's pockets and he was charged with possession.[205] The State dismissed the charges after the trial court granted Washington's motion to suppress.[206] The Indiana Supreme Court concluded that there was no Fourth Amendment violation.[207]

Applying the Indiana Constitution, the court used the factors outlined in *Litchfield v. State*, balancing the degree of suspicion of lawbreaking, the degree of intrusion of the method of search, and law enforcement needs.[208] The court found a reasonable basis for stopping Washington and found the degree of intrusion minimal.[209] It concluded that the officer's action was not unreasonable under the circumstances.[210]

Two justices dissented.[211] Justice Boehm believed the officer violated article 1, section 11 after stopping Washington because his questioning on unrelated

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199. *Id.* at 1061, 1067 (holding that two independent offenses were committed, one involving 12.96 grams of ephedrine and pseudoephedrine (the attempted dealing evidence) and the other involving 0.48 grams of methamphetamine (the dealing conviction)).

200. Laramore, *supra* note 111, at 918-25.

201. 898 N.E.2d 1200 (Ind. 2008), *reh'g denied*, No. 02S03-0804-CR-191, 2009 Ind. LEXIS 624 (Ind. May 14, 2009).

202. *Id.* at 1202-03.

203. *Id.* at 1203.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 1205.

208. *Id.* at 1206 (citing Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005)).

209. *Id.*

210. *Id.* at 1208.

211. *Id.* at 1208-14.

subjects was not reasonable.[212] He stated that the Indiana Constitution "requires limiting questioning to the offense justifying the stop."[213] Because the officer lacked reasonable suspicion that any other offense had been committed, he should not have open-endedly questioned Washington on other potential violations.[214] Similarly, Justice Rucker believed that the additional time the officer detained Washington to make inquiries unrelated to the stop was unreasonable and violated the Fourth Amendment.[215]

In *Meredith v. State*,[216] the Indiana Supreme Court upheld a search incident to a traffic stop.[217] The officer stopped Meredith because the officer was unable to read the temporary license plate in his back window.[218] During the stop, the officer asked Meredith for consent to search the car, which Meredith gave, and the officer found drugs.[219] The court held that the traffic stop was reasonable by analyzing various motor vehicle statutes and concluding that drivers must display and illuminate temporary license plates like a permanent plate, which Meredith had not done.[220] The court also approved the officer's request to search despite his failure to give the warning that Meredith was entitled to legal counsel before giving consent to search, as required by *Pirtle v. State*.[221] The court concluded that although Meredith was the subject of a traffic stop, he was not actually in police custody (despite the officer's testimony that Meredith was not free to leave); thus, *Pirtle* did not apply.[222] Justice Rucker dissented, asserting that the motor vehicle laws on temporary plates are ambiguous, so the officer lacked a justification to make the traffic stop.[223]

The Indiana Court of Appeals addressed several search cases under section 11. In *George v. State*,[224] the court approved police testing of a pill found during an inventory search of an impounded car, reasoning that the police inventory policy required it and testing the pill would increase the chances that whoever was prescribed the pill would not miss a scheduled dose.[225] In *Hathaway v. State*,[226] the court found that an automobile search that found a handgun was not reasonable and excluded the evidence.[227] The police searched after arresting

212. *Id.* at 1211 (Boehm, J., dissenting).
213. *Id.*
214. *Id.* at 1211-12.
215. *Id.* at 1213-14 (Rucker, J., dissenting).
216. 906 N.E.2d 867 (Ind. 2009).
217. *Id.* at 869.
218. *Id.*
219. *Id.*
220. *Id.* at 870-72.
221. *Id.* at 873 (citing Pirtle v. State, 323 N.E.2d 634, 640 (Ind. 1975)).
222. *Id.* at 874.
223. *Id.* at 874-75 (Rucker, J., dissenting).
224. 901 N.E.2d 590 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 990 (Ind. 2009).
225. *Id.* at 596-97.
226. 906 N.E.2d 941 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).
227. *Id.* at 945-46.

Hathaway for driving without a license. Police insisted on searching his car before towing it, although the car's passenger was willing to drive it away.[228] The tow was therefore unnecessary (and no search was necessary to find evidence of driving without a license) so the search was unreasonable.[229]

The court also held a search reasonable in *Powell v. State*,[230] where police action included cutting cocaine out of Powell's underwear.[231] The court found the search reasonable because Powell was under arrest, the officers were going to transport him, and they had to determine what the object they found in their pat down was to ensure their safety.[232] They were able to remove the object with minimal intrusion because Powell wore his pants so low, and the arrest occurred in a location where no one was likely to see Powell's private parts.[233]

In *State v. Brown*,[234] the court invalidated a seizure.[235] Police stopped Brown on the street, questioned him when he appeared "nervous," and eventually ran his name through a database and learned his driver's license had been suspended.[236] He was prosecuted for driving without a license because he had been driving a car before police stopped him.[237] The court suppressed the result of the record search, resulting in dismissal of the charges, because the police lacked valid basis upon which to question Brown.[238]

I. Sentencing—Article 7, Section 4

The Indiana Supreme Court issued at least four opinions using its authority to revise sentences under article 7, section 4.[239] Professor Schumm fully addresses these cases in his Article on developments in criminal procedure.[240] Perhaps the most notable of these is the divided opinion in *McCullough v. State*.[241] In, that case, the majority concluded that appellate courts' power under article 7, section 4 extends not only to reducing sentences that are inappropriately

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228. *Id.* at 943.

229. *Id.* at 945-46.

230. 898 N.E.2d 328 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 983 (Ind. 2009).

231. *Id.* at 330.

232. *Id.* at 336.

233. *Id.*

234. 900 N.E.2d 820 (Ind. Ct. App. 2009), *reh'g denied*, No. 3805-0810-CR-573, 2009 Ind. App. LEXIS 1576 (Ind. Ct. App. May 14, 2009), *trans. denied*, 919 N.E.2d 551 (Ind. 2009).

235. *Id.* at 821.

236. *Id.* at 821-22.

237. *Id.* at 822.

238. *Id.* at 823-24.

239. McCullough v. State, 900 N.E.2d 745 (Ind. 2009); Hayes v. State, 906 N.E.2d 819 (Ind. 2009); Cardwell v. State, 895 N.E.2d 1219 (Ind. 2008); Harris v. State, 897 N.E.2d 927 (Ind. 2008).

240. Joel Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 43 IND. L. REV. 691 (2010).

241. *McCullough*, 900 N.E.2d at 749-50.

severe, but also to increasing sentences—but only when the sentence is outside statutory authority or when the convicted person initiates the challenge to the sentence under article 7, section 4.[242]

J. Due Course of Law—Article 1, Section 12
Equal Privileges and Immunities—Article 1, Section 23

Both Indiana appellate courts addressed several claims during the survey period that statutory enactments violated article 1, section 12, the due course of law clause, or article 1, section 23, the equal privileges and immunities clause. Claims under these two sections often are brought in the same lawsuit.[243] As has been habitual in the past several years, Indiana's appellate courts have been reluctant to find that the General Assembly has violated these provisions when it has enacted statutes, and this year was no exception to that trend.

In *State ex rel. Indiana State Police v. Arnold*,[244] the Indiana Supreme Court rejected a challenge to the statute permitting courts to expunge arrest records.[245] In this case, a trial court granted expungement to Arnold, who had been arrested for robbery but never charged.[246] The State Police Department later sought to overturn the expungement, arguing that Arnold did not meet the statutory criteria for expungement.[247] The Indiana Supreme Court ruled that the statute gave trial courts significant discretion and rejected the State Police's argument that discretion was fettered if the person seeking expungement had certain other criminal offenses on his record.[248] The court also rejected the State Police's argument that the court's own interpretation of the statute—giving courts significant discretion—violated the equal privileges and immunities clause because significant judicial discretion could lead to similarly situated persons being treated differently.[249] The court found that discretion, in and of itself, did not violate the equal privileges and immunities clause.[250]

Herron v. Anigbo[251] is one of the Indiana Supreme Court's periodic applications of the state constitution in the medical malpractice context.[252] The

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242. *Id.*

243. Laramore, *supra* note 111, at 934-36.

244. 906 N.E.2d 167 (Ind. 2009).

245. *Id.* at 172.

246. *Id.* at 167-68.

247. *Id.* at 168.

248. *Id.* at 170-71.

249. *Id.* at 172.

250. *Id.* Chief Justice Shepard dissented on the statutory construction issue. *Id.* (Shepard, C.J., dissenting).

251. 897 N.E.2d 444 (Ind. 2008), *reh'g denied*, No. 45S03-0811-CV-594, 2009 Ind. LEXIS 119 (Ind. Feb. 10, 2009).

252. *See* Martin v. Richey, 711 N.E.2d 1273, 1279 (Ind. 1999) (holding that the Indiana Constitution does not require a discovery-base rule for statute of limitations); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 603 (Ind. 1980) (holding that occurrence-based statute of

question was whether the two-year, occurrence-based statute of limitations could constitutionally be applied to Herron, who had post-operative complications after suffering a fall.[253] Herron filed his complaint approximately nine months after the two-year limitations period expired.[254] The court concluded that, in this case, as a matter of law Herron knew of a *potential* malpractice claim four months before the limitations period ran, and he had a duty to investigate the claim at that time rather than wait until he received more definitive evidence.[255] Because there was no obstacle to his investigation and filing before the limitations period ran, there was no denial of due course of law or equal privileges.[256] Justices Dickson and Rucker dissented, finding insufficient basis in the record to conclude that Herron should have known to investigate potential malpractice before the limitations period ran.[257]

The Indiana Court of Appeals addressed a similarly founded claim relating to workers' compensation in *Pavese v. Cleaning Solutions*.[258] The worker claimed that the statutory allocation of the burden of proof to the employee at all stages deprived him of due course of law under article 1, section 12.[259] She lost consciousness in a fall and was therefore unable to testify whether the fall was a result of her employment, and no medical evidence of the source of the fall could be found.[260] She was denied workers' compensation benefits because she could not prove that her injury arose from employment.[261] The court rejected her claim that the statutory burden allocation violated section 12.[262] First, the court found that she waived this point by failing to provide any supporting analysis.[263] Second, the court concluded that in the context of workers' compensation, a wholly statutory remedial scheme, the choice of allocation of burden of proof was entirely legislative.[264]

In *Gibson v. Department of Correction*,[265] the Indiana Court of Appeals rejected constitutional challenges to the addition of certain violent offenders to the Sex and Violent Offender Registry.[266] The court found no violation of article 1, section 23 because the class of persons required to register (murderers, attempted murderers, persons committing voluntary manslaughter, and persons

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limitations periods are facially constitutional).

253. *Herron*, 897 N.E.2d at 447-48.

254. *Id.* at 447.

255. *Id.* at 449-50.

256. *Id.* at 452-53.

257. *Id.* at 454-55 (Dickson, J., dissenting).

258. 894 N.E.2d 570 (Ind. Ct. App. 2008).

259. *Id.* at 576-77.

260. *Id.* at 573-74.

261. *Id.* at 574.

262. *Id.* at 577.

263. *Id.*

264. *Id.*

265. 899 N.E.2d 40 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 987 (Ind. 2009).

266. *Id.* at 52-53, 55.

who have committed attempted voluntary manslaughter) have manifested intentional violent, deadly behavior toward others.[267] The fact that a prosecutor could charge a lesser offense for the same conduct so that the person would not be required to register did not render the statute unconstitutional because "there are sufficient inherent differences between murder, voluntary manslaughter, and attempts to commit those crimes, as compared with . . . other . . . offenses resulting in death, to permit the General Assembly to specify different treatment."[268]

The court also rejected a challenge based on section 12.[269] The plaintiffs argued that, in contrast to sex offenders, data show that violent offenders are much less likely to reoffend. Placing them on the Registry serves no valid purpose and is arbitrary.[270] The court concluded that

> the fact that there is some (albeit slight) recidivism among violent offenders at least for some time after release, and that community notification about violent offenders provides an opportunity for enhancing public safety ([a] legitimate state interest), the requirement that violent offenders register for at least some amount of time meets the low threshold of rational relation.[271]

In *Town of Chandler v. Indiana-American Water Co.*,[272] the Indiana Court of Appeals also rejected a section 23 challenge by a municipality to the Utility Regulatory Commission's assertion of authority in a territorial dispute.[273] The court held that "[b]ecause Chandler is a municipality, it is not a citizen," article 1, section 23 did not apply."[274]

II. Decisions Relating to Governmental Structure and Powers

Indiana courts considered several cases involving the structure and powers of state government, including the right to vote, takings and the transfer of accessors' duties.

A. Right to Vote

The Indiana Court of Appeals invalidated Indiana's voter identification law on state constitutional grounds in *League of Women Voters of Indiana, Inc. v. Rokita*.[275] The Indiana Supreme Court granted a petition for transfer during the

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267. *Id.* at 51-52.

268. *Id.* at 52.

269. *Id.* at 53-54.

270. *Id.*

271. *Id.* at 55.

272. 892 N.E.2d 1264 (Ind. Ct. App. 2008).

273. *Id.* at 1270.

274. *Id.*

275. 915 N.E.2d 151 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, No. 49S02-1001-CV-50, 2010 Ind. LEXIS 85 (Ind. Jan. 25, 2010), *superseded*, 2010 Ind. LEXIS 412 (Ind. June 30,

survey period.[276]

Indiana's voter identification law, considered one of the most stringent in the United States,[277] permits a registered voter to vote in person only after presenting a government-issued identification with a photograph and expiration date.[278] Under the law, a registered voter who appears without identification required by the law may vote a provisional ballot, which is counted if the voter presents valid identification at the county clerk's office within ten days.[279] The U.S. Supreme Court rejected a federal constitutional challenge to the law in *Crawford v. Marion County Election Board*.[280]

The trial court had dismissed the case, concluding that the complaint failed to state a claim on which relief could be granted.[281] The Indiana Court of Appeals first concluded that the Secretary of State was a proper defendant, despite his protestations that he lacks power to enforce election laws (although he has other election-related duties and is named Chief Election Official by statute).[282] The court concluded that the League's complaint could be redressed by the Secretary of State in his role as advisor to local election officials because, if the League prevailed, the Secretary could advise local election officials not to enforce the statute.[283]

The court then rejected the League's claim that the voter identification law established new qualifications for voters, which may be done only by constitutional amendment and not by statute.[284] The court found that the voter identification requirement was not a qualification, but rather a restriction on the time, place, or manner in which qualified voters may vote, much like registration requirements.[285]

But the court did accept the League's argument that portions of the voter identification law violated article 1, section 23, the equal privileges and immunities clause.[286] Under that provision, which precludes the General Assembly from granting privileges or immunities to any group "which, upon the same terms, shall not equally belong to all citizens,"[287] requires that "disparate treatment accorded by . . . legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes" and that

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276. *Id.*

277. David Stout, *Supreme Court Upholds Voter Identification Law in Indiana*, N.Y. TIMES, Apr. 29, 2008, http://www.nytimes.com/2008/04/29/Washington/28cnd-Scotus.html.

278. *Rokita*, 915 N.E.2d at 154-55.

279. *Id.* at 155.

280. 553 U.S. 181 (2008).

281. *Rokita*, 915 N.E.2d at 155-56.

282. *Id.* at 156-57.

283. *Id.* at 157.

284. *Id.* at 159-60.

285. *Id.* at 160-61.

286. *Id.* at 162-63, 165.

287. IND. CONST. art. 1, § 23.

"preferential treatment must be uniformly applicable and equally available to all persons similarly situated."[288]

The court concluded that the voter identification law treated in-person voters differently than mail-in absentee voters, and that disparate treatment was not related to any inherent characteristics distinguishing the groups.[289] The Indiana Supreme Court has affirmed statutes treating mail-in absentee ballots more stringently because "inherent differences make mailed-in ballots more susceptible to improper influences or fraud."[290] If mail-in absentees are more susceptible to fraud, the court reasoned, more stringent treatment of in-person voters is not reasonably related to any inherent characteristic distinguishing the two groups.[291]

The court also found that special treatment of voters residing in state-licensed care facilities, who also vote at those facilities, violated article 1, section 23.[292] The Secretary of State justified this different treatment by arguing that persons living in state-licensed care facilities generally are elderly or disabled and therefore may vote by absentee ballot, and eliminating the voter identification requirement makes it easier for them to vote in-person where they live.[293] He also argued that persons who vote in the very facility where they live are likely to be recognized and unlikely to commit fraud.[294] The court rejected this reasoning, concluding that there was nothing *inherent* in the status of living in a state-licensed care facility that was also a polling place that justified special treatment.[295]

The court rejected the League's arguments that other, equally reliable types of identification should be allowed and that the voter identification law violated the rule that all voter qualifications must be uniform.[296]

The court noted that the General Assembly could easily remove the provision giving special treatment to persons living in state-licensed care facilities, eliminating that constitutional problem.[297] But it would be much more difficult, if not impossible, for the General Assembly to eliminate the disparate treatment of in-person and mail-in absentee voters.[298] Because of this inherent flaw, the court concluded that the statute had to be invalidated on its face and "declar[ed] . . . void."[299]

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288. *Rokita*, 915 N.E.2d at 161 (quoting Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994)).
289. *Id.* at 163.
290. *Id.* at 162.
291. *Id.* at 163.
292. *Id.* at 165.
293. *Id.*
294. *Id.*
295. *Id.* at 165.
296. *Id.* at 166.
297. *Id.* at 168.
298. *Id.*
299. *Id.* at 168-69.

B. Takings—Article 1, Section 21

The Indiana Supreme Court defined the boundaries of compensable takings in *State v. Kimco of Evansville, Inc.*,[300] a case involving the redesign of streets providing access to a shopping center. The streets around Kimco's Plaza East Shopping Center were reconfigured to improve traffic flow, thereby decreasing access to the shopping center.[301] The shopping center sued for damages, alleging that its customers had more difficulty reaching the shopping center after the street redesign, and won a $2.3 million verdict.[302] The State appealed.[303] The court concluded that the shopping center's loss of access did not constitute a taking under article 1, section 21, aligning Indiana law with federal takings law.[304]

The court said that "the state and federal takings clauses are textually indistinguishable and are to be analyzed identically."[305] Under federal law, there is no taking unless the government action "deprives an owner of all or substantially all economic or productive use of his or her property," and Indiana adopted that standard in *Kimco*.[306] The court said: "although an elimination of rights of ingress and egress constitutes a compensable taking, the mere reduction in or redirection of traffic flow to a commercial property is not a compensable taking of a property right."[307] Because, in this case, the State's action only limited access to the shopping center but did not cut off that access altogether, there was no compensable taking.[308] Justices Dickson and Rucker dissented "believing that the Court of Appeals correctly decided this case," but they did not write a separate opinion.[309]

Lindsey v. DeGroot[310] was a challenge, on takings grounds, to the Indiana Right to Farm Act (the "Act"), in which neighbors of the DeGroot farm alleged that the statute unconstitutionally took away their right to sue for nuisance.[311] The Act states that a farming operation cannot constitute a nuisance, so long as it is operated properly and does not materially change its activities, "by any changed conditions in the vicinity of the locality after the agricultural or industrial operation . . . has been in operation continuously" on the site for at

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300. 902 N.E.2d 206 (Ind. 2009), *reh'g denied*, 2009 Ind. LEXIS 625 (Ind. May 13, 2009), *cert. denied*, 2010 WL 154926 (U.S. Jan. 19, 2010).

301. *Id.* at 208-09.

302. *Id.* at 209-10.

303. *Id.*

304. *Id.* at 215-16.

305. *Id.* at 210.

306. *Id.* at 211 (citing Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538-40 (2005)).

307. *Id.* at 214.

308. *Id.* at 214-15.

309. *Id.* at 216.

310. 898 N.E.2d 1251 (Ind. Ct. App. 2009).

311. *Id.* at 1255-56.

least one year.[312] The plaintiffs alleged that the Act essentially created an easement allowing odors from the DeGroot farm to permeate their property without recourse.[313] The plaintiffs premised their only constitutional theory on the Act creating an easement (which an Iowa court found in examining a similar statute[314]).[315] The court's rejection of that theory because no Indiana law supported the "seemingly unique Iowa holding that the right to maintain a nuisance is an easement," thus defeated the constitutional claim.[316]

C. Transfer of Assessor's Duties

Stoffel v. Daniels[317] was a multi-faceted challenge to the statute that abolished most township assessors' positions. Stoffel was an elected township assessor, and the statute abolished her position at the end of her term.[318] Mid-term, however, it removed all of her duties and transferred them to the county assessor (and permitted the county to reduce her salary).[319] Stoffel argued that it was unconstitutional for the legislature to change a township assessor's duties during the middle of an elected term.[320] She cited article 6, section 3, which provided that township assessors "shall be elected, or appointed, in such manner as may be prescribed by law,"[321] article 15, section 2, which allows the legislature to establish terms of office, and article 15, section 3, which states that when a person is elected for a given term, "the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified."[322] The court concluded that none of these provisions preclude the General Assembly from abolishing a legislatively created office in the middle of the term, nor do they prevent changing the duties of the office mid-term.[323] The court held "the Indiana General Assembly has the authority to curtail the duties, powers, and obligations of an elected township assessor, even during the middle of his elected term, and transfer these duties, powers, and obligations to the county assessor."[324]

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312. IND. CODE § 32-30-6-9 (2008).
313. *Lindsey*, 898 N.E.2d at 1257-58.
314. Churchill v. Burlington Water Co., 62 N.W. 646 (Iowa 1895).
315. *Id.* at 1258.
316. *Id.* at 1259.
317. 908 N.E.2d 1260 (Ind. Ct. App. 2009).
318. *Id.* at 1263-65 (citing IND. CODE §§ 36-6-5-1, -3 (2009)).
319. *Id.*
320. *Id.* at 1267 (citing IND. CODE art. 6, § 3 & art. 15, §§ 2, 3.
321. IND. CONST. art. 6, § 3.
322. *Id.* at 1267-68.
323. *Id.* at 1269-70.
324. *Id.* at 1270.