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## A LOOK BACK: DEVELOPING INDIANA LAW POST-BENCH REFLECTIONS OF AN INDIANA SUPREME COURT JUSTICE

### SELECTED DEVELOPMENTS IN THE INDIANA CONSTITUTIONAL LAW (1993-2012)

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As a Justice of the Indiana Supreme Court for almost nineteen years (from late-1993 until mid-2012), I participated in the adjudication of claims implicating the Indiana Constitution. In this Article, I will describe some selected developments in Indiana Constitutional law during this timeframe. I will not attempt to try to cover everything, but instead will identify and detail several major themes and also discuss the varying approaches to answering constitutional questions deployed by my fellow justices and me.

I ask the reader to appreciate that this Article contains some highly personal reflections. It is not an argument but neither is it entirely objective.

#### I. THE RENAISSANCE IN STATE CONSTITUTIONAL LAW

When I joined the Indiana Supreme Court in November, 1993, a Renaissance in State Constitutional Law was underway. I call it a Renaissance (others have called it a Revolution<sup>1</sup>) because state constitutions had always been the subject of attention by lawyers and courts. Indiana re-wrote its Constitution from scratch in 1851, and the Indiana Supreme Court was routinely called on to interpret it.

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\*\* This Article is dedicated collectively to former Chief Justice Randall T. Shepard, Justice Brent E. Dickson, former Justice Theodore R. Boehm, and Justice Robert D. Rucker, my cherished colleagues on the Indiana Supreme Court, whose careful and wise interpretation of the Indiana Constitution will be to the great benefit of future generations of Hoosiers. The five of us served together from November 19, 1999, until September 30, 2010.

1. Jack L. Landau, "Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation," 79 OR. L. REV. 793 (2000).

Some of those decisions, like *Callender v. State*,<sup>2</sup> vindicating individual rights as a matter of state constitutional law, presaged by decades equivalent holdings by the United States Supreme Court under the United States Constitution.

It was nevertheless true that by the 1960s, state constitutions or, to be more precise, state constitutions' bills of rights, were not being invoked by courts, lawyers, or litigants as sources of individual liberties. It was 1969 when the first article appeared championing the use of state constitutions for such purposes and it should be a source of Hoosier pride that this absolutely seminal (and I do not exaggerate one whit) piece was written by an Indiana law professor, Robert Force of the Indiana University Robert H. McKinney School of Law, and published by an Indiana law journal, the *Valparaiso University Law Review*. Indeed, I borrow my characterization of the state of Indiana constitutional law in November, 1993, from Professor Force's title: "State 'Bill of Rights': A Case of Neglect and the Need for a Renaissance."<sup>3</sup>

The next big thing that happened was Justice William Brennan's unabashed call for state courts to construe their own state constitutions to protect individual liberties in the face of decreased United States Supreme Court activism to that end.<sup>4</sup> The Brennan argument, published in the *Harvard Law Review*, is the starting point for every discussion of modern state constitutionalism.<sup>5</sup>

The kindling for Indiana's Renaissance (Revolution if you prefer) in state constitutionalism was Chief Justice Randall T. Shepard's address to the Indiana Civil Liberties Union on September 17, 1988.<sup>6</sup> Entitled "Second Wind for the Indiana Bill of Rights," Shepard worked through a long list of Indiana Supreme Court decisions in which individual rights were vindicated based upon provisions of the Indiana Constitution.<sup>7</sup> "The story of the Indiana Supreme Court for most of the 1970s and 1980s, however, has been a different one," Shepard declared. "Until recently, our attention has been diverted from the jurisprudence of the Indiana Constitution."<sup>8</sup> And he called on Indiana lawyers to help assure "that the Indiana Constitution and the Indiana Supreme Court be strong protectors of civil

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2. 138 N.E. 817 (Ind. 1923) (holding that evidence discovered pursuant to an invalid search warrant could not be introduced over the objection of the defendant). The United States Supreme Court did not apply the exclusionary rule against the states until 1961. *Mapp v. Ohio*, 367 U.S. 643 (1961).

3. 3 VAL. U. L. REV. 125 (1969). For a tribute recognizing the Force article as beginning the contemporary discussion in State Constitutional interpretation, see Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 175 n. 17 (1970). To the same effect, see Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV., at xiii (1996).

4. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

5. See Landau, *supra* note 1, at 809 n.50 (collecting references to the Brennan article as the genesis of the state constitutional "revolution").

6. The address is published at 22 IND. L. REV. 575 (1989).

7. *Id.* at 577-80.

8. *Id.* at 580.

liberties.”<sup>9</sup>

Shepard is the single most influential figure in all of Indiana legal history and this speech is likely his most influential contribution to it. From the moment of its delivery to today, its frank invitation to Indiana lawyers to press constitutional claims has been enthusiastically embraced by lawyers of all ideologies. Though a quarter-century-old, it is routinely referenced in legal brief and conversation alike.<sup>10</sup>

The Renaissance was not to come immediately, however, as Professor Patrick Baude—the Indiana Supreme Court’s most clear-eyed and fearless critic<sup>11</sup>—made clear when he wrote four years later that while there was “no shortage of rhetorical commitment” to state constitutionalism, “[t]he striking fact [was] that in 1992 no Indiana appellate court found any state statute to be unconstitutional.”<sup>12</sup> Baude went on to tweak the Indiana Supreme Court and Court of Appeals for interpreting “the state constitution . . . so narrowly to parallel the federal, even when the language and history of the two documents are so different.”<sup>13</sup>

Not for long. Soon after the Baude article appeared, the Indiana Supreme Court handed down its decision in *Price v. State*.<sup>14</sup> In a scholarly tour de force, Chief Justice Shepard interpreted the Free Speech Clause, Art. I, § 9, of the Indiana Constitution without a nod to its First Amendment counterpart. “[T]here is within each provision of our Bill of Rights,” Shepard wrote for the Court, “a cluster of essential values which the legislature may qualify but not alienate. A right is impermissibly alienated when the State materially burdens one of the core values which it embodies. Accordingly . . . the State may not punish expression when doing so would impose a material burden upon a core constitutional value.”<sup>15</sup>

The “core constitutional value” at stake in *Price* was asserted to be political expression and the Court went to some length to “confirm that § 9 enshrines pure political speech as a core value.”<sup>16</sup>

The words of *Price* are important. At the substantive level, they explicate the meaning of § 9. At a higher level of abstraction, they elucidate a method for

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9. *Id.* at 586.

10. The maxim that humor is the sincerest form of flattery demonstrates the importance of the “Second Wind” speech. More than a few wags have wondered whether “Second Wind” was strong enough to change Indiana jurisprudence or “whether it is merely rhetorical hot air.” See, e.g., Thomas J. Herr, *Will 2000 Census Create Indiana Constitutional Crisis?*, 43 RES GESTAE 15, 16 (Aug. 1999).

11. Patrick Baude, *Indiana’s Constitution in a Nation of Constitutions*, in THE HISTORY OF INDIANA LAW 21 (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006).

12. Patrick Baude, *Recent Constitutional Decisions in Indiana*, 26 IND. L. REV. 853, 853 (1993).

13. *Id.* at 863.

14. 622 N.E.2d 954 (Ind. 1993).

15. *Id.* at 960.

16. *Id.* at 963.

constitutional interpretation. But what really gives any decision its bite is its result, not its words. *Price*'s result was breathtaking: the Court held that Colleen Price had the constitutional right under § 9 to call Indianapolis police officers "motherfuckers" in a late-night encounter; her conviction for disorderly conduct was held unconstitutional.<sup>17</sup> The Renaissance in Indiana Constitutional law was underway.<sup>18</sup>

*Price* was handed down on the morning of November 1, 1993. Later that day, I was sworn in as a member of the Court.

## II. OF MIRRORS AND LOCK STEPS

The advocates of Renaissance direct their harshest scorn at judges who interpret parallel state and federal constitutional provisions in accordance with federal constitutional analysis. Their claim is that state constitutional analysis that no more than mirrors federal, that no more than marches in lock-step with it, fails to recognize the independence significant of state constitutions.<sup>19</sup>

Now at least a quarter-century into the Renaissance, not many voices are raised in defense of "lock-stepism." Even the troglodyte acknowledges the "independent significance of state constitutions." But I want to raise a note of caution. States should not take a different approach from the federal in interpreting a parallel state constitutional provision solely for the sake of taking a different approach.

There are some reasons why mirror interpretation often makes sense. First and foremost, many state constitutional provisions were meant to mirror their federal counterparts. Article I, § 11, of the Indiana Constitution is the same as the Fourth Amendment. The Framers of our two Constitutions (both the original one adopted in 1815 and the new one adopted in 1851) could have provided different language but they didn't. Isn't it reasonable to infer that the original intent was to provide Hoosiers with the same protection against unreasonable searches and seizures as did the federal Constitution—no more and no less?

Second, the mirror interpretation is often precedent. Now I have written elsewhere<sup>20</sup> that it is appropriate to overrule precedent in certain circumstances. But *stare decisis* is the default position in American jurisprudence for reasons well-known to anyone who would read an Article like this.

Third, at least under the current state of the law, state constitutional interpretation operates only as a ratchet.<sup>21</sup> While states are free to interpret their

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17. *Id.* at 964-65.

18. Sharp with his criticism in the past, Professor Baude was quick with his praise, noting the similarities between *Price* and (no less than) *Marbury v. Madison*. Patrick Baude, *Has the Indiana Constitution Found Its Epic?*, 69 IND. L.J. 849 (1994).

19. See, e.g., Linde, *supra* note 3.

20. Frank Sullivan, Jr., Lecture, *What I've Learned About Judging*, 48 VAL. U. L. REV. 195, 205 (2013).

21. The notion of "ratchet" (a wrench that turns in only one direction) in constitutional law is primarily attributed to the implication, drawn from Justice Brennan's footnote in his opinion for

own constitutions to extend greater protections to their citizens than the federal Constitution, the states cannot interpret their constitutions to restrict federal constitutional guarantees.<sup>22</sup> This creates a very slippery slope. The only outcome determinative way that Art. I, § 11, of the Indiana Constitution can be interpreted differently than the Fourth Amendment is by reading it to extend greater protection; if § 11 is read to provide less protection than the Fourth Amendment, the Fourth Amendment dictates the result. In other words, at least when it comes to individual liberties, an independent state constitutional interpretation only makes a difference if it produces a more liberal result.

This should not shock; it is why, after all, Justice Brennan wrote his article in the first place. Distressed at the Burger Court's curtailment of the Warren Court's expansiveness, he saw state constitutionalism as a possible buffer against retrenchment.<sup>23</sup>

This is not an argument against liberal results but it is an argument against result-driven decision-making. Nor should this be taken as an unequivocal defense of lock-stepism. There are plenty of questions of constitutional law on which the United States Supreme Court has not spoken or where its words are ambiguous. A state court most assuredly, in my view, need not bend over backwards in such circumstances to try to divine what the federal approach would be and then apply it to its own constitution. But the common history of many federal and state constitutional provisions, the importance of precedent, and concern over result-driven decision-making has led me to conclude that categorical rejection of lock-stepism goes too far.

My own voting record in this regard is not consistent. Early on, the Court faced a § 11 claim in *Brown v. State*<sup>24</sup> where the police had searched an apparently abandoned automobile without a warrant. Justice DeBruler's opinion for a four-Justice majority took the position that while the Fourth Amendment may impose a warrant requirement, the test of the constitutionality of a search under § 11 is its reasonableness.<sup>25</sup> My dissent argued for a "mirror" rule. "In my view, we would be well advised to follow precedent and not chart a new course that will cause substantial uncertainty both for police when they conduct criminal investigations and for defense counsel when they assess the admissibility of evidence . . . . These practical considerations are among the reasons why federal and Indiana courts have found warrant requirements in both the Fourth Amendment and Article 1, § 11. There is no reason to change that now."<sup>26</sup>

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the United States Supreme Court in *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966), that Congress can increase constitutional protections but not "restrict, abrogate, or dilute" them. I first heard the expression "Brennan ratchet" as a restriction on state constitutional jurisprudence in a speech by Charles Fried to the Seventh Circuit Bar Association in Indianapolis in, I believe, 1999.

22. *Cooper v. California*, 386 U.S. 58, 62 (1967).

23. Brennan *supra* note 4, at 495.

24. 653 N.E.2d 77 (Ind. 1995).

25. *Id.* at 79.

26. *Id.* at 82 (Sullivan, J., concurring in result).

Ten years later in *Litchfield v. State*,<sup>27</sup> the Court considered a marijuana possession conviction where the evidence was obtained from the warrantless search of the defendants' trash. There was no Fourth Amendment violation here—there was clear Supreme Court precedent on point.<sup>28</sup> Nevertheless, the Court reversed the conviction, finding a violation of § 11. I concurred without comment.

### III. DARLINGTON, ASHWANDER, AND PASSIVE VIRTUES

The Indiana Supreme Court has long taken the position that it will not decide questions of state constitutional law unless the case cannot be decided on any non-constitutional grounds. The classic formulation of this doctrine of judicial restraint comes from the Court's 1899 decision in *State v. Darlington*.<sup>29</sup>

[C]ourts will not pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. This court has repeatedly held that questions of this character will not be decided unless such decision is absolutely necessary to a disposition of the cause on its merits.<sup>30</sup>

There are many interesting examples of the Court avoiding state constitutional questions and deciding cases on non-constitutional grounds as dictated by *Darlington*'s avoidance rule. A sampling will suffice.

In 1939, *Roth v. Local Union No. 1460 of Retail Clerks Union*<sup>31</sup> included a claim that the Indiana Anti-Injunction Act, a statute placing limitations on the jurisdiction of courts to grant injunctions in labor disputes, constituted an "unconstitutional encroachment[ ] by the legislative branch of the government upon the powers of the judiciary" in violation of Art. III, § 1 (separation of functions).<sup>32</sup> But the Court resolved the case without reaching the constitutional issue because, Justice Shake wrote, "Courts will not pass upon a constitutional question or decide whether a statute is invalid, unless such decision is absolutely necessary to a disposition of the cause on its merits."<sup>33</sup>

In 2001, I wrote *Owens Corning Fiberglass Corp. v. Cobb*<sup>34</sup> where a jury found that asbestos manufactured by the defendant caused the plaintiff serious illness and awarded compensatory and punitive damages. The trial court reduced the punitive damages pursuant to statutory limits.<sup>35</sup> The plaintiff argued on

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27. 824 N.E.2d 356 (Ind. 2005).

28. See *California v. Greenwood*, 486 U.S. 35 (1988).

29. 53 N.E. 925 (Ind. 1899).

30. *Id.* at 926.

31. 24 N.E.2d 280 (1939) (Shake, J.).

32. *Id.* at 368-69.

33. *Id.* at 369.

34. 754 N.E.2d 905 (Ind. 2001).

35. IND. CODE §§ 34-4-6, 34-4-34-3, and 34-4-34-5 (1993), recodified in 1998 as IND. CODE §§ 34-51-3-5, 34-51-31-3, and 34-51-3-6.

appeal that the punitive damage limitations violated the Indiana Constitution in several respects.<sup>36</sup> Because we set aside the judgment of the trial court in its entirety, we explicitly refrained from addressing the constitutional claims.<sup>37</sup>

In 2013, following my departure, the Court decided *Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc.*,<sup>38</sup> in which a scouting organization claimed the Indiana Constitution's Contracts Clause<sup>39</sup> had been violated by a statute<sup>40</sup> limiting reversionary clauses in land transactions to a maximum of thirty years. The statute had been invoked to block enforcement of a condition in a deed that pre-dated enactment of the statute.<sup>41</sup> The deed conveyed a campground from one scouting organization to another on the condition that scouting use would continue for 49 years but that ownership of the campground would revert to the grantor if the scouting-use condition was breached during that time.<sup>42</sup> The Court explicitly addressed a potentially dispositive non-constitutional claim first in order to "avoid addressing constitutional questions if a case can be resolved on other grounds."<sup>43</sup> Only after it determined that "the parties' non-constitutional arguments [could not] resolve [the] case," did the Court address the constitutional question.<sup>44</sup>

There are, however, examples as well of the Court articulating a fully sufficient non-constitutional ground for disposing of the case but nevertheless addressing the constitutional claims on the merits.

One such case was *State ex rel. Attorney General v. Lake Superior Court*,<sup>45</sup> where a trial court had enjoined mailing bills for property taxes due in 2003 in Lake County after determining that two 2001 property tax assessment statutes<sup>46</sup> that applied only in Lake County violated the Indiana Constitution in several

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36. The plaintiff claimed that the statutory limits on punitive damages violated Art. I, § 12 (right to remedy by due course of law), § 20 (right to trial by jury), § 21 (right to compensation for property), § 23 (right to equal privileges and immunities); Art III, § 1 (separation of functions); and Art. VII, § 1 (judicial power). Brief for Appellees/Cross-Appellants at 50-63, *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905 (Ind. 2001) (No. 49A04-9801-CV-46), 1998 WL 35152647.

37. *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d at 916 (quoting *State v. Darlington*, 53 N.E. 925, 926 (1899)). The Court later addressed these claims in *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003), discussed below.

38. 988 N.E.2d 250 (Ind. 2013).

39. Art. I, § 24.

40. IND. CODE § 32-17-10-2 (2013).

41. *Girl Scouts of S. Ill.*, 988 N.E.2d at 252.

42. *Id.* at 252-53.

43. *Id.* at 254.

44. *Id.* at 255.

45. 820 N.E.2d 1240 (Ind. 2005).

46. IND. CODE § 6-1.1-4-32 (2004) (authorizing the Indiana Department of Local Government Finance (DLGF) to employ private firms to assess real property in Lake County), and IND. CODE § 6-1.1-8.5-1 et seq. (providing for the DLGF itself to assess industrial properties in Lake County with an estimated assessed value in excess of \$25 million).

respects.<sup>47</sup> The Indiana Supreme Court was unanimously of the view that the trial court should have dismissed the case because the Indiana Tax Court had exclusive jurisdiction over its subject matter.<sup>48</sup>

Even though this provided for a complete disposition of the case, three members of the Court proceeded to address the merits of the constitutional claims. Justices Dickson, Boehm, and Rucker “recognize[d] that ordinarily lack of jurisdiction of the trial court would preclude deciding any other issues.”<sup>49</sup> But because the “case present[ed] a challenge to the entire assessment process in Indiana’s second most populous county[,]” and because the three thought it “clear that the [taxpayers would] ultimately fail in their effort to enjoin the tax bills produced by the 2002 countywide reassessment,” they concluded that it was “not in anyone’s interest to preserve false hopes by resolving this appeal on jurisdictional grounds alone. In short,” they said, “there is broad public interest in a prompt resolution of this case, and the parties ask us to address the merits of the plaintiffs’ claims without regard to jurisdiction.”<sup>50</sup>

This was a highly understandable and perhaps correct basis for deviating from *Darlington*’s avoidance rule. But I (joined by Chief Justice Shepard) was of the view that the Court should not reach the constitutional claims. My separate opinion recognized that if the Court had not decided the constitutional claims, the taxpayers would have been required to advance them through “several layers of administrative review before being allowed to appeal to the Tax Court” and that this appeared “unwieldy if not unfair.”<sup>51</sup> I took the position that that “sound reasons explain[ed] why the Legislature established this procedure.”<sup>52</sup>

Protests over taxes are frequent and yet taxes are needed to provide public safety and other public services. A system that channels tax protests through an orderly system of administrative and Tax Court review without risking abrupt stoppages in tax collections by order of any one of the state’s hundreds of trial courts protects the interests of both taxpayers and of all of us who rely on government services. Furthermore, utilizing an orderly system of administrative and Tax Court review allows the executive and legislative branches to effect compromises of tax controversies, rather than have the answers dictated by (a variety of) courts.<sup>53</sup>

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47. The taxpayers claimed that the statutes violated Art. IV, § 22 (prohibited local and special laws), and § 23 (uniform law); Art. X, § 1 (uniform and equal rate of property assessment and taxation), and Art. I, § 21 (right to compensation for property). The taxpayers also claimed a constitutional right, not clearly tied to any specific constitutional provision, to have locally elected officials perform the assessments. *State ex rel. Atty. Gen.*, 820 N.E.2d at 1248-51.

48. *State ex rel. Atty. Gen.*, 820 N.E.2d at 1247.

49. *Id.* at 1244.

50. *Id.*

51. *Id.* at 1257 (Sullivan, J., concurring in part and concurring in result).

52. *Id.*

53. *Id.*



It was in part because I believed that taxpayers and the executive and legislative branches should have maximum freedom to effect compromise of this tax controversy that I thought the Court was wrong to reach the merits of the various constitutional claims advanced.<sup>54</sup>

There is another situation where the applicability of *Darlington*'s avoidance rule is called into question: certified questions from federal courts on issues of state constitutional law.

Perhaps some background is required here. From time to time, the federal courts are called upon to make determinations of state law. This can occur when the federal court is hearing a case in the exercise of its "diversity jurisdiction," i.e., its power to hear lawsuits between citizens of different states where the amount in controversy exceeds \$75,000.<sup>55</sup> It can also occur in bankruptcy cases.<sup>56</sup> Rather than decide the issues of state law themselves, federal courts often take advantage of state rules that allow federal courts to "certify" questions of state law to state courts of last resort for decision. Indiana Rule of Appellate Procedure 64(A) authorizes any federal court to "certify a question of Indiana law to the Supreme Court when it appears to the federal court that a proceeding presents an issue of state law that is determinative of the case and on which there is no clear controlling Indiana precedent."

When certified questions from federal courts raise—as they often do—questions of whether a particular state statute or procedure violates the Indiana Constitution, the Indiana Supreme Court faces some special challenges. In one opinion, Chief Justice Shepard identified two problems "with certified questions involving constitutional claims."<sup>57</sup> First, the Court is not given the opportunity to exercise *Darlington*'s avoidance rule because the federal court

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54. *Id.*

55. 28 U.S.C. § 1332(a) (2014). For purposes of the statute, a corporation is treated as a citizen of the state in which it is incorporated. *Id.* § 1332(c). Thus, a federal court has jurisdiction to adjudicate a contract dispute or a tort claim between, e.g., an individual resident of Indiana and any corporation incorporated in any state other than Indiana. "Except in matters governed by the federal Constitution or by acts of Congress, the law to be applied" by the federal court is the applicable state statutory or common law. In fact, "[t]here is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state . . . be they commercial law or a part of the law of torts." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (Brandeis, J.).

56. Bankruptcy cases are required by federal statute to be adjudicated in federal court. *See* 28 U.S.C. § 1334(a) (2014). For the most part, however, creditors' and debtors' rights and obligations in bankruptcy are governed by state law, not federal law. Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 746 (2000) (citing John D. Ayer, *Through Chapter 11 with Gun or Camera, but Probably Not Both: A Field Guide*, 72 WASH. U. L.Q. 883, 886 (1994) ("It is axiomatic that bankruptcy respects rights established under state law."); Vern Countryman, *The Use of State Law in Bankruptcy Cases* (pts. 1 & 2), 47 N.Y.U. L. REV. 407, 631 (1972)).

57. *Citizens Nat'l Bank of Evansville v. Foster*, 668 N.E.2d 1236, 1241 (Ind. 1996).

does not identify in its certification order any “unresolved non-constitutional grounds on which the case might be resolved.”<sup>58</sup> Second, “such questions tend to separate the constitutional claim from the specifics of the case,” putting the Court in a position of having to “speculate about hypothetical applications of a statute challenged on constitutional grounds” without the “issues [having been] fully vetted by the adversarial process.”<sup>59</sup> In a later law review article, Shepard added a third: “The creation of precedent-setting law without a well-developed factual background before the state supreme court may very well undermine and dilute state case law.”<sup>60</sup>

Having identified these challenges, the Court nevertheless has been willing to answer the questions.<sup>61</sup> The interests of efficiency and establishing clear precedent seem to outweigh the very strong justification for *Darlington*’s avoidance rule in the certified question circumstance.

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Justice Louis D. Brandeis’s classic formulation from his concurring opinion in *Ashwander v. Tennessee Valley Authority* bears a striking resemblance to *Darlington*’s avoidance rule, both in substance and tone: “[C]onsiderations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function . . . .”<sup>62</sup>

Professor Alexander Bickel wrote that “one of the truly major themes in Brandeis’s judicial work [was] the conviction that the Court must take the most pains to avoid precipitate decisions of constitutional issues, and that it must above all decide such issues only when it is absolutely unable to dispose of the case properly before it.”<sup>63</sup> In *Ashwander*, Brandeis synthesized two decades of thinking and writing by setting forth “a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.”<sup>64</sup>

In his 1962 book *The Least Dangerous Branch*,<sup>65</sup> Bickel took Brandeis’s seven *Ashwander* rules and created a grand narrative about “techniques . . . for

58. *Id.*

59. *Id.*

60. Honorable Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions A Good Idea or A Bad Idea?*, 38 VAL. U. L. REV. 327, 346 (2004).

61. See *Snyder v. King*, 958 N.E.2d 764, 786-88 (Ind. 2011); *A Woman’s Choice-E. Side Women’s Clinic v. Newman*, 671 N.E.2d 104, 113 (Ind. 1996) (Selby, J., concurring and dissenting); *Citizens Nat. Bank of Evansville v. Foster*, 668 N.E.2d 1236, 1242 (Ind. 1996); Shepard, *supra* note 60, at 351.

62. *Ashwander v. T.V.A.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

63. ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 2-3 (1957).

64. *Ashwander v. T.V.A.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

65. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

staying the Court's hand,"<sup>66</sup> i.e., for, in Brandeis's formulation, refraining from passing on constitutionality. Bickel famously called these techniques of restraint the "passive virtues."<sup>67</sup>

What follows are a few thoughts about the "passive virtues" in the context of Indiana constitutional jurisprudence.

In *Ashwander*, Brandeis said that courts should "not anticipate constitutional questions, but decide them only when legitimately in front of the [c]ourt."<sup>68</sup> This is the passive virtue of "ripeness." Ripeness, in other words, "relates to the degree to which the defined issues in a case are based on actual facts rather than on abstract possibilities, and are capable of being adjudicated on an adequately developed record."<sup>69</sup>

My best example of the Indiana Supreme Court's discussion of ripeness in connection with a state constitutional claim is Justice Roger O. DeBruhl's 1994 opinion, *Indiana Department of Environmental Management v. Chemical Waste Management, Inc.*<sup>70</sup> Following the Legislature's adoption in 1990 of a statute conditioning solid and hazardous waste disposal permits on extensive disclosures by applicants and granting the Indiana Department of Environmental Management broad powers to deny such permits,<sup>71</sup> the owner and operator of an enterprise in Indiana that treated and disposed of hazardous waste filed suit claiming that the statute violated the Indiana Constitution in several respects.<sup>72</sup>

The State took the position that judicial intervention was unwarranted because the Commissioner of Environmental Management had not even begun the decision-making process regarding the hazardous waste disposal enterprise's application. And it was certainly true that the enterprise had neither been denied

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66. *Id.* at 71.

67. *Id.* at 111.

68. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 709 (2009) (paraphrasing *Ashwander v. T.V.A.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)).

69. *Ind. Dep't of Env'tl. Mgmt. v. Chem. Waste Mgmt., Inc.*, 643 N.E.2d 331, 336 (Ind. 1994).

70. *Id.*

71. IND. CODE § 13-7-10.2-3 (1993). Among the disclosures required was a description of all civil, criminal, and administrative complaints alleging a violation of an environmental law, convictions for environmental crimes, or convictions for crimes of moral turpitude within the five years before the date of submitting the permit application. *Id.* Under the statute, the Commissioner of Environmental Management was allowed to deny a permit application even if the alleged violation is never proven, the applicant or responsible party denied any wrong-doing, the alleged violation did not threaten public health or the environment, or a settlement was entered solely for the purpose of settling a disputed claim. *Id.*

72. The hazardous waste disposal enterprise claimed that the statute violated Art. I, § 1 (inalienable rights), § 12 (remedy by due course of law for injury to reputation), § 23 (equal privileges and immunities), § 25 (effective date of laws), and § 31 (right of assembly); Art. III, § 1 (separation of functions); Art. IV, § 1 (legislative authority) and § 23 (general and uniform laws). Corrected Brief of Appellee, *Ind. Dep't of Env'tl. Mgmt. v. Chem. Waste Mgmt., Inc.*, 643 N.E.2d 331 (No. 49-S00-9310-CV-1143), 1994 WL 16462161.

a permit nor had an opportunity to exhaust administrative remedies. The State also made the telling point that any “as applied” analysis of the statute’s constitutionality on the sparse record developed to that point depended on hypothetical harms and that such an approach did not support the serious act of striking down a law passed by the Legislature.<sup>73</sup>

The Court agreed with the result advocated by the State and held that the case was not ripe for the Court’s review.<sup>74</sup> But before announcing that result, Justice DeBruler’s (unanimous) opinion distanced itself from strict enforcement of a “ripeness” requirement:

The Indiana Constitution lacks the well known “cases” and “controversies” language of Art. III, § 2 of the U.S. Constitution. This Court can and does issue decisions which are, for all practical purposes, “advisory” opinions. However, it is also true that the separation of powers language in Art. III, § 1 fulfills an analogous function in our own judicial activity, or lack thereof. While this Court respects the separation of powers, we do not permit excessive formalism to prevent necessary judicial involvement. Where an actual controversy exists we will not shirk our duty to resolve it.<sup>75</sup>

The Court did not stop there. In full advisory opinion mode, it went on to address virtually all of the constitutional claims, in order “to provide clarification as the Commissioner attempts to apply the [s]tatute.”<sup>76</sup> In doing so, the Court for all practical purposes decided all of the constitutional claims in favor of the State.<sup>77</sup> While reciting that it was deciding the case against the hazardous waste disposal enterprise on grounds of ripeness, the Court in fact decided the case against the enterprise on the merits. Looking at *Chem. Waste Mgmt.* twenty years on, I think the Court should have enforced the passive virtue of ripeness more firmly and wish I had taken that position at the time.

In *Ashwander*, Brandeis also said that courts should “not pass upon the validity of the statute unless the complaining party can show that it is injured by its operation.”<sup>78</sup> This is the passive virtue of “standing.” Standing, in other words, requires that “courts act in real cases, and eschew action when called upon to engage only in abstract speculation.”<sup>79</sup>

In 1992, the Legislature enacted a law<sup>80</sup> that coupled an increase in legislative pensions with provisions amending the Indiana Code to bring the Code into

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73. *Ind. Dep’t of Env’tl. Mgmt.*, 643 N.E.2d at 336.

74. *Id.*

75. *Id.* at 336-37 (footnotes omitted).

76. *Id.* at 337.

77. *Id.* at 337-42.

78. UROFSKY, *supra* note 68, at 709 (paraphrasing *Ashwander v. T.V.A.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)).

79. *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995).

80. P.L. 4-1992.

accord with the Americans with Disabilities Act (ADA).<sup>81</sup> I was State Budget Director at the time the bill was passed and still remember the howls of outrage over what was perceived to be a too-clever-by-half maneuver by legislators to increase their benefits. Governor Bayh refused to sign the bill but did permit it to become law without his signature because of the importance of bringing the state into compliance with the federal ADA.<sup>82</sup>

Now-Governor Mike Pence, then a private citizen, challenged the constitutionality of the statute on grounds that it violated the Indiana Constitution's requirement that statutes be limited to a single subject.<sup>83</sup> Again Justice DeBruhl wrote for the Court. Although he used language similar to *Chem. Waste Mgmt.* in emphasizing that the Court would not yield to excessive formalism to refuse to adjudicate constitutional questions, he was more affirmative in enforcing the passive virtue of standing:

Standing is a key component in maintaining our state constitutional scheme of separation of powers. See Ind. Const. art. III, § 1. The standing requirement is a limit on the court's jurisdiction which restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury. That a particular statute is invalid is almost never a sufficient rationale for judicial intervention; the party challenging the law must show adequate injury or the immediate danger of sustaining some injury.<sup>84</sup>

We held that Pence did not have standing because he was unable to show that he had or would sustain any direct injury as a result of the Legislature's (admittedly distasteful) action.<sup>85</sup>

A few more words need to be said about standing in general and *Pence* in particular.

*Pence* was not a unanimous decision. Justice Dickson wrote the proverbial "vigorous dissent." His was a double-barreled attack. First, he found in the Open Courts Clause of the Indiana Constitution's Art. I, § 12, a broad constitutional right of any "Indiana taxpayer to challenge the constitutionality of the expenditure of public funds by state officials under [any] statute."<sup>86</sup> Second, he argued that the Court should begin to enforce what he termed the "constitutional imperative" of the Single Subject Matter Clause of Art. IV, § 19.<sup>87</sup>

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81. 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

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

83. *Id.* (citing IND. CONST. art. IV, § 19).

84. *Id.* at 488 (quotation marks and citations omitted).

85. *Id.*

86. *Id.* at 489 (citing *Marshall v. Dye*, 231 U.S. 250 (1913); *Graves v. City of Muncie*, 264 N.E.2d 607, 609 (Ind. 1970); *Zoercher v. Agler*, 172 N.E. 186, 189 (Ind. 1930); *Dudley v. Sears, Roebuck & Co.*, 109 N.E.2d 620, 623-24 (Ind. Ct. App. 1952); *Ellingham v. Dye*, 178 Ind. 336, 414 (1912), *appeal dismissed*)).

87. *Pence*, 652 N.E.2d at 489 (Ind. 1995). Justice Dickson and I would exchange views at some length on this topic in our respective separate opinions in a later case. *A.B. v. State*, 949

In 2003, Justice Dickson's unanimous opinion in *State ex rel. Cittadine v. Indiana Department of Transportation*<sup>88</sup> held that a motorist had standing to require the Indiana Department of Transportation to enforce Indiana's Clear View Statute<sup>89</sup> by virtue of the "public standing exception" to the "general doctrine of standing." There Justice Dickson wrote that there are "certain situations in which public rather than private rights are at issue and [where] the usual standards for establishing standing need not be met . . . [W]hen a case involves enforcement of the public rather than private right the plaintiff need not have a special interest in the matter . . . ."<sup>90</sup>

After *Cittadine*, Chief Justice Shepard wrote that Justice Dickson's opinion in that case constituted the "triumph" of Justice Dickson's position on standing in *Pence*.<sup>91</sup> I think that Chief Justice Shepard is wrong on this score. First, *Cittadine* did not involve any constitutional challenge to the expenditure of public funds as was the case in *Pence* nor was the plaintiff held to have standing by virtue of being a taxpayer. Second, Justice Dickson goes to some length in *Cittadine* to recite the general rule that "only those persons who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct will be found to have standing."<sup>92</sup> (It was the inclusion of this language that accounts for my vote for the majority opinion in *Cittadine* while continuing to believe that *Pence* was correctly decided.) Finally, the narrowness of the *Cittadine* exception to the general rule that standing requires a showing of direct injury was demonstrated by a post-*Cittadine* unanimous decision of the Court, *Huffman v. Indiana Office of Environmental Adjudication*.<sup>93</sup> In *Huffman*, the Court held that the language of the Administrative Orders and Procedures Act precluded the plaintiff from asserting "public standing." That is to say, public standing constituted principle of common law that could be overridden by statute, not a principle of constitutional law which, of course, could not.<sup>94</sup>

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N.E.2d 1204, 1221 (Ind. 2011) (Dickson, J., concurring); *id.* at 1225 (Sullivan, J., concurring in part).

88. 790 N.E.2d 978, 979 (Ind. 2003).

89. IND. CODE § 8-6-7.6-1 (2003) (generally providing at the time that railroads must maintain crossings so that motorists would have unobstructed views for 1500 feet in both directions along the tracks). The statute has since been amended and the Court held that the amendment rendered the case moot.

90. *State ex rel. Cittadine*, 790 N.E.2d at 979 (quoting *Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1206 n.3 (Ind.1990)).

91. Randall T. Shepard, *What Can Dissents Teach Us?*, 68 ALB. L. REV. 337, 345 (2005).

92. *State ex rel. Cittadine*, 790 N.E.2d at 979 (citing *Oman v. State*, 737 N.E.2d 1131, 1135 (Ind. 2000); *Hammes v. Brumley*, 659 N.E.2d 1021, 1029-30 (Ind. 1995); *Shourek v. Stirling*, 621 N.E.2d 1107, 1109 (Ind. 1993); *Higgins v. Hale*, 476 N.E.2d 95, 101 (Ind. 1985)).

93. 811 N.E.2d 806 (Ind. 2004).

94. I acknowledge that Justice Dickson treats "taxpayer standing" as equivalent "public standing" in his opinion in *Embry v. O'Bannon*, 798 N.E.2d 157, 160 (Ind. 2003). But it is not

## IV. TORT REFORM AND THE CONSTITUTION

“Tort reform” became a rallying cry of the business and insurance community during the last quarter of the 20th century and has continued unabated into the 21st. Willing legislatures in many states have enacted statutory limitations on common law rights to recover damages in tort. In turn, those interested in preserving such rights—consumer groups, labor unions, and lawyers who represent injured persons—have looked to state constitutions for refuge.

An early example of state constitutional litigation provoked by tort reform was the critically important 1980 decision of the Indiana Supreme Court, *Johnson v. St. Vincent Hospital, Inc.*<sup>95</sup> In 1975, Indiana had become the first state in the nation to enact comprehensive medical malpractice reforms.<sup>96</sup> The Medical Malpractice Act<sup>97</sup> contained a number of dramatic limitations on common law medical malpractice procedures. First, before filing suit in court, plaintiffs would now be required to submit their complaints to the State Insurance Commissioner for consideration by a medical review panel. The panel would then render an opinion admissible at trial. Second, recovery in medical malpractice cases would now be limited to \$500,000 in respect of health care providers that elected to come under the Act. Third, attorney fees to be paid plaintiffs’ attorneys would now be limited. Fourth, the time in which a malpractice action could be brought would be severely limited. And fifth, a new patient’s compensation fund was created.<sup>98</sup> These provisions were all challenged as violating multiple provisions of the Indiana Constitution.<sup>99</sup>

In a comprehensive opinion for a unanimous Court, Justice DeBruler held against the plaintiffs on all of the constitutional claims. It is beyond the scope of this Article to examine his analysis but it is important to point out that the factual record documenting the “conditions in the healthcare and insurance industries which gave rise to the Act” was described by the Court with some particularity.<sup>100</sup> The Court took the position that “[t]hroughout the State premiums for medical

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clear to me that there were three votes for that proposition, Justice Boehm’s vote being opaque on that point. And in any event, Embry preceded Huffman. If “public standing” can be overridden by statute, as Huffman unanimously held, it does not seem to me that it can be of constitutional dimension. (Embry is discussed in the context of Art. I, § 6 (no funds for religious institutions) below.)

95. 404 N.E.2d 585 (Ind. 1980).

96. *Medical Malpractice*, INDIANA STATE MEDICAL ASSOCIATION, <http://www.ismanet.org/legal/malpractice/> (last visited Aug. 11, 2014).

97. IND. CODE § 34-18-1-1 et seq.

98. *Johnson*, 404 N.E.2d at 590-91.

99. The plaintiffs claimed that the statute violated Art. I, § 9 (right to free speech), § 20 (right to jury trial), § 12 (due course of law), and § 23 (equal privileges and immunities); Art. III, § 1 (separation of functions); Art. IV, § 23 (general and uniform laws); and Art. IX, § 12 (prohibition on state loan of its credit in aid of any person). *Id.*

100. *Johnson*, 404 N.E.2d at 589.

malpractice insurance were high and a large number of private companies were withdrawing their product from the market. These circumstances and conditions particularly affected health care providers and created the danger that health care services would not be maintained at their existing level contrary to the public interest.”<sup>101</sup> The Court held these facts to constitute a constitutionally sufficient basis for the legislation notwithstanding the claimed infringements of constitutional rights.<sup>102</sup>

One of the toughest provisions of the Medical Malpractice Act, alluded to above, was the limitation on the time in which a malpractice action could be brought.<sup>103</sup> In contrast to standard tort statutes of limitation, which measure the time for filing from the date on which the plaintiff discovers the injury, the Act measured the time of filing from the date the injury occurred and then limited that time to two years. The constitutionality of this “occurrence” statute of limitations was explicitly held not to violate the rights provided in Art. I, § 12, of “open courts” and of “every person, for injury done to him in his person, property, or reputation, [to] remedy by due course of law.”

During my tenure, the Indiana Supreme Court was presented with a plethora of cases challenging the constitutionality of tort reform enactments. The most important were *Martin v. Richey* in 1999; *McIntosh v. Melroe Co.* in 2000; and *Cheatham v. Pohle* in 2003.

In *Martin v. Richey*,<sup>104</sup> the plaintiff had consulted a physician after self-detecting a lump in her breast and experiencing “shooting pains” from the lump. The plaintiff contended that, after performing certain procedures, the physician advised her that “he thought the lump was benign . . . and that she had nothing to worry about.”<sup>105</sup> Her version of the facts was corroborated by the physician’s nurse practitioner who testified that she was in the room with the plaintiff and the physician when the foregoing conversation took place.<sup>106</sup>

The “nothing to worry about” conversation occurred on March 20, 1991. In April, 1994, the plaintiff experienced increased pain from the lump; a biopsy resulted in a diagnosis of breast cancer that required both surgery and chemotherapy.<sup>107</sup>

She filed her medical malpractice claim against the physician on October 14, 1994, well beyond the two-year period from the March 20, 1991, “occurrence” of the malpractice and the physician sought dismissal of her complaint on that

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101. *Id.* at 606.

102. *Id.*

103. IND. CODE § 34-18-7-1(b) (1980).

104. 711 N.E.2d 1273 (Ind. 1999). An interesting feature of this case was the appearance pro hac vice at oral argument for the plaintiff of noted constitutional scholar Lawrence H. Tribe. I remember his impressive mastery of the Indiana constitutional issues at stake, totally belying my initial skepticism on this point.

105. *Id.* at 1276.

106. *Id.* The Court’s opinion describes the factual record in detail, presenting both sides’ version of the facts.

107. *Id.* at 1276-77.



basis. She replied that to enforce the statute in her circumstances would violate Art. I, § 12 (open courts; remedy by due course of law), and § 23 (equal privileges and immunities).<sup>108</sup>

Justice Myra C. Selby wrote the opinion of the Court, holding that to enforce the occurrence-based statute of limitations in these circumstances would be unconstitutional. Again a detailed discussion of the Court's analysis is beyond the scope of this Article. In brief, the Court concluded that the Equal Privileges and Immunities Clause had been violated because the statute precluded this particular plaintiff, "unlike many other medical malpractice plaintiffs," from pursuing a claim because her disease had a long latency period.<sup>109</sup> And it concluded that the Open Courts and Right to Remedy guarantees had been violated because the "plaintiff [had had] no meaningful opportunity to file an otherwise valid tort claim within the specified statutory time period because, given the nature of the asserted malpractice and the resulting injury or medical condition, [she had been] unable to discover that she [had] a cause of action."<sup>110</sup>

A challenge to the constitutionality of a central feature of the Indiana products liability act<sup>111</sup> was the subject of the Indiana Supreme Court's 2000 opinion, *McIntosh v. Melroe Co.*<sup>112</sup> The plaintiff in this case had been injured in an accident involving a "skid steer loader," a machine akin to a forklift, manufactured by the defendant and placed in service approximately 13 years before the accident. One of the requirements of the Indiana Products Liability Act is that "a products liability action must be commenced . . . within ten years after the delivery of the product to the initial user or consumer."<sup>113</sup>

The plaintiff did not dispute that his claim had been brought outside the limit of this "statute of repose" but maintained, not unlike the plaintiff in *Martin v. Richey*, that its enforcement violated Art. I, §§ 12 and 23.<sup>114</sup> The Court held that the statute of repose was constitutional.<sup>115</sup>

Justice Boehm's majority opinion contains an extraordinarily interesting comparative analysis of the "remedy by due course of law" guarantee of Art. I, § 12, and the "due process" guarantees of the federal Constitution, including discussions of their procedural and substantive prongs. In the end, the majority concluded that because the Legislature had determined that injuries occurring ten years after a product is placed in service are not legally cognizable, the plaintiff was not entitled to a remedy under § 12. "Thus, the statute of repose does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action from ever arising."<sup>116</sup> Nor did the majority find a violation of § 23,

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108. *Id.* at 1277.

109. *Id.* at 1282.

110. *Id.* at 1284.

111. IND. CODE § 34-20-1-1 et seq. (2000).

112. 729 N.E.2d 972 (Ind. 2000).

113. IND. CODE § 34-20-3-1(b) (2000).

114. *McIntosh*, 729 N.E.2d at 973.

115. *Id.* at 984.

116. *Id.* at 978 (internal quotation marks and citation omitted).

holding that the statute of repose was reasonably related to the inherent characteristics of the affected class and did not distinguish among members of the class.<sup>117</sup>

Justice Dickson, joined by Justice Rucker, wrote a stirring dissent that begins with what I find to be the most memorable assertion of judicial authority written by any member of the Court during my tenure: “This case presented us with an opportunity to restore to Indiana’s jurisprudence important principles of our state constitution. By doing so, *we could have vividly exemplified the Rule of Law notwithstanding the allure of pragmatic commercial interests.*”<sup>118</sup>

The dissenters went on to make a strong case that the ten-year statute of repose provision in the Indiana Products Liability Act violated both the Right to Remedy and the Equal Privileges and Immunities Clauses of the Indiana Constitution. As was his style, Justice Boehm methodically responded to each of the dissenters’ claims.<sup>119</sup> I cast my vote with Justice Boehm.<sup>120</sup>

The third of the three principal cases challenging the constitutionality of Indiana tort reform enactments was *Cheatham v. Pohle*.<sup>121</sup> Implicated was Indiana’s punitive damages allocation statute<sup>122</sup> that mandated that any award of punitive damages was to be paid to the clerk of the court, and the clerk was to pay 75% of it to the State’s Violent Crime Victims’ Compensation Fund and 25% to the plaintiff. A plaintiff who had received a reduced punitive damages award contended that the statute violated Art. I, § 21 (right to compensation for property), and Art. X, § 1 (uniform and equal rate of property assessment and taxation).

As to Art. I, § 21, the plaintiff first contended that the statute constituted an unconstitutional “taking” of the plaintiff’s property.<sup>123</sup> Justice Boehm’s majority opinion rejected that claim, holding that a punitive damages award “is not the property of the plaintiff . . . . Rather, the claim [the plaintiff] had before satisfaction was, pursuant to statute, a claim to only one fourth of any award of punitive damages. As a result, there is no taking of any property.”<sup>124</sup>

There was a second dimension to the plaintiff’s § 21 argument, grounded in its requirement that “[n]o person’s particular services shall be demanded, without just compensation,” contending that the statute placed in unconstitutional demand on the plaintiff’s attorney’s “particular services.”<sup>125</sup> Justice Boehm’s opinion also found no constitutional violation, saying that “[m]any legal doctrines serve to reduce the potential recovery by a civil plaintiff. The lawyer and the client get to

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117. *Id.* at 984.

118. *Id.* at 985 (Dickson, J., dissenting) (emphasis supplied).

119. *Id.* at 985-94 (Dickson, J., dissenting).

120. *Id.* at 979 (§ 12); *id.* at 981-84 (§ 23).

121. 789 N.E.2d 467 (Ind. 2003).

122. IND. CODE § 34-51-3-6 (1995).

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

124. *Id.* at 473.

125. *Id.* at 476.

play the hand the legislature deals them, no more and no less.”<sup>126</sup>

Finally, Justice Boehm’s opinion also rejected the plaintiff’s taxation contention, explaining that Art. X, § 1, only applied to property taxes.<sup>127</sup>

As they had in *McIntosh*, Justices Dickson and Rucker dissented. Justice Dickson’s opinion would have adopted the plaintiff’s contention that the punitive damages allocation statute constituted an unconstitutional taking of the plaintiff’s property, an unconstitutional demand on the plaintiff’s attorney’s particular services, and a violation of the Uniform and Equal Rate of Property Assessment and Taxation Clause.<sup>128</sup>

#### V. OF JUSTICIABILITY<sup>129</sup>

When a court declares a statute unconstitutional, the court says this: “Legislature, notwithstanding your Separation of Powers authority to make the laws, this law is beyond your power to make.” As such, declaring a statute unconstitutional can place highly controversial subject matter beyond legislative compromise. And when highly controversial subject matter cannot be compromised, dire consequences can flow from the inability of the contending legislative factions to compromise.

The prototypical example of this phenomenon is, of course, *Dred Scott v. Sandford*.<sup>130</sup> I focus here on Chief Justice Taney’s holding that it was unconstitutional for Congress to prohibit slavery in the territories, thereby invalidating the “Missouri Compromise.”<sup>131</sup> And just what was the “Missouri Compromise”? It was, in fact, an act of Congress that effected a compromise between North and South on slavery. In *Dred Scott*, slavery was declared “a national institution; there was . . . no legal way in which it could be excluded from any territory.”<sup>132</sup> Congress could no longer compromise on the most divisive issue of the day.

Not as cataclysmic as *Dred Scott*, to be sure, but I offer our Court’s property tax case, *State Board of Tax Commissioners v. Town of St. John*,<sup>133</sup> as another example where declaring a statute unconstitutional placed highly controversial subject matter beyond legislative compromise. At the time this litigation began, real property in Indiana was assessed based on its “true tax value.” “True tax value” was not market value but rather was based on “cost schedules” that took into account replacement cost, physical depreciation, and obsolescence, and so varied depending upon whether the property was industrial, commercial, agricultural, or residential. This was alleged to violate Art. X, § 1, that mandates

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126. *Id.* at 475.

127. *Id.* at 475-76.

128. *Id.* at 477-78 (Dickson, J., dissenting).

129. I have previously made this argument. See Sullivan, *supra* note 19, at 207-11.

130. 60 U.S. 393 (1857).

131. *Id.* at 452.

132. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 118 (1993).

133. 702 N.E.2d 1034 (Ind. 1998)

the General Assembly provide “for a uniform and equal rate of property assessment and taxation.”<sup>134</sup> The Indiana Supreme Court held the “true tax value” system to be unconstitutional. (To be precise, the Court declared unconstitutional the “cost schedules” used to calculate true tax value because they did not meet the requisite uniformity and equality requirements.)<sup>135</sup>

The Court’s decision placed beyond the power of the Legislature the ability to compromise the competing interests of industrial and commercial, agricultural, and residential taxpayers in ways that had occurred for many decades. My concern about interference with the Legislature’s ability to compromise was at the core of my approach to claims that statutes were unconstitutional. As to the property tax case, I said in my dissent:

[that I could] think of no area where we can be more confident of the ability of the normal democratic processes working as they should than in taxation. Residential, commercial, industrial and agricultural interests can well pursue and protect their respective interests in state tax policy before the executive and legislative branches without judicial intervention.<sup>136</sup>

In *City of South Bend v. Kimsey*,<sup>137</sup> the Court struck down a statute that restricted the ability of cities in St. Joseph County to annex suburban territory because it violated the requirement of “general and uniform laws” contained in Art. IV, § 22.<sup>138</sup> My answer was this: “The legislation at issue here represents a political struggle between suburban and urban interests. While the geographic focus of this particular law was St. Joseph County, the legislative history shows a hard-fought battle in which the suburban interests narrowly prevailed.”<sup>139</sup> The Court had “intervene[d] to turn those who lost a close fight in the Legislature into winners.”<sup>140</sup>

Now I personally did not like assessing property based on true tax value rather than fair market value. And I would have voted “no” on the law at issue in *Kimsey* had I been a legislator. But my view of these cases was that Separation of Powers demanded that the Court not intervene to invalidate statutes where it was clear that the majoritarian political process had worked in exactly the way the Constitution intended. Competing interest groups had brought their views to the Legislature and the Legislature had acted on those views, making compromises it deemed appropriate along the way.

Now the counterargument to my position is straightforward—that when presented with a constitutional question, courts have the duty to answer it. And this point was forcefully made by Justice Boehm, writing for the majority in

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134. *Id.* at 1035-37.

135. *Id.* at 1043.

136. *Id.* at 1044 (Sullivan, J., dissenting).

137. 781 N.E.2d 683 (Ind. 2003).

138. *Id.* at 697.

139. *Id.* at 698 (Sullivan, J., dissenting).

140. *Id.*

*Kimsey*:

Justice Sullivan in substance argues for a doctrine of nonjusticiability of Article IV issues. But for over seventy years precedent has uniformly rejected [his] view . . . . As we held in *Dawson v. Shaver* [in 1822], citing *Marbury v. Madison*: “The task is delicate and unpleasant, but the duty of the Court is imperative, and its authority is unquestionable, to declare any part of a statute null and void that expressly contravenes the provisions of the constitution, to which the legislature itself owes its existence.”<sup>141</sup>

Justice Boehm is right that I argue for a doctrine of non-justiciability when it comes to judicial review of legislative enactments where there is no suggestion that the majoritarian process did not work properly. (He maintained that the majoritarian process had not worked properly in *Kimsey*, and I contended that there was no way a Court could reach that conclusion. But all of this is at a level of detail that is beyond the scope of this Article.)

But taking Justice Boehm’s point, suppose the majoritarian process has not worked properly in a particular case. Would I still treat the claim as non-justiciable?

In arguing against my position, Justice Boehm deploys the reapportionment decisions of the 1960s to attempt to demonstrate the necessity for judicial review of the constitutionality of statutes.<sup>142</sup> “What, Sullivan, do you say about this?” Justice Boehm’s position asks. “Shouldn’t the Court have intervened to rectify malapportionment? And if your answer to that is “yes,” how do you justify not intervening in cases like *Town of St. John* and *Kimsey*?”

I find my answer in Justice Harlan F. Stone’s Footnote 4 in his 1938 opinion for the United States Supreme Court in *United States v. Carolene Products Co.*<sup>143</sup> *Carolene Products* is an otherwise little-known case in which a federal statute blatantly protecting the milk industry was challenged on grounds that it violated the Commerce Clause and the Fifth Amendment. The Court rather summarily dismissed the constitutional challenges, citing its obligation to presume that Congress had acted rationally. But the Court added a footnote—Footnote 4—at this point, saying that scrutiny of a statute for constitutionality may be warranted in one of three circumstances:

- Where the statute appears on its face to conflict with a specific prohibition of the Bill of Rights.
- Where the statute “restricts those political processes that can ordinarily be expected to bring about repeal of undesirable legislation.”
- Where the statute reflects prejudice against particular religious, national, racial, or other discrete and insular minorities.<sup>144</sup>

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141. *Id.* at 695-96.

142. *Id.*

143. 304 U.S. 144, 152 n.4 (1938).

144. *Id.*

It is important to recognize what happens in these three circumstances. In the first, the Court is in a position where it cannot avoid ruling on constitutionality. If the Legislature takes action that facially violates a constitutional provision, the Court can hardly defer to the Legislature as the Legislature has no authority to make a statute in violation of the plain language of the Constitution.

As to the second, Separation of Powers demands the proper functioning of the majoritarian process and so it is entirely appropriate for a Court to assure that the Legislature's exercise of its lawmaking authority does not extend to undermining the majoritarian process. As Footnote 4 says, the Legislature's lawmaking authority does not extend to "restrict[ing] those political processes that can ordinarily be expected to bring about repeal of undesirable legislation."<sup>145</sup> The proper functioning of the majoritarian process must not restrict the Legislature's ability to pass self-correcting legislation. Justice Boehm's malapportionment example falls snugly into this category.

As to the third, legislation prejudicing religious, national, racial, or other discrete and insular minorities, the point is that courts may need to step in to assure that the majoritarian political process respects the constitutional rights of minorities. Why? Simply because their being in a minority may prevent them from having sufficient political influence to protect those rights in a majoritarian process.

My position is that in judicial review for constitutionality, Separation of Powers counsels—if not demands—that it is the legislative branch that has free reign when it comes to political and policy preferences, including those regarding taxes and annexation. The Court's power of judicial review should be constrained to instances where the Legislature has tread upon the very face of the Constitution; or tread upon the self-correcting features of the majoritarian process; or tread upon the rights of those whom the Constitution, but not the majoritarian process, protects.

#### VI. THE CONSTITUTION ACCORDING TO . . .

Despite the extensiveness of the foregoing, it has touched upon a bare fraction of the Indiana Supreme Court's state constitutional jurisprudence during my tenure. Rather than try to categorize any more of it, I will conclude this Article with a brief tour of some selected state constitutional decisions of the five justices—Shepard Dickson, Boehm, Rucker, and myself—who served together during the decade-plus from Justice Rucker's arrival in November 1999, to Justice Boehm's departure at the end of September 2010.

This is not meant to be a "greatest hits" list—indeed many of the Court's most significant constitutional decisions during this period are discussed above. Rather, it is a smorgasbord of cases that each of us wrote, and a limited one at that: I arbitrarily chose five decisions for each of us (except for Justice Dickson whose body of work defies limitation to that number).

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145. *Id.*

*Randall T. Shepard*

Chief Justice Shepard's extraordinary contribution to Indiana constitutional adjudication has infused this entire article, starting with the "Second Wind" speech and seminal decision of *Price v. State*. And his influence has been noted in the discussion of many of the other cases discussed above. What follows is a small sampling of the remaining body of his work.

In 1993, the Court received a certified question from a federal court asking whether the Indiana Constitution imposed any upper limit on the Indiana statutory exemption from bankruptcy estates of funds held in retirement accounts. Chief Justice Shepard's opinion in *In re Zumbrun*<sup>146</sup> responded that Art. I, § 22,<sup>147</sup> contains three requirements: (1) the Legislature must enact exemptions; (2) exemption statutes much balance reasonably the interests of lenders and debtors; and (3) statutes (such as the one at issue in *Zumbrun*) which create unlimited exemptions are inconsistent with § 22 and, therefore, unconstitutional.<sup>148</sup>

That same year, the Court was presented with an appeal from a defendant who had been convicted of distributing grass—real grass!—but which the defendant had held out to be marijuana. The defendant stood convicted of a class C felony for distributing a non-controlled substance represented to be a controlled substance; had he been convicted of distributing an equivalent amount of real marijuana, he would have been guilty only of a misdemeanor. In *Conner v. State*,<sup>149</sup> Chief Justice Shepard held the conviction violated Art. I, § 16: "In its direction that '[a]ll penalties shall be proportioned to the nature of the offense,'" Shepard wrote, § 16 "makes clear that the State's ability to exact punishment for criminal behavior is not without limit. This provision goes beyond the protection against cruel and unusual punishment contained in the Eighth Amendment to the U.S. Constitution."<sup>150</sup>

During its 1993 session, the Legislature authorized (over the veto of Governor Evan Bayh) casino gambling in Indiana so long as it took place on "riverboats."<sup>151</sup> Legalized gambling was to produce a number of notable cases for the Court in the ensuing two decades, the first of which was *Indiana Gaming*

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146. 626 N.E.2d 452 (Ind. 1993).

147. Art. I, § 22, provides: "The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability . . . ."

148. *In re Zumbrun*, 626 N.E.2d at 455. Justice Dickson and I were of the view that this provision required the Legislature only to enact minimum reasonable exemption laws, not to impose any maximum limitation on exemption laws. *Id.* (Dickson, J., dissenting); *id.* (Sullivan, J., dissenting).

149. 626 N.E.2d 803 (Ind. 1993).

150. *Id.* at 806. Justice Richard M. Givan dissented: "I see no constitutional violation in the legislature determining that perpetrating a fraud by purporting to sell drugs when the content of the package in fact is not a drug should be punished more severely than the actual dealing in marijuana." *Id.* (Givan, J., dissenting). In retrospect, I agree with Justice Givan.

151. P.L.277-1993(ss), § 124.

*Commission v. Moseley*.<sup>152</sup> Four Porter County residents, disappointed after residents of their county voted against having a casino in Portage,<sup>153</sup> challenged the statute as violating Art. I, (equal privileges and immunities), and Art. IV, § 23 (general and uniform laws). Chief Justice Shepard's opinion found no violation of either the constitutional requirement of equal privileges and immunities or the constitutional prohibition on special legislation.<sup>154</sup>

David Malinski was arrested at 10 p.m. one evening in the summer of 1999 in connection with the disappearance of a young woman.<sup>155</sup> After having been given his Miranda advisements, he gave the police two statements over the course of the night and early morning.<sup>156</sup> Malinski did not request or otherwise seek the assistance of an attorney.<sup>157</sup> At about 9:45 a.m. in the morning, a local attorney secured by Malinski's wife and brother arrived at the jail and asked to speak with Malinski.<sup>158</sup> The attorney was denied access to Malinski and Malinski was not informed that there was an attorney at the jail trying to reach him.<sup>159</sup> The attorney petitioned to the trial court for access to Malinski and for an end to the interrogation, but these requests were denied.<sup>160</sup>

In *Malinski*, Chief Justice Shepard wrote for a unanimous Court that Art. 1, § 13 (right of criminal defendant to counsel), provides an incarcerated suspect a constitutional right to be informed that an attorney hired by the suspect's family to represent him the suspect present at the station and wishes to speak to the suspect.<sup>161</sup> However, Malinski himself did not benefit from the new rule; the Court concluded that under the totality of the circumstances of the case, the constitutional violation did not require reversal of Malinski's conviction.<sup>162</sup>

*Alpha Psi Chapter of Pi Kappa Alpha v. Monroe County Auditor*,<sup>163</sup> put an exclamation point on *Kimsey*, a case discussed at length above. Three fraternities at Indiana University in Bloomington failed to make an annual filing required to obtain an exemption from property taxation.<sup>164</sup> When the Monroe County attempted to collect the taxes due, the brothers asked the Legislature to enact a

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152. 643 N.E.2d 296 (Ind. 1994).

153. Voters in Portage voted for gambling but were outnumbered by opponents in other parts of the county. *Id.* at 298.

154. *Id.* at 302, 305. Justice Givan dissented. He would have found the Riverboat Gambling Act unconstitutional special legislation. *Id.* at 305 (Givan, J., dissenting).

155. *Malinski v. State*, 794 N.E.2d 1071, 1074 (Ind. 2003).

156. *Id.* at 1074-75.

157. *Id.* at 1075.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 1079. The United States Supreme Court has held that neither the Fifth or Sixth Amendments are violated in such circumstances. *Moran v. Burbine*, 475 U.S. 412 (1986).

162. *Malinski*, 794 N.E.2d at 1073.

163. 849 N.E.2d 1131 (Ind. 2006).

164. *Id.* at 1133.



statute allowing them to make the filing retroactively.<sup>165</sup> The Legislature passed the statute but made it applicable only to fraternities at Indiana University.<sup>166</sup> Following *Kimsey*, Chief Justice Shepard's opinion held the statute to be unconstitutional special legislation in violation of Art. I, § 23 (general and uniform laws).<sup>167</sup>

*Brent E. Dickson*

The state constitutional jurisprudence of Justice Brent E. Dickson warrants an article (if not a book) of its own and I hope that a keen observer of Indiana constitutional law like Jon Laramore or Professor Joel Schumm—or perhaps one of Justice Dickson's fabulously capable law clerks like Michael DeBoer, Andrea Kochert, or Maggie Smith—will compile one someday. But there is one really important thing to understand about constitutional adjudication before discussing Justice Dickson's contributions any further. And that is the distinction between judicial activism and ideology.

Over the lifetimes of baby boomer and the younger generations, the expression "judicial activist" has been nearly synonymous with ideological liberalism. Ideologically conservatives attacked the ideologically liberal decisions of United States Supreme Court during the tenures of Chief Justice Earl Warren and Justice William Brennan as improperly activist, by which they meant that the decisions had, in their view, infringed upon the constitutional prerogatives of the legislative and judicial branches by an overly active judiciary.

But in a different era, the shoe was on the other foot. In the first third of the 20th century, ideological liberals attacked the ideological conservative decisions of the United States Supreme Court on precisely the same terms. This was, after all, the Holmes and Brandeis critique of *Lochnerism*. And it was what gave some ideological liberals like Justice Frankfurter such difficulty with the approach of the Warren Court.<sup>168</sup>

Putting ideology aside altogether, Justice Dickson's constitutional jurisprudence reflects at times a particularly robust attitude toward the judicial review for constitutionality of the acts and actions of the political branches. His

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165. *Id.* at 1134.

166. P. L. 256-2003.

167. *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cnty.*, 849 N.E.2d at 1139. As in *Kimsey*, I dissented from the Court's opinion in *Alpha Psi Chapter*. At least one issue that I raised in my dissent remains open: whether striking a statute found in violation of § 23 is the proper remedy as opposed to requiring all those included in the class to benefit from it. For example, "[c]ould fraternities at other colleges (rather than the Monroe County Auditor) have brought this lawsuit contending that if the Legislature was going to extend this benefit to IU fraternities, the Constitution required that it be extended to them as well?" *Id.* at 1140 (Sullivan, J., dissenting).

168. For an exceptionally fine discussion of the history of the change in liberal attitudes toward judicial review, see EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* (1999). It is the best book on constitutional law that I have ever read.

opinions discussed above striking the state's property tax assessment regulations and calling for invalidation of the products liability statute of repose are apt but by no means exclusive exemplars of my point. (As to the ideology that his opinions reflect, well, I would say that some are conservative and some are liberal.)

And even more than that, much of his work has fearlessly blazed entirely new paths of constitutional analysis.

A most noteworthy example is *Collins v. Day*.<sup>169</sup> For several decades before *Collins*, Indiana courts had deployed federal equal protection clause analysis when evaluating claimed violations of the guarantee of equal privileges and immunities contained in Art. I, § 23.<sup>170</sup> The future, said Justice Dickson, would be different. "[N]o settled body of Indiana law . . . compels application of a federal equal protection analytical methodology to claims alleging special privileges or immunities under [§] 23 . . . . Section 23 should be given independent interpretation and application."<sup>171</sup>

Holding that "[t]he formulation of a separate [§] 23 standard requires consideration of the circumstances of its adoption and its application in subsequent Indiana cases,"<sup>172</sup> Justice Dickson proceeded to develop a two-factor test. "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."<sup>173</sup> The point I need to stress is that this was an entirely original formulation; an act of total and complete judicial creativity on Justice Dickson's part, derived and synthesized by him alone from his analysis of the circumstances of § 23's adoption and its application in subsequent Indiana cases. Though guarantees of privileges and immunities go back at least as far as the Constitution itself,<sup>174</sup> no judge or court had ever before used this standard.

There was to be a qualification to the new standard, however, a "pop-off valve," if you will: the burden would be on the challenger to the constitutionality of the statute "to negative every conceivable basis which might have supported the classification."<sup>175</sup>

In *Collins* itself, the pop-off valve was triggered. The plaintiff had complained that the exclusion of agricultural workers from coverage under the Indiana workers compensation act<sup>176</sup> denied the plaintiff privileges and immunities guaranteed by § 23. Because it found that the plaintiff had not

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169. 644 N.E.2d 72 (Ind. 1994).

170. See, e.g., *Dortch v. Lugar*, 266 N.E.2d 25, 39 (Ind. 1971). *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 600 (Ind. 1980), discussed at length above, also took this approach.

171. *Collins*, 644 N.E.2d at 75.

172. *Id.* at 75.

173. *Id.* at 80.

174. U.S. CONST. art. IV, § 2.

175. *Collins*, 644 N.E.2d at 80.

176. IND. CODE § 22-3-2-9 (1994).

“carr[ied] the burden placed upon the challenger to negative every reasonable basis for the classification,” the Court held that the agricultural worker exclusion was constitutional.<sup>177</sup>

*Collins* has stood the test of time and its methodology has been used ever since to analyze § 23 claims.

*Ratliff v. Cohn*<sup>178</sup> is of a different character. Donna Ratliff was a juvenile convicted of a serious crime and incarcerated in the Indiana Women’s Prison.<sup>179</sup> She challenged the constitutionality of her incarceration there on multiple grounds, both federal and state. The trial court had dismissed her complaint without comment, but the Indiana Court of Appeals, finding her incarceration in violation of Art. IX, § 2,<sup>180</sup> reversed.<sup>181</sup>

Justice Dickson’s unanimous opinion for the Supreme Court set aside the finding made by the Court of Appeals of a violation of Art. IX, § 2—and then went on to affirm the dismissal of Ratliff’s claims that her incarceration in the Women’s Prison violated Art. 1, § 15 (prohibition on confinement with unnecessary rigor); § 16 (prohibition on cruel and unusual punishment); § 18 (penal code must be founded on principles of reformation, and not of vindictive justice); and § 23 (equal privileges and immunities). The opinion did, however, reverse the dismissal of her claims of violation of the federal constitutional prohibition on cruel and unusual punishment<sup>182</sup> and guarantee of equal protection.<sup>183</sup>

Standing with *Collins v. Day* as a testament to Justice Dickson’s judicial creativity is *Richardson v. State*.<sup>184</sup> The facts of *Richardson* were simple enough. Robert Richardson had been convicted of the class C felony of robbery and the class B misdemeanor of battery. He contended that the convictions violated the Double Jeopardy Clause of the Indiana Constitution.<sup>185</sup>

Both the United States Supreme Court and the Indiana Supreme Court had struggled in recent years to define the scope of the protection against double jeopardy in the federal and state Constitutions. Not unlike *Collins v. Day*, Justice Dickson formulated a new test for analyzing state double jeopardy claims based on his analysis of the history of the Indiana Double Jeopardy Clause and its application in Indiana cases. Henceforth, convictions for “two or more offenses [would] violat[e] § 14], if, with respect to either the statutory elements of the

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177. *Collins*, 644 N.E.2d at 81. I dissented in *Collins* and would have been content to continue to apply federal equal protection analysis. *Id.* (Sullivan, J., dissenting).

178. 693 N.E.2d 530 (Ind. 1998).

179. *Id.* at 533.

180. “The General Assembly shall provide institutions for the correction and reformation of juvenile offenders.”

181. *Ratliff v. Cohn*, 679 N.E.2d 985, 988 (Ind. Ct. App. 1997), *rev’d*, 693 N.E.2d 530 (Ind. 1998).

182. U.S. CONST. amend. VIII.

183. U.S. CONST. amend. XIV, § 1.

184. 717 N.E.2d 32 (Ind. 1999).

185. IND. CONST. art. I, § 14.

challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.”<sup>186</sup> This too was an entirely new standard; no judge or court had ever used this formulation in analyzing double jeopardy before. And it is worth noting that Richardson received some relief: his convictions were found to violate double jeopardy and the battery conviction was vacated.

Richardson was not a unanimous opinion at the time<sup>187</sup> and its approach has arguably been altered in subsequent years<sup>188</sup> but there can be no questioning of its importance in Indiana constitutional jurisprudence.<sup>189</sup>

Justice Dickson’s opinion in *City Chapel Evangelical Free, Inc. v. City of South Bend ex rel. Department of Development*,<sup>190</sup> examined whether a church congregation was entitled to a hearing on the plan of the City of South Bend to take the downtown storefront which housed the church as part of an urban redevelopment project. This was claimed to violate the protections of religious freedom provided in Art. I, § 2, 3, 4, and 7. A key issue was whether these protections extended to religious congregations or only to individuals. Justice Dickson’s opinion concluded that:

the framers and ratifiers of the Indiana Constitution’s religious liberty clauses did not intend to afford only narrow protection for a person’s internal thoughts and private practices of religion and conscience. By protecting the right to worship according to the dictates of conscience and the rights freely to exercise religious opinion and to act in accord with personal conscience, Sections 2 and 3 advance core values that restrain government interference with the practice of religious worship, both in private and in community with other persons.<sup>191</sup>

That is an important principle, well explicated.<sup>192</sup>

*Embry v. O’Bannon*<sup>193</sup> placed at issue another religion clause: the prohibition of Art. I, § 6, that “[n]o money shall be drawn from the treasury, for the benefit

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186. Richardson v. State, 717 N.E.2d at 49.

187. *Id.* at 55 (Sullivan, J., concurring); *id.* at 57 (Selby, J., concurring in result); *id.* (Boehm, J., concurring in result).

188. See Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002).

189. My own relationship with Richardson was complicated. I provided the third vote for the opinion itself in tribute to its excellent historical survey although I expressed my understanding of its holding in a separate concurrence. Justice Dickson later enunciated an understanding different from mine in Spivey v. State, 761 N.E.2d 831 (Ind. 2002), where I joined Justice Rucker’s dissent. 761 N.E.2d 831, 836 (Ind. 2002) (Rucker, J., dissenting).

190. 744 N.E.2d 443 (Ind. 2001).

191. *Id.* at 450.

192. As a matter of relatively recent Indiana constitutional history, the opinion is interesting as well. Justice Dickson relies heavily on two sources for his methodology: the majority opinion in Price—from which, the reader may remember, Justice Dickson originally dissented!—and his own opinion in McIntosh—which, the reader may remember, was itself a dissent!

193. 798 N.E.2d 157 (Ind. 2003).

of any religious or theological institution.” The plaintiffs in this case challenged a state statute pursuant to which public and parochial schools entered into so-called “dual-enrollment agreements” under which the public schools agreed to provide various secular instructional services to private school students in return for those students being included in the respective public school corporation enrollment counts for purposes of the state school funding formula.<sup>194</sup>

Justice Dickson’s opinion found the practice passed constitutional muster. The Court acknowledged that “the text [of § 6] and its historical context do not inform us whether the framers intended to prohibit all public funds from providing merely incidental benefits to religious and theological institutions.”<sup>195</sup> But it found that

Indiana case law . . . [had] interpreted [§ 6] to permit the State to contract with religious institutions for goods or services, notwithstanding possible incidental benefit to the institutions, and to prohibit the use of public funds only when directly used for such institutions’ activities of a religious nature. Because the dual-enrollment programs permitted in Indiana [did] not confer substantial benefits upon any religious or theological institution, nor directly fund activities of a religious nature,

the Court held, the dual-enrollment programs did not violate § 6.<sup>196</sup>

During my senior year in college forty years ago, the California Supreme Court held that whether the California public school financing system, because of its substantial dependence on local property taxes and resultant wide disparities in school revenue, violated the Equal Protection Clause.<sup>197</sup> But eighteen months later, in evaluating a virtually identical claim in respect of the Texas public school financing system, the United States Supreme Court found no equal protection violation.<sup>198</sup> Henceforth, any constitutional claim challenging funding disparities among public school districts would have to be waged under state constitutions.

In the intervening decades, many such cases made headlines around the country. As well known as any was a 1989 decision of the Kentucky Supreme Court holding that its public school funding system violated the Kentucky’s Constitution’s guarantee of “an efficient system of common schools throughout the state.”<sup>199</sup> Such a case filed by more than 50 Indiana public school districts in 1987, claiming the Indiana public school funding formula violated Art I, § 23 (equal privileges and immunities), and Art. VIII, § 1 (general and uniform system of common schools), had been settled in 1992.<sup>200</sup>

194. *Id.* at 158.

195. *Id.* at 167.

196. *Id.* Also at issue in Embry was the issue of standing, discussed above.

197. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

198. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973).

199. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 189 (Ky. 1989) (Stephens, C.J.).

200. *Lake Cent. v. State*, No. 56 C01-8704-CP81 (Newton Cir. Ct. 1987). See Marilyn R. Holscher, *Funding Indiana’s Public Schools: A Question of Equal and Adequate Educational Opportunity*, 20 VAL. U. L. REV. 273, 293-94. As State Budget Director at the time, I participated

After a decade-and-a-half's quiescence, new litigation was initiated that reached the Indiana Supreme Court in 2009. Rather than challenging funding levels per se as had the earlier lawsuit, the plaintiffs in *Bonner v. Daniels*<sup>201</sup> sought relief from a claimed failure on the part of the state to meet a what the plaintiffs contended was a standard of quality education imposed by Art. VIII, § 1.<sup>202</sup> Justice Dickson's opinion for the Court held that Art. VIII, § 1, imposed only a general duty to provide for a system of common schools and did not require the attainment of any standard of resulting educational quality.<sup>203</sup>

Many cases decided during my tenure on the Court involved appellate review—and the proper approach to appellate review—of sentences imposed in criminal cases. Should—and when should—the sentence imposed by the trial court be reduced? Interlaced with our own examination of these questions were some dramatic developments in federal constitutional law affecting sentencing. Justice Rucker's *Anglemyer* opinion<sup>204</sup> discussed below (and Justice Boehm's *Cardwell* opinion<sup>205</sup> mentioned below) encompass these matters.

But after *Anglemyer* and *Cardwell* at least one issue remained unanswered. Could an Indiana appellate court increase a sentence imposed by a trial court? Justice Dickson's opinion in *McCullough v. State*<sup>206</sup> makes clear that Art. VII, § 4 (the Supreme Court shall have, in all appeals of criminal cases, the power . . . to review and revise the sentence imposed), includes the power to either reduce or increase a criminal sentence on appeal.<sup>207</sup> However, the Court said, only the defendant and not the State has the authority to request a sentencing revision.<sup>208</sup>

The last of Justice Dickson's prodigious output that I will discuss is *League of Women Voters of Indiana, Inc. v. Rokita*.<sup>209</sup> When the United States Supreme Court turned away the Indiana Democratic Party's challenge<sup>210</sup> to the constitutionality of a statute requiring voters to identify themselves at the polls using a photo ID,<sup>211</sup> the opponents of the statute filed new claims contending that it violated Art. I, § 23 (equal privileges and immunities), and Art. II, § 1 ("All elections shall be free and equal") and § 2 ("Every citizen" meeting age and

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in the negotiated settlement of this litigation along with Jane Magnus-Stinson, Governor Bayh's counsel at the time.

201. 907 N.E.2d 516 (Ind. 2009).

202. *Id.* at 518.

203. Justice Rucker dissented, arguing that it was premature to dismiss the plaintiffs' complaint. He would have found the plaintiffs entitled to present their evidence that the state's educational funding system "[fell] short of the constitutional mandate to provide for a general and uniform system of open common schools." *Id.* at 525 (Rucker, J., dissenting).

204. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007).

205. *Cardwell v. State*, 895 N.E.2d 1219, 1223 (Ind. 2008).

206. 900 N.E.2d 745 (Ind. 2009).

207. *Id.* at 750.

208. *Id.*

209. 929 N.E.2d 758 (Ind. 2010).

210. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

211. P. L. 109-2005.

residency requirements “shall be entitled to vote”).

Noting that “[n]o individual voter has alleged that the Voter ID Law has prevented him or her from voting or inhibited his or her ability to vote in any way[,]”<sup>212</sup> the Court held that it “was within the power of the legislature to require voters to identify themselves at the polls using a photo ID.”<sup>213</sup> The Court said, however, that it was not foreclosing “as-applied” claims in the future upon evidence that “reasonable government assistance was not actually available to adequately relieve either the cost or hardship of obtaining photo ID.”<sup>214</sup>

*Frank Sullivan, Jr.*

A reader of this Article knows by now of my wariness about state constitutionalism. But the last four of the following five opinions, I think, show my openness to and recognition of state constitutional claims in the appropriate circumstances.

At the time I joined the court in 1993, it was not unusual to find high school students and high schools themselves engaged in litigation with the Indiana High School Athletic Association. *Indiana High School Athletic Association v. Carlberg*<sup>215</sup> was one such case—and a typical one. Jason Carlberg had transferred from Brebeuf Preparatory School to Carmel High School for reasons unrelated to athletics.<sup>216</sup> He sued the IHSAA to participate on the Carmel varsity swim team after the IHSAA held that its “transfer rule” would limit him to junior varsity participation for one year.<sup>217</sup> Among his claims was that this decision denied him his right to equal privileges and immunities under Art. I, § 23.<sup>218</sup> My opinion for the Court held that the IHSAA was subject to constitutional scrutiny (it had argued that as a “private membership organization,” it was not required to comply with the Constitution),<sup>219</sup> and then applied the tests of *Collins v. Day* to the transfer rule, finding no constitutional violation.<sup>220</sup>

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212. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 761.

213. *Id.* at 772.

214. *Id.* at 769. Justice Boehm filed an intriguing dissent. He said that the issue in the case was not “a balancing of the relative benefits, if any, of a voter ID requirement against the problems that requirement creates for some citizens, if perhaps relatively few” but rather “who gets to resolve that issue under the Indiana Constitution.” He took the position that this was a matter that could only be addressed by constitutional amendment. *Id.* at 773 (Boehm, J., dissenting).

215. 694 N.E.2d 222 (Ind. 1997).

216. *Id.* at 226.

217. *Id.*

218. *Id.* at 227.

219. *Id.* at 229.

220. *Id.* at 240. Justice Dickson concurred in the opinion’s holding that the IHSAA was subject to constitutional scrutiny but dissented from the conclusion that the transfer rule was constitutional. *Id.* at 243 (Dickson, J., dissenting). Justice Dickson dissented from the Court’s view in other cases involving the IHSAA, perhaps most sharply in *Indiana High School Athletic Association, Inc. v. Watson*, 938 N.E.2d 672, 683 (Ind. 2010) (Dickson, J., dissenting).

*Seay v. State*<sup>221</sup> implicated the mandate of Art. I, § 19, that “[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts.” The Legislature had enacted a statutory scheme that provided for enhanced sentences for “habitual offenders.” In brief, the statute entitles the State, after an offender is convicted of a crime,<sup>222</sup> to prove beyond a reasonable doubt that the offender had accumulated two prior unrelated felony convictions.<sup>223</sup> The statute goes on to provide that if the jury finds the defendant to be a habitual offender, the court is then required to sentence the defendant to an additional fixed term prescribed by statute.<sup>224</sup>

The unresolved question was this: Could the jury in such circumstances render a verdict that the defendant was not a “habitual offender” even if it found that the State had proven beyond a reasonable doubt that the defendant has accumulated two prior unrelated felonies? My unanimous opinion for the Court held that the jury was entitled to make a determination of habitual offender status as a matter of law independent of its factual determinations regarding prior unrelated felonies.<sup>225</sup>

The plaintiffs in *Baldwin v. Reagan*<sup>226</sup> contended that the Indiana Seatbelt Enforcement Act<sup>227</sup> authorized the police to stop motorists in violation of Art. I, § 11 (prohibition on unreasonable searches and seizures). My opinion for a unanimous Court held that an Indiana police officer may not stop a motorist to enforce the seat belt law unless the officer observes circumstances that would cause an ordinary person to agree that the driver or passenger is not wearing a seat belt.<sup>228</sup> However, because the Seatbelt Enforcement Act can be applied in conformity with this holding, we concluded that the statute was constitutional on its face.<sup>229</sup>

The Court was required to deal with the contentious issue of abortion on several occasions during my tenure. One was in *Humphreys v. Clinic for Women, Inc.*,<sup>230</sup> which involved a complicated interplay between the federal and state components of Indiana’s Medicaid program. As required by federal law, Indiana’s Medicaid program will pay for a poor woman to have an abortion but only if necessary to preserve her life or if rape or incest caused her pregnancy.<sup>231</sup> The plaintiffs in this case argued, and the trial court held, that because Medicaid

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221. 698 N.E.2d 732 (Ind. 1998).

222. IND. CODE § 35-50-2-8(b) (2014).

223. *Id.* § 35-50-2-8(c).

224. *Id.* § 35-50-2-8(d).

225. *Seay*, 698 N.E.2d at 733-34. My opinion actually adopted the formulation of Justice Dickson in an earlier case which had not drawn three votes. *See Duff v. State*, 508 N.E.2d 17, 24 (Ind. 1987) (Dickson, J., separate opinion).

226. 715 N.E.2d 332 (Ind. 1999).

227. IND. CODE § 9-19-10-2 (2014).

228. *Baldwin*, 715 N.E.2d at 337.

229. *Id.* at 340.

230. 796 N.E.2d 247 (Ind. 2003).

231. *Id.* at 248.



paid for some abortions that were medically necessary, Art. I, § 23 (equal privileges and immunities), required that Medicaid must pay for any abortion that was medically necessary.<sup>232</sup>

The Court's views were divided, resulting in a complicated decision. I was of the opinion that § 23 did not require Medicaid to pay for all medically necessary abortions. Chief Justice Shepard and Justice Dickson joined in that holding.<sup>233</sup> However, I was also of the opinion that, so long as the Indiana Medicaid program paid for abortions to preserve the lives of pregnant women and where rape or incest caused pregnancy, § 23 required that it must also pay for abortions in cases of pregnancies that create for pregnant women serious risk of substantial and irreversible impairment of a major bodily function. Justices Boehm and Rucker joined in that holding.<sup>234</sup>

I would say that *Snyder v. King*<sup>235</sup> was my most substantial constitutional project. David Snyder had been incarcerated following his conviction on a class A misdemeanor battery charge, and by statute, he was not permitted to vote while incarcerated.<sup>236</sup> Article II, § 8, authorizes the legislature to disenfranchise "any person convicted of an infamous crime." Snyder contended that his disenfranchisement violated Art. II, § 8 because, as he argued, misdemeanor battery was not an "infamous crime" and so his constitutional rights had been violated when was not permitted to vote after being convicted and incarcerated for that crime.<sup>237</sup> The Court unanimously agreed with my conclusion that the crime in this case was not an "infamous crime." Rather, the Infamous Crimes Clause was properly understood primarily as a measure "to regulate suffrage and elections."<sup>238</sup> As such, the Clause authorized the Legislature to disenfranchise

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232. *Id.*

233. *Id.* at 248-49. Justices Boehm and Rucker dissented from this holding, believing that § 23 required Medicaid to pay for any necessary abortion. *Id.* at 264 (Boehm, J., dissenting).

234. *Id.* at 248-49. Chief Justice Shepard and Justice Dickson dissented from this holding, believing that § 23 did not require Medicaid to pay for abortions in such circumstances. *Id.* at 260 (Ind. 2003) (Shepard, C.J., dissenting); *id.* (Dickson, J., dissenting).

Humphreys was decided on September 24, 2003. When the lawsuit was filed, Katherine Humphreys, the named defendant in the case, had been the Secretary of the Indiana Family & Social Services Administration (FSSA), the agency of state government that administered the Medicaid program. Ten days prior to the decision, Indiana Governor Frank O'Bannon had passed away and was succeeded by his Lieutenant Governor, Joe Kernan. On October 1, 2003, I learned that Governor Kernan would appoint my wife, Cheryl G. Sullivan, to be the new Secretary of FSSA. Had I learned of this while the case was still pending, I would have been required to recuse. IND. CODE OF JUDICIAL CONDUCT R. 2.11(A)(2)(a) (2014). Assuming no change in the voting alignment in the case, this would have produced a 2-2 vote on all of the issues. Under the Indiana Rules of Appellate Procedure, the decision of the trial court would have been affirmed. IND. APP. R. 59(B).

235. 958 N.E.2d 764 (Ind. 2011).

236. IND. CODE §§ 3-7-13-4, 3-7-13-5(a), & 3-7-46-2 (2014).

237. *Snyder*, 958 N.E.2d at 768.

238. *Id.* at 781.

permanently those who compromise the integrity of elections.<sup>239</sup> However, this did not entitle Snyder to relief. We went on to conclude that the Legislature has separate constitutional authority to cancel the registration of any person incarcerated following conviction, for the duration of incarceration.<sup>240</sup>

*Theodore R. Boehm*

No judge ever came to the Indiana Supreme Court with stronger credentials than Theodore R. Boehm. The fact that he had clerked for Chief Justice Warren made his openness to constitutional claims unsurprising. Yet the distinction between openness to constitutional claims and ideology that I made with respect to Justice Dickson must be made with respect to Justice Boehm as well. Like Justice Dickson, Justice Boehm's constitutional jurisprudence also reflects at times a particularly robust attitude toward the judicial review for constitutionality of the acts and actions of the political branches. Non-exclusive illustrations of my point discussed above include his *Kimsey* opinion and calling for invalidation of voter ID statute.

Much of the Boehm constitutional canon has already been discussed in this Article but I offer five more opinions following.

In *Pierce v. State*,<sup>241</sup> James Pierce challenged his conviction for child molesting on grounds that the use at trial of testimony of witnesses reporting the purported child victim's statements and of a videotape of an interview with the child violated the Indiana Constitution's Confrontation Clause.<sup>242</sup> The testimony and videotape were hearsay, and therefore generally inadmissible, Justice Boehm explained, because they were all made outside the courtroom and were offered to prove that Pierce molested the child. However, they had been admitted pursuant to the "protected person" statute, a set of special procedures created by the Legislature for introducing evidence that is "not otherwise admissible" in cases involving crimes against children and the mentally disabled.<sup>243</sup> On the critical issue of whether evidence properly admitted pursuant to the "protected person" statute nevertheless violated the Confrontation Clause, Justice Boehm wrote for a unanimous Court that it did not so long as the defendant was presented with a meaningful opportunity for cross-examination, even if that confrontation right was exercised outside the presence of the jury.<sup>244</sup> Pierce had had an opportunity to cross-examine the child and so the statute did not violate the Confrontation

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239. *Id.* at 782.

240. *Id.* at 786. I must acknowledge the extraordinary assistance of my law clerk, Aaron Craft, in writing Snyder.

241. 677 N.E.2d 39 (Ind. 1997).

242. Art. I, § 13, provides criminal defendants the right "to meet the witnesses face-to-face." Unlike the Sixth Amendment, it does not use the verb "confront." Justice Boehm says that he uses the expression "Confrontation Clause" to be consistent with precedent. *Pierce v. State*, 677 N.E.2d 39, 43 n.5 (Ind. 1997).

243. IND. CODE § 35-37-4-6 (2014).

244. *Pierce*, 677 N.E.2d at 48-49.

Clause either on its face or as applied.

In one sense, every case in which a court is asked to invalidate a statute is a Separation of Powers case in that it implicates extent of the judicial branch's authority to review the legislative branch's work. But even though that be so, *State v. Monfort*<sup>245</sup> implicated Separation of Powers in a particularly striking way: the statute at issue literally abolished a court!

Specifically, in 1995, the Legislature abolished Jasper Superior Court No. 2.<sup>246</sup> The presiding judge of that court, Judge Robert V. Montfort, contended that the statute violated Art. III, § 1 (separation of powers).<sup>247</sup> Justice Boehm's opinion for a unanimous court concluded that under the constitution, the Legislature has the authority to abolish courts but that by doing so, it could not interfere with the exercise of judicial functions.<sup>248</sup> In this respect, the statute, by terminating the existence of the court upon passage of the bill—in the middle of Judge Montfort's term—was an unconstitutional interference with the exercise of judicial functions.<sup>249</sup> However, the court held, the effective date provision of the statute was severable and the court would be construed to be abolished upon the expiration upon the expiration of Judge Montfort's term.<sup>250</sup>

In *Sanchez v. State*,<sup>251</sup> a defendant convicted of rape and criminal confinement appealed, contending that a statute that prohibits the use of evidence of voluntary intoxication to negate the mens rea requirement of a crime violates Art. I, § 12 (due course of law). The case raised a number of subtle and complicated issues.

I took the position in a separate opinion (joined by Justice Rucker) that the Indiana Constitution requires that a defendant have the opportunity to present evidence on a mens rea element or any other element or recognized defense.<sup>252</sup> Justice Boehm's majority opinion did not quarrel with the notion of a constitutional right to present evidence. But it took the position that the Constitution does not dictate mens rea requirements or, for that matter, other substantive criminal law constraints, and it was unwilling to infer them. Because "courts must be careful to avoid substituting their judgment for those of the more politically responsive branches," Justice Boehm wrote, "constitutional rights not grounded in a specific constitutional provision should not be readily discovered."<sup>253</sup> And if it is within the power of the Legislature to define whether there is a mens rea requirement to any particular offense, then the statute challenged in this case, which prohibits the use of voluntary intoxication evidence to negate mens rea, is constitutionally permissible because it does no more than

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245. 723 N.E.2d 407 (Ind. 2000).

246. P. L. 18-1995, §§ 17, 44-55, 125-26.

247. *Monfort*, 723 N.E.2d at 409.

248. *Id.* at 414.

249. *Id.*

250. *Id.* at 416.

251. 749 N.E.2d 509 (Ind. 2001).

252. *Id.* at 522 (Sullivan, J., concurring in result).

253. *Id.* at 516.

define the mens rea requirement itself.”<sup>254</sup>

One of the signature initiatives of Governor Mitch Daniels following his election in 2004 was his “Major Moves” program that included privatizing the Indiana Toll Road, the major East-West super-highway running across the Northern Indiana. The constitutionality of the privatization act was challenged in *Bonney v. Indiana Finance Authority*,<sup>255</sup> where the claims were that it constituted special legislation in violation of Art. IV, § 23; that the proceeds of the transaction had not been applied to retire “public debt” in violation of Art. X, § 2; and that the exemption of the Toll Road from property taxes violated Art. X, § 1.<sup>256</sup> Justice Boehm’s opinion for a unanimous Court rejected each of the claims.<sup>257</sup>

In 2004, the Legislature enacted the Frivolous Claim Law and the Three Strikes Law to screen and prevent abusive and prolific offender litigation in Indiana, after which Eric D. Smith filed three civil cases.<sup>258</sup> The trial court found that the Frivolous Claim Law barred his claims, and the court’s order of dismissal included a ruling that under the Three Strikes Law, Smith was prohibited from filing a new complaint or petition without a determination that he is in immediate danger of serious bodily injury.<sup>259</sup> Justice Boehm’s opinion for the Court in *Smith v. State* held that the Three Strikes Law violated Art. I, § 12 (open courts): “[A]lthough there is no right under the Open Courts Clause to any particular cause of action and the Legislature may create, modify, or abolish a particular cause of action, to the extent there is an existing cause of action, the courts must be open to entertain it.”<sup>260</sup>

*Robert D. Rucker*

One of the unwritten but inviolable rules of the Indiana Supreme Court during my tenure was that in every initial discussion of every case, the junior-most justice always voted first, saying whatever he (or, in Justice Selby’s case, she) wanted to about the case. For a longer period than any other justice in state history, Justice Robert D. Rucker was the junior-most justice. And the funny thing is that I can never remember a single instance in that nearly-eleven years that Justice Rucker asked for a pass; he never once was not prepared. The same for oral argument; Justice Rucker was always prepared, invariably the best prepared. And even more than that, I have never known a judge better able to compartmentalize principle and ideology.

Much has been written above about Justice Rucker’s constitutional

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254. *Id.* at 515.

255. 849 N.E.2d 473 (Ind. 2006).

256. *Id.* at 484, 486, 488.

257. *Id.* at 473.

258. *Smith v. Ind. Dep’t of Correction*, 883 N.E.2d 802 (Ind. 2008).

259. *Id.* at 803-04.

260. *Id.* at 810. Chief Justice Shepard and I dissented. *Id.* at 811 (Shepard, C.J., dissenting); *id.* (Sullivan, J., dissenting).

jurisprudence. But the following five cases help fill out the picture.

*Holden v. State*<sup>261</sup> is an object example of Justice Rucker's ability to put principle ahead of ideology. As an LLM student at the University of Virginia School of Law prior to his appointment to the Indiana Supreme Court, Justice Rucker had written a masters' thesis with the provocative title: "The Right to Ignore the Law."<sup>262</sup> His paper traced the history of the doctrine of "jury nullification" that allowed juries to determine both the law and the facts in criminal cases and concluded that "an 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 Art. I, § 19,<sup>263</sup> which had become] a dead letter provision" in the Indiana Constitution.<sup>264</sup>

In *Holden*, the Court was presented with precisely that question. Acknowledging his thesis's conclusion, Justice Rucker nevertheless wrote for a unanimous Court that the Constitution did not authorize jury nullification. "[I]t is improper for a court to instruct a jury that they have a right to disregard the law. Notwithstanding [§ 19] . . . a jury has no more right to ignore the law than it has to ignore the facts in a case."<sup>265</sup> The defendant's conviction was affirmed.

In 1996, the Indiana Supreme Court had issued an opinion in response to a certified question from Federal District Court Judge David F. Hamilton.<sup>266</sup> The issue arose in litigation challenging the federal constitutionality of amendments to the Indiana criminal abortion statute adopted by the Legislature in 1995.<sup>267</sup> The proponents of this legislation characterized it as materially identical to that held constitutional in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>268</sup> The federal litigation was not resolved until 2003, when the United States Supreme Court denied certiorari after the Court of Appeals for the Seventh Circuit found the statute to be constitutional.<sup>269</sup>

At that point, the challengers initiated claims in state court that the statute violated Art. I, § 1 (inalienable rights), § 12 (open courts; remedy by due course of law), and § 9 (freedom of expression). When *Clinic for Women, Inc. v. Brizzi*<sup>270</sup> was decided in November, 2005, it presented a stark contrast between the positions of Justice Boehm and Justice Dickson. Justice Boehm's position was

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261. 788 N.E.2d 1253 (Ind. 2003).

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

263. "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."

264. Rucker, *supra* note 262, at 481.

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

266. *A Woman's Choice-E. Side Women's Clinic v. Newman*, 671 N.E.2d 104 (Ind. 1996).

267. P. L. 187-1995, § 4.

268. 505 U.S. 833, 881-87 (1992).

269. *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003).

270. 837 N.E.2d 973 (Ind. 2005).

that “the inalienable right to liberty enshrined in [§ 1] includes the right of a woman to choose for herself whether to terminate her pregnancy, at least where there is no viable fetus or her health is at issue.”<sup>271</sup> On the other hand, Justice Dickson’s position was that “the Indiana Constitution does not protect any alleged right to abortion.”<sup>272</sup>

Justice Rucker’s opinion for a three-justice majority that included Chief Justice Shepard and me took a more restrained approach. Assuming without deciding that § 1 includes a privacy right that would extend to the abortion decision, Justice Rucker wrote, the test of the statute’s constitutionality would be whether, under *Price*, the enactment places a “material burden” on that right.<sup>273</sup> In *Casey*, the Supreme Court held that the standard of review for the constitutionality of restrictions on the abortion right would be whether the restrictions imposed an “undue burden” on a woman’s ability to make the abortion decision.<sup>274</sup> The majority opinion then held that *Price*’s material burden test was the equivalent of *Casey*’s undue burden test for purposes of assessing whether the statute violated any abortion right that might exist under § 1.<sup>275</sup> And after reviewing cases from multiple jurisdictions examining this question, the Court concluded that the statute would not impose a material burden on any abortion right that might exist under § 1 and was, therefore, constitutional.<sup>276</sup>

For the 2002-2003 school year, the Evansville-Vanderburgh School Corporation imposed a \$20 student services fee on all students in grades K through 12. In *Nagy v. Evansville-Vanderburgh School Corp.*,<sup>277</sup> parents of children in that school system challenged the fee as violating Art. VIII, § 1.<sup>278</sup> That provision of the Constitution requires in relevant part the Legislature “to provide, by law, for a general and uniform system of Common Schools, where intuition shall be without charge.”<sup>279</sup> It was the argument of the parents that the

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271. *Id.* at 994 (Boehm, J., dissenting). In his dissent, Justice Boehm had to distinguish the position that he had taken in *Sanchez v. State*, 749 N.E.2d 509, 516 (Ind. 2001), discussed above, that “constitutional rights not grounded in a specific constitutional provision should not be readily discovered.” *Clinic for Women, Inc.*, 837 N.E.2d at 1000 (Boehm, J., dissenting).

272. *Id.* at 988 (Dickson, J., concurring in result). “In addition,” Justice Dickson said, “because the challenged statutory pre-abortion requirements not only discourage harm to fetal life, but also protect the health of pregnant women, particularly in light of the risks to women from post-abortion psychological harm, I am convinced that [the] requirements [of the challenged statute] not only are a proper exercise of legislative power but also are in direct harmony with and furtherance of core values of [§ 1], which declares the inalienable right of ‘life’ and the institution of government for the ‘peace, safety, and well-being’ of the people.” *Id.* at 988 (Dickson, J., concurring in result).

273. *Id.* at 978 (citing *Price v. State*, 622 N.E.2d 954 (Ind.1993)).

274. *Id.* at 982 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992)).

275. *Id.* at 988.

276. *Id.* at 987-88 (Ind. 2005).

277. 844 N.E.2d 481 (Ind. 2006).

278. *Id.* at 482.

279. *Id.* at 483.

\$20 fee was unconstitutional because it was used to pay for what amounts to “tuition.” Justice Rucker’s opinion for the Court agreed, finding that the fee constituted tuition because it was used to pay for what was “already . . . a part of a publicly-funded education in the state of Indiana.”<sup>280</sup> The opinion went on to make clear that the Court’s holding did not preclude public school systems “from offering programs, services or activities that are outside of or expand upon those deemed by the legislature or State Board [of Education] as part of a public education.”<sup>281</sup>

In my view, Justice Rucker’s *Anglemyer v. State*<sup>282</sup> opinion was the single most important decision of the Indiana Supreme Court during my tenure. Already relied upon in more than 2,000 subsequent Indiana appellate opinions, the decision is at once a comprehensive and cogent history of recent and substantial changes in federal and state sentencing jurisprudence and a detailed and clear explanation of the consequences of those changes. In its 2000 decision, *Apprendi v. New Jersey*,<sup>283</sup> the United States Supreme Court launched a new set of federal constitutional principles that ultimately led to the invalidation of the Indiana criminal sentencing scheme<sup>284</sup> and the enactment of a new sentencing regimen by the Legislature.<sup>285</sup> These developments were accompanied by significant changes in our Court’s own understanding and exercise of its power under Art. VII, § 4, “in all appeals of criminal cases, . . . to review and revise the sentence imposed.” Justice Rucker’s unanimous opinion in *Anglemyer* carefully discusses all of these developments and then explains the way in which sentences must be imposed and reviewed on appeal to accord with their requirements.<sup>286</sup> Applying these principles to the case at hand, the defendant’s sentence was affirmed.

A collection of statutes known as the Indiana Sex Offender Registration Act require defendants convicted of sex and certain other offenses to register with local law enforcement agencies and to disclose detailed personal information, some of which is not otherwise public. In *Wallace v. State*,<sup>287</sup> the defendant claimed that the registration act constituted retroactive punishment forbidden by Art. I, § 24 (prohibition on ex post facto laws).<sup>288</sup> Applying an “intent-effects”

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280. *Id.* at 493.

281. *Id.* My dissent did not quarrel with Justice Rucker’s definition of “tuition” but that the trial court’s findings in this case caused me to conclude that the matters for which the school corporation was charging the activity fee were, in fact, outside of those constitutionally required. *Id.* at 494 (Sullivan, J., dissenting).

282. 868 N.E.2d 482 (Ind. 2007).

283. 530 U.S. 466 (2000). *See also* *Blakely v. Washington*, 542 U.S. 296 (2004).

284. *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005).

285. P. L. 71-2005, § 6, eff. April 25, 2005.

286. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). In a helpful and often-cited opinion following *Anglemyer*, Justice Boehm further elaborated on these standards for appellate review of sentences. *Cardwell v. State*, 895 N.E.2d 1219, 1223 (Ind. 2008).

287. 905 N.E.2d 371 (Ind. 2009).

288. *Id.* at 373.

test derived from past precedent, Justice Rucker's opinion for a unanimous Court held that as applied in this case, the act violated the constitutional provision and the defendant's registration requirement was set aside.<sup>289</sup> Justice Rucker's opinion has been cited by courts in ten states and one federal circuit outside Indiana and an uncommon number of law review articles that praised it for its thoughtful analysis.<sup>290</sup>

#### CONCLUSION

Indiana lawyers and judges are well past even thinking about any such things as a "Renaissance" in state constitutional law. Decisions explicating the state charter's provision are now regularly forthcoming from trial and appellate courts alike. This Article has reviewed a selected group of those decisions in what I hope has been an informative and constructive way.

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289. *Id.* at 384.

290. See, e.g., Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 62 (2010); Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1074 (2012); Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 354 (2014); Wayne A. Logan, *Populism and Punishment Sex Offender Registration and Community Notification in the Courts*, CRIM. JUST., Spring 2011, at 37, 40.